

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM SUB - REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO.101 OF 2022**

*(Appeal from the judgment of the Resident Magistrates' Court of Dar es Salaam at Kisutu (Hon. Simba, PRM) dated 12/11/2021 in Criminal Case No. 382 of 2017)*

**DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT**

**VERSUS**

**GEOFREY JOHN GUGAI.....1<sup>ST</sup> RESPONDENT**

**GEORGE MAKARAMBA.....2<sup>ND</sup> RESPONDENT**

**LEONARD MABAI ALOYS.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**POMO, J**

This is an appeal by the Appellant, the DIRECTOR OF PUBLIC PROSECUTIONS, Against the judgment of the Resident Magistrates' Court of Dar es Salaam at Kisutu in Criminal Case No. 382 of 2017 (the trial court) delivered on 12<sup>th</sup> November, 2021 Hon. T.K. Simba, PRM acquitting the Respondents from the charge of possession of unexplained properties; forgery and money laundering contrary to section 27(1)(b) of the Prevention

and Combating of Corruption Act No.11 of 2007; section 333, 335(a) and 337 of the Penal Code [Cap 16 R.E.2002] and section 12(c) and 13 of the Anti-Money Laundering Act No.12 of 2006 respectively

Briefly stated, on 16<sup>th</sup> November,2017, the respondents and another person not a party to this appeal, were arraigned before the trial court facing a criminal charge comprising of forty (40) counts. The forty counts were in three categories, **one**, possession of unexplained properties contrary to section 27(1)(b) of the Prevention and Combating of Corruption Act No.11 of 2007; **two**, Forgery contrary to section 333, 335(a) and 337 of the Penal Code [Cap 16 R.E.2002]; and **lastly**, Money Laundering Contrary to section 12(c) and 13 of the Anti-Money Laundering Act No.12 of 2006.

For possession of unexplained properties, the Appellant preferred only one count and it was against the 1<sup>st</sup> Respondent, GODFREY JOHN GUGAI. The explanation giving raise to it was that, between January, 2005 and December, 2015 within the city and region of Dar es Salaam, the 1<sup>st</sup> respondent being a Public Officer employed by the Prevention and Combating of Corruption Bureau, owned properties valued at Tanzania shillings Three Billion Six Hundred and Thirty Four Million, Nine Hundred Sixty One Thousand One Hundred and Five and Two Cents **(TZS 3,**

**634,961,105.02)** disproportionate to his present and past lawful income amounting to Eight Hundred Fifty Two Million One Hundred Eighty Three Thousand One Hundred and Sixty and Forty Six Cents **(TZS 852,183,160.46)** and was unable to provide satisfactory explanation on how such properties came under his ownership.

In respect of forgery contrary to section 333, 335(a) and 337 of the Penal Code [Cap 16 R.E.2002], the counts are 2<sup>nd</sup>; 3<sup>rd</sup>; 4<sup>th</sup>; 5<sup>th</sup>; 6<sup>th</sup>; 7<sup>th</sup>; 8<sup>th</sup>; 10<sup>th</sup>; 11<sup>th</sup>; 12<sup>th</sup>; 13<sup>th</sup>; 14<sup>th</sup>; 15<sup>th</sup>; 16<sup>th</sup>; 17<sup>th</sup>; 18<sup>th</sup>; 19<sup>th</sup> and 20<sup>th</sup> in which the 1<sup>st</sup> Respondent is alleged to had forged Sale Agreements purporting to show that he sold, on 14/08/2009 to ZENA MRISHO MGALLAH Plot No.225 Block 6 Mbweni JKT; 14/07/2011 to SALEH SAID SAS Plot No.622 & 623 Block A Gomba Arumeru District; 20/10/2013 to ARIF NAZIR PREMJI Plot No.64 Block Ununio Kinondoni; 20/12/2014 to EDITH MARTIN MBATIA Plot No.737 Block C Mwarongo/Mwambani Tanga; 20/12/2014 to again EDITH MARTIN MBATIA Plot No.1, 2 & 3 Block J Mwarongo/Mwambani; 20/11/2009 to LEONARD MABAI ALOYS Plot No.150 Block 8 Bunju Kinondoni municipality; 19/11/2009 again to LEONARD MABAI ALOYS Plot No.275, 277, 296 & 297 Block 2 Nyamhongolo Mwanza; 20/08/2010 again to LEONARD MABAI ALOYS Plot No.90 Block 5 Bugarika Mwanza; 10/09/2013 again to LEONARD

MABAI ALOYS Plot No.713 Block B Kiseke Mwanza; 20/10/2015 again to LEONARD MABAI ALOYS Plot No.230 Block B Nyegezi Mwanza municipality; 30/11/2011 to MANWALI KEVIN MASALAKULANGWA Plot No.14 Block "J" Bunju; 15/11/2015 again to MANWALI KEVIN MASALAKULANGWA Plot No.103 & 104 Block "L" Bagamoyo; 19/11/2015 again to MANWALI KEVIN MASALAKULANGWA Plot No.184 Block "B" Buyuni Temeke; 4/11/2011 to ROSE ABDALLAH Plot No.34 Block "K" B-Centre Dodoma; 5/11/2013 again to ROSE ABDALLAH Plot No.32 Block "N" Itege Dodoma; 14/11/2014 again to ROSE ABDALLAH Plot No.47 Block B Mwongozo Temeke; 30/11/2014 again to ROSE ABDALLAH Plot No.24 & 39 Block "B" & "M" Chidachi Noty and Itega Dodoma; 10/9/2015 PATRICK PASCHAL MAGESA Plot No.7/9 & 11/13 Block "C" Mwakidila Magoani Tanga and lastly on 15/10/2015 again to PATRICK PASCHAL MAGESA Plot No.18 Block "J" Mwarongo/Mwambani Tanga, the fact which is asserted he knew to be false.

Likewise, under the 9<sup>th</sup>; 10<sup>th</sup> and 11<sup>th</sup> in the forgery counts, the 3<sup>rd</sup> Respondent jointly was charged with the 1<sup>st</sup> Respondent as a person who purportedly bought from him, Plot No.275, 277, 296 & 297 Block 2 Nyamhongolo Mwanza; Plot No.90 Block 5 Bugarika Mwanza; Plot No.713

Block B Kiseke Mwanza; Plot No.230 Block B Nyegezi Mwanza municipality, the fact which is alleged he knew to be false.

The last category, the money laundering counts, which counts are 21<sup>st</sup> to 40<sup>th</sup> counts in the charge sheet, the 1<sup>st</sup> respondent faced all the counts; the 2<sup>nd</sup> Respondent faced only the 26<sup>th</sup> while the 3<sup>rd</sup> Respondent, faced 27<sup>th</sup> to 30<sup>th</sup> counts. In these counts, the 1<sup>st</sup> respondent is accused of disguising the establishment of true owner of landed properties purportedly to be sold by him knowingly they are proceeds of corruption offence namely unexplained properties which is a predicate offence. Likewise, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were charged in the respective counts on account of purporting to have bought the mentioned landed properties from the 1<sup>st</sup> Respondent knowingly are disguising establishment of true owner of the same and knew the same to be proceeds of corruption, a predicate offence.

In proving the counts, the Appellant paraded 42 witnesses and tendered 48 exhibits while for defence side, the respondents testified themselves without calling any witness. At the end, on the height of the defence evidence the trial court was convinced and satisfied that the Appellant failed to prove the charge beyond reasonable doubt against the

Respondents henceforth acquitted them. The judgment aggrieved the Appellant hence this appeal armed with 7 grounds of appeal, to wit: -

- 1. That, the trial court erred in law and fact by acquitting the Respondents and holding that the Appellant failed to prove all the counts facing the Respondents beyond reasonable doubt*
- 2. That, the trial court erred in law and fact by giving weight the Respondents' defence which was evasive denial and disregarding the evidence of the prosecution*
- 3. That, the trial court erred in in law and fact by holding that failure of the prosecution to bring in court the lawyer who witnessed the purported forged sale agreement one Beatus Malima makes the offence of forgery unproved*
- 4. That, the trial court erred in law and fact by holding that the prosecution failed to prove the offence of forgery by failure to charge the lawyer who signed the purported Sale Agreement*
- 5. That, the trial court erred in law and fact by holding that forensic evidence is required in order to prove the offence of forgery*
- 6. That, the trial court erred in law and fact by failure to convict the Respondents in the offence of Money Laundering despite of the strong prosecution evidence*

*7. That, the trial court erred in law and fact by treating the offence of forgery jointly with the offence of money laundering.*

On 24<sup>th</sup> April, 2023 when the appeal was called on for hearing, Christin Joel, learned Senior State Attorney appeared for the Appellant. The Respondents were present represented by Messrs. Alex Mgongolwa, Seni Malimi and Nduruma Majembe, learned advocates. I ordered appeal hearing be by way of written submissions and fixed the schedules of filing the respective submissions. both sides complied the orders. I am grateful and highly indebted to the learned minds for their well-articulated contending submissions for the appeal

However, in the course of composing the judgment, I observed from the trial court proceedings that on 16<sup>th</sup> September, 2021 the Appellant substituted the charge against the Respondents (see pp. 388 – 391 of the proceedings). Changes made were, among others, the date and year (1<sup>st</sup> July, 2007 to 31<sup>st</sup> August, 2016 from the former, January 2005 to December,2015) on which the 1<sup>st</sup> count of the offence charged is allegedly was committed by the 1<sup>st</sup> Respondent and secondly, his lawful income changed to TZS 901,284,005.41 from TZS 852,183,160.46 stated in the former charge. Having substituted the charge sheet, the trial court

proceeded with the trial of the case without first complying the legal requirement set under section 234(2) of the Criminal Procedure Act, [CAP. 11 R.E.2019]. Following that, I had to re-open the appeal to allow both sides of the appeal address this court on such non-compliance regard being on the propriety of the trial court proceedings, competence of the trial court judgment founded on such proceedings, the appeal herein and the way forward.

On 12<sup>7th</sup> November, 2023, both sides of the appeal appeared before Hon. S.B. Fimbo, Deputy Registrar for mention whereby schedules of filing written submissions addressing the issue raised by the court were put in place. Orders were complied with. With a view of finding out compliance of written submissions' filing orders, on 5<sup>th</sup> April, 2024 is when parties appeared before the Deputy registrar of the High Court. Indeed, orders are complied with.

Addressing the issue, Ms. Estazia Wilson, a learned state attorney argued by admitting the charge was, on the 16<sup>th</sup> September, 2021, substituted by the appellant in respect of the 1<sup>st</sup> count. However, she is of a submission that the substitution of the charge did not in any way prejudice the Respondents asserting that the substitution didn't introduce any new fact and the Respondents were given opportunity to cross -examine the prosecution's witnesses in respect of the evidence they had adduced in court.



Arguing in the alternative, Ms. Estazia submitted that, should this court find that section 234(2) of the Criminal Procedure Act, [Cap. 20 R.E.2022] was violated, resulting into nullification of the proceedings, then the extent of nullification be from the stage when the charge was substituted with an order of retrial to that effect. According to her, this will not give a chance the republic to refill gapes and believes the already adduced evidence suffices to ground conviction on the charged offence

As regards the respondents' response to the issue raised, do agree on existence of noncompliance of section 234(2) of the CPA on 16<sup>th</sup> September, 2021 when the appellant republic substituted the charge against them. That, the trial court didn't inform them the right of recalling witnesses who had adduced evidence earlier before the charge was substituted. However, are also of the view that they were not prejudiced anyhow by such omission done by the trial court. To them, the omission didn't render the proceedings improper because in the end the trial court acquitted them after considering the evidence before it. Hence, assert that, no failure of justice or miscarriage of justice was occasioned for the error, omission or irregularities done. Advancing their argument further, stated that, had the respondents been convicted, then failure of justice could have said to exist basing on the failure to comply the requirement of section 234(2)(b) of the CPA. Therefore, the trial court proceedings were not vitiated so is the resultant

judgment and henceforth the appeal herein is properly before the court. Further are of the contention that, the way forward is to determine the appeal.

Alternatively, the respondents' argument is that the consequences of noncompliance of section 234(2) of the CPA, as expounded by several decisions of the court, is that witnesses who had already testified must be recalled and examined and failure of which is to render their evidence to have no evidential value. In that regard this court is referred to the case of **Ezekiel Hotay versus Republic**, Criminal Appeal No. 300 of 2016 CAT at Arusha (unreported). Therefore, since after substituting the charge, the prosecution didn't recall the witnesses already testified then were ready for the consequences.

Again, the respondents are of the submission that the trial court, in composing the judgment, acted on the assumption that all the evidence were properly admitted and recorded in the proceedings. The evaluation of the evidence done by the trial court found the prosecution to had failed to prove the charged offence against the respondents hence their acquittal.

The respondents are of further submission that should this court find the trial court proceedings were improper, then retrial should not be ordered after nullification of the proceedings and quashing the judgment as the appellant's evidence are in discrepancies. In support, cited the case of **Omary Salum @ Mjusi versus Republic**, Criminal Appeal No. 125 of 2020 CAT at Dar es Salaam

(unreported) in which the case of **Fatehali Manji versus R** [1966] EA 341 is cited which demonstrated guidance to the court on ordering retrial or otherwise when the trial courts proceedings are nullified. That, here retrial will give the appellant an opportunity to fill in gaps in their evidence which are at discrepancies.

I have given due consideration the submissions by the contending sides of the appeal on the issue raised on non-compliance of section 234(2) of the Criminal Procedure Act, [Cap. 20 Revised Edition, 2022] (the CPA) when, on 16<sup>th</sup> September, 2021 in the course of trial of the case, the charge sheet against the respondents was substituted by the Appellant. This is what transpired of the date:

*"Date: 16/09/2021*

*Coram: Hon. T.K. Simba – PRM*

*For Republic: Mr. Christopher, SSA*

*1<sup>st</sup> accused*

*2<sup>nd</sup> accused*

*3<sup>d</sup> accused*

*CC: Sophia*

*MR. Alex Mgongolwa and Mr. Nyarigo Mbayati*

***MR. Msigwa:*** *This matter was fixed today for hearing.*

*We pray to substitute charge under section 234(1) of the CPA,  
Cap. 20 R.E. 2019*

***Sgd: T.K. Simba – PRM***

***16/09/2021***

***Court:*** *New charge read over and explained to the accused who is required to plead thereto:*

***1<sup>st</sup> Count: to 42<sup>nd</sup> Count: "Not true"***

***Court: Entered as plea of not guilty***

***Sgd: T.K. Simba – PRM***

***16/09/2021***

***MR. Christopher Msigwa: We pray to close prosecution case***

***Sgd: T.K. Simba – PRM***

***16/09/2021***

***Mr. Mgongolwa: We are waiting for the ruling of the court***

***Order: Ruling on 16/09/2021***

***AFRIC***

***Sgd: T.K. Simba – PRM***

***16/09/2021"***

On 17<sup>th</sup> September, 2021 the trial court delivered a ruling and found the Respondent to have a case to answer. Thereafter, defence hearing commenced.

It is common ground from the filed submissions, both concede that having substituted the charge sheet, the trial court proceeded with the trial of the case without first complying the legal requirement set under section 234(2) of the CPA. Besides, it is both sides' argument that violation of the said provision prejudiced no one to the case and thus, in their contentions, the trial court proceedings are proper so is the appeal herein founded on the judgment entered from such proceedings. Nevertheless, both sides cited no authority supporting their stance.

In **Shabani Isack @ Mgambo and Another versus Republic**, Criminal Appeal Nos. 192 and 218 of 2012 CAT referred at page 9 in **Omary Juma Lwambo versus Republic**, Criminal Appeal No. 59 of 2019 CAT at Dar es Salaam (unreported), the court of appeal had this to state: -

*"Being guided by the above cited authorities, we are in agreement with the learned Senior State Attorney that failure by the trial court to observe the requirement imposed under the said provision vitiated the entire trial hence renders the trial proceedings a nullity. So were the proceedings and judgment in the appeal before the High Court, as they stemmed from null proceedings."*

In this **Omary Juma Lwambo's** case the Court having referred the above findings in that case, had this to state, at the same page 10: -

*"The above being the effect of a failure by the trial court to comply with s. 234(1) and (2) of the CPA after substitution or alteration of a charge, **we similarly find that, in this case, the omission rendered the proceedings which followed after the date of substitution of the charge, a nullity.**"*

*[Emphasis supplied]*

Under our legal jurisdiction, that is the effect of non-compliance of section 234(2) of the CPA as interpreted by the court of appeal. In absence of any other interpretation to the contrary by the very court, the high court herein being subordinate to it, is bound to follow the interpretation.

Now, that being the stance of the law, as interpreted, I decline accepting the line of argument suggested by the parties that violation of section 234(2) of the CPA didn't affect the proceedings as no one was prejudiced by it. In my considered view, accepting that stance is tantamount to legalize a nullity trial court's proceedings on record.

Thus, applying **Omary Juma Lwambo versus Republic's** case (**supra**), which follows in all fours to the suggestion in alternative put forward by Ms. Estazia, for the Appellant, the violation of section 234(2) of the CPA committed by the trial court renders the proceedings after the substitution of the charge done on 16<sup>th</sup> September, 2021 be a nullity proceeding liable to be expunged from the court record. I hereby do so. Since there is no valid judgment which can stem from nullity proceedings, the same is also hereby set aside. The net effect of nullification of the proceedings and setting aside the judgment leads in having no valid appeal before this court.

Consequently, I hereby struck out this appeal and order for a retrial of the case from where the charge sheet was substituted, that is to say on 16<sup>th</sup> September, 2021, and the legal requirement set under section 234(2) of the CPA, as interpreted by the superior court, be complied with. It is so ordered

Right of Appeal explained

DATED at DAR ES SALAAM on this 20<sup>th</sup> day of JUNE, 2024



**MUSA K. POMO**  
**JUDGE**  
**20/06/2024**



**Court:** - Judgement delivered on this 28<sup>th</sup> day of June, 2024 in presence of MS. Eva Kassa, learned state attorney for the Appellant, the Respondents in person together with their advocates one Nduruma Majembe and Kallaghe Rashid.

**Sgd: S. B. Fimbo**  
**Deputy Registrar**  
**28/06/2024**