

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

(C/f Criminal case no. 49 of 2023, in the District Court of Mkuranga at Mkuranga)

CRIMINAL APPEAL NO.258 OF 2023

ABDALLAH KALIZARI KABIGA1ST APPELLANT

ABDULIAHAMAN OMARY MZUZURI.....2ND APPELLANT

VRS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order:5-2-2024

Date of Judgment:4-3-2024

B.K.PHILLIP,J

The appellants herein and Kassim Abilah Sangulisa who is not a party in this appeal were arraigned at the District Court of Mkuranga at Mkuranga on two counts, to wit; Conspiracy to commit an offence contrary to section 384 of the Penal Code, and obtaining money by false pretences contrary to section 301 and 302 of the Penal Code.

Briefly, at the trial court, the prosecution case was as follows; the appellants herein and Kassim Abillah Sangulisa with Said Sameery Said and Seleman who are still at large conspired to commit an offence of obtaining money by false pretences and obtained a sum of Tshs. 35,000,000/= from Omary Salum Omary purporting to sell him (10) hectares of land knowing that there

was no such plot/farm for sale. In proving its case the prosecution paraded six witnesses.

At the end of the prosecution case, all of them were found with a case to answer. On the other hand, the appellant defended the case and summoned one witness to support them. At the end of the hearing, the trial court acquitted Kassim Abilah Sangulisa and found the appellants herein guilty of the offence charged against them. Consequently, were sentenced to serve four years imprisonment for each count. The sentences were ordered to run concurrently.

Aggrieved by the judgment of the District Court, the appellant lodged this appeal on six grounds of appeal which can be conveniently reduced/summarized into the following grounds of appeal.

- i) That the learned trial Magistrate erred in law and facts to convict the appellants whereas the prosecution did not prove the case beyond reasonable doubt.
- ii) That, the learned trial Magistrate erred in law and facts to convict the 2nd appellant without considering that he was involved in the sale of the land in question as a village leader by Said Sameery who is at large whom he verily believed to be the rightful owner of the said piece of land.

- iii) That, the learned trial Magistrate erred in law and fact to convict the appellants without considering that the one who sold the piece of land to the complainant (PW1) was Said Sameery who is at large and the contract for sale was between him and the complainant.
- iv) That, appellants were subjected to an unfair trial since during the hearing of the defence case, the trial Magistrate conducted the examination chief of all the defence witnesses, thus denying the appellants the right to defend the case freely and fairly.
- v) That the trial Magistrate erred in law and fact for failure to take into consideration the appellants' defence without assigning any cogent reasons.

The appellants appeared in person, unrepresented, and the respondent was represented by the learned State Attorney, Rose Makupa. When the appeal was called for hearing the learned State Attorney did not enter appearance in court although the hearing date was fixed in her presence. I ordered the appeal to be heard ex-parte by way of written submission following the appellants' prayer for an ex-parte hearing of this appeal. The appellants filed their written submission as ordered.

I will start dealing with the 4th ground of appeal for the reason that will be apparent shortly.

Submitting for the 4th ground of appeal, the appellants argued that the trial Magistrate examined in chief the witnesses during the defence case. They contended that the trial Magistrate denied their right to defend their case freely and fairly because she guided and limited them on what they should tell the court as a result, they were not able to inform the court of some of the information about the case. The appellants reproduced in the written submission the relevant part of the proceedings during the defence case and referred this court to the case of **Kassim Salum Mnyukwa Vrs The Republic, Criminal Appeal No. 405 of 2019**, (unreported), to cement their arguments.

I have perused the lower court's proceedings during the defence case and noted that they are tainted with fatal irregularity. Indeed, the trial Magistrate examined in chief the witnesses during the hearing of the defence case. As demonstrated by the appellants in their written submissions, the trial Magistrate conducted the examination in chief of the appellants as well as DW4, who was summoned by the appellants as their witness. The position of the law on the examination of witnesses is that the trial Magistrate is supposed to take a neutral part as an umpire. Examination in chief has to be conducted by the party or the advocate engaged by the party, if any. If the party is not represented then, the court has to let her/him give his testimony on his own. However, the court can make general guidance on how a party should make his/her testimony and/or ask questions for clarification only if need be. In the case of **Kassim Salum Mnyukwa**, (supra) the Court of Appeal has this to say on the proper procedure in the examination of witnesses;

".....examination in chief is essentially the domain of a party that has called the witness in question, in this case , the appellant so as to give evidence on his side. It is during examination in chief when the party concerned is afforded with an opportunity to tell his/her side of the story and elicit his/her account of what transpired concerning the incidence . The given evidence will eventually assist the trial court to elucidate what happened so as to arrive at a fair and balanced decision..... We understand that the trial magistrate has a duty to put questions for clarification if need be, but such question are asked after the witness has finished to testify , though he may as well interrupt and seek clarification when the witness is testifying. In matter at hand however, the questions asked by the trial magistrate were not for clarification, instead were to examine the witnesses in chief ,which was wrong procedurally. By doing so, the magistrate turned himself into a party to the case instead of being an umpire who would give decision at the end. We wish to instructively state that , since DW2 was called by the appellant, then, he was the one supposed to examine him in chief and not the court as it happened.....We further order the case file be remitted back to Temeke District Court to enable the appellant to defend himself.."

Additionally, despite pointing out the aforesaid irregularity, the appellant submitted on all grounds of appeal and implored this court to set aside the judgment of the District Court on the reason that the prosecution failed to prove its case to the standard required by the law. I wish to point out that the irregularity found in the proceedings is fatal since the appellant did not defend the case as required by the law. Under the circumstances, I cannot proceed with the determination of the remaining grounds of appeal instead

I hereby nullify the lower court's proceedings starting from the defence case, the findings, and the decision of the lower court.

Further, I hereby order that the case shall be tried *de novo* by another Magistrate starting from the defence case. The case file shall be remitted to the trial court forthwith.

Dated this 4th day of March 2024.




B.K.PHILLIP

JUDGE.