

TANZANIA / JUDGMENT

charles mdunyamichael vs republic

2023 tzhc 17270 12 may 2023

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TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB REGISTRY OF KIGOMA) AT KI G O M A ECONOMIC APPEAL NO. 1 OF 2022 (Arising from Economic Case No. 08 of 2022 at the District Court of Kibondo) CHARLES MDUNYA@ MICHAEL APPELLANT VERSUS REPUBLIC I I I ... I I I ... I .. I I I RESPONDENT Date of Last Order: 24 .04. 2023 Date of Judgement: 12 .OS. 2023

JUDGEMENT

MAGOIGA, J. The appellant, CHARLES MDUNYA @ MICHAEL was on lih day of May, 2022 arraigned in the District Court of Kibondo for economic offence of embezzlement and misappropriation contrary to section 28

- (1) of the Prevention and combating of Corruption Act No. 11/2007 read together with paragraph 21 of the First Schedule to and Sections 57(1) and 60(2) both of the Economic and Organised Crimes Control Act [Cap 200 R.E 2019] for having fraudulently misappropriated sum of Tanzanian ~ 1 Shillings Four Hundred Ninety Seven Thousand One Hundred Only (Tzs. 497, 100/=) which was entrusted to him as public officer. It was alleged that the appellant on unknown dates of the financial year 2018/2019 at Kitahana village within Kibondo District in Kigoma region, acting as a Ward Executive Officer at Kitahana Ward did fraudulently misappropriate Tzs.497,100/= which was entrusted to him through performance of public duites. Having heard the case for both parties on merits, the trial Resident Magistrate found the accused guilty as charged and sentenced him to serve a custodial sentence of 20 years. Aggrieved by conviction and sentence, the appellant preferred this appeal to this Court faulting the trial Resident Magistrate on the following grounds, namely:
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 1. That the trial court erred in law in convicting the appellant basing on the exhibit P3 the tax invoice and certificate of authenticity whose contents were not read loud to the appellant in court after being admitted as evidence.
 2. That the trial court erred in law in convicting the appellant without proper analysis and evaluation of evidence of the prosecution and the defence sides. 2

3. That, the prosecution side failed to prove their case beyond reasonable doubt. On the strength of the above grounds of appeal, the appellant prayed that this Court be pleased to quash the decision of the trial court, allow this appeal and set him free and any other reliefs this court may deem fit and just to grant. When this appeal was called on for hearing, the appellant had the legal services of Ms. Mburalina Maira, learned advocate who was heard through vide video conference, while the Republic was represented by Ms. Antia Julius, learned State Attorney who was heard as well through video link. The appellant's learned counsel submitted on the first ground that the trial court did not comply with the law because the exhibits tendered were not loudly read over to the accused person in particular exhibit P3. To bolt up the above stance, the learned advocate cited the case of Rashid Kazimoto and Masudi Hamis vs R, Criminal Appeal No. 458 of 2016 CAT Mwanza and Mbagha Julius vs Republic, Criminal Appeal No. 131 of 2015 CAT, Mwanza in cases which it was insisted that exhibits once admitted should be read in open court. Failure to read exhibits renders the said exhibit incompetent and it has ~ to be expunged from the court record. 3 It was further submitted by the appellant's learned counsel that in this case that was not done. So, on the same vein she prayed exhibit P3 be expunged from the court record. According to Ms. Maira, this exhibit goes to the root of the dispute herein. So, once exhibit P3 is expunged, the case for prosecution definitely was not proved. On the 2nd and 3rd grounds argued jointly, Ms. Maira submitted that the evidence given was by 3 prosecution witnesses to the charge for embezzlement and misappropriation of funds with no written document was tendered to show that by 2018/2019 he was Revenue Collector because he handed over and deposited all that he had collected and no more claims. The counsel insisted that DW2 supported the appellant's case that he paid all what he collected. Therefore, the learned counsel submitted that, the Republic failed to tell what they agreed and when it stopped. On the above reasons, Ms. Maira finally prayed this court to allow the appeal and set aside the conviction and sentence meted out against the appellant, and set him free. On the other hand, Ms. Antia Julius, learned State Attorney told the court that the Republic strongly opposes this appeal. On the first ground of appeal, Ms. Antia, readily conceded that exhibit P3 was not read and is prone to be expunged from the record but she was quick to point out ~ 4 that the oral evidence of PW1 is strong and is enough to prove the offence charged. She went on submitting that, PW1, at pages 17- 18 of the typed proceedings, told the court that the claim against the appellant was Tshs. 497,100/=. To bolt up the point, the learned Attorney cited case of Issa Hassan Uki vs R, Criminal Appeal No. 129 of 2017 CAT Mtwara at page 15 underscored the point. In this case the testimony of PW1 covers all the allegations by exhibit. On issue of the cautioned statement which was admitted in evidence the State Attorney submitted that the appellant confessed to be indebted and that no question was asked to challenge anything on its contents to show he agreed to what was said by PW1. Failure to cross examined on the point is an admission. To buttress her argument, she cited the case of Joseph Meganzamlevi and Dotto Salum Ndutwa, Criminal Appeal No. 536/337 of 2015 (unreported) CAT at Tabora at page 7 the apex court insisted that failure to cross examine the matter is believed to accept what was said. On that note, Ms. Antia pointed that the 1st ground is baseless and urged this court to found it baseless and dismiss it. 5 On the 2

and 3 grounds in rebuttal the learned Attorney submitted that the case was proved and the trial Resident Magistrate examined and analyzed all evidence and come to conclusion as arrived. Analysis was done well by considering both sides evidence. According to her, the case was proved to the standard required in criminal cases. She added that the analysis of evidence was done at pages 7-10 of the typed judgment. Further was the submissions of the learned Attorney that, under section 28(1) of PCCB Act [Cap 329 R.E. 2019] two ingredients for proving the offence charged are; one, one must be a Public official, and two, must have committed embezzlement of public funds. To bolt up the point, the learned Attorney cited the case of DPP vs Justina Patrick Gidohay, Criminal Appeal No. 67 /2020 HC Arusha. In this case the Appellant was a public servant and fraudulently misappropriated the money in dispute, insisted Ms. Antia. On the foregoing, the learned Attorney concluded that, the case was proved beyond reasonable doubt by PW1 who proved the amount that was embezzled. She thus prayed this appeal be dismissed for want of merits. In rejoinder, Ms. Maira rejoined that, oral evidence was not enough to prove the offence as charged. As to the cautioned statement, she argued the cautioned statement was not enough by itself to prove the money alleged to have been stolen. The learned counsel for the appellant added further that no proof that he used the money for his own use. He used 300,000/= which he deposited and reiterated his earlier prayers. This marked the end of hearing of this hotly contested appeal. The task of this court now is to determine the merits or otherwise of this appeal in the light of evidence on record. Starting with the first ground of appeal, the complaint is based on the fact that the exhibit P3 was tendered in court and admitted without its content been read to the accused. I have taken trouble to peruse the records of appeal and found that it is true that at page 17 of the typed proceedings the court admitted exhibit P3 but the record is silent as to whether it was loudly read out in the trial Court. This point is not contested between rivaling learned counsel for parties. However, they lock horns on the outcomes of the fate the same I expunged. While the learned advocate for appellant is of the strong view that it goes to the root of the matter without which the offence of fraudulently misappropriation was not proved. On the other hand, the learned Attorney is of the strong view that, even if exhibit P3 is expunged from the record but still there are other strong evidence from PW1 which proves the offence charged, 7 The rationale for reading the contents of exhibits after its admission has been re-echoed by the Court of Appeal of Tanzania in a number of its decisions. One of this is the case of Bulungu Nzungu vs Republic, Criminal Appeal No. 39 of 2018, Court of Appeal at Shinyanga (Unreported) in which it was held that: "It is now a well-established principle in the Law of Evidence as applicable in trial of cases, both civil and criminal, that generally once a document is admitted in evidence after clearance by the person against whom it is tendered, it must be read over to that person." Guided by the above stance and under the doctrine precedent, I hereby expunge exhibit P3 which no doubt was admitted but was not read out before trial Court. Now next question is was that the only evidence on the amount alleged to have been misappropriated, hence, the offence was not proved? This was the stance of the learned advocate for the appellant whereas the stance of the learned State Attorney was that there were other evidence which still proved the offence beyond reasonable doubt. Having

carefully considered the rivalling submissions by learned counsel for parties on this ground, with due respect to Ms. Maira, I find that 8 • apart from exhibit P3, which was expunged, as correctly submitted by the learned Attorney there are other available evidence on record which proved the offence charged. These are; one, the testimony of PW1 as rightly argued by the learned Attorney was not cross examined connoting that what he testified under oath was nothing but the truth. As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. (See Cyprian A. Kibogoyo v R Criminal Appeal No. 88 of 1992, Paul Yusuf Nchia v National Executive Secretary, Chama cha Mapinduzi and Another Civil Appeal No. 85 of 2005 (both Unreported). Two, the contents of exhibits P4 and PS which were admitted and read out in court after admission clearly proves the amount of money that was misappropriated by the appellant and the appellant in exhibit PS admitted to know the money and that is due of him. In this the appellant in exhibit PS when questioned on the amount in dispute had this to say: "Deni hilo limetokana na ukusanyaji wa mapato katika halmashauri ya wi/aya ya Kibondo kutumia POS na deni hilo langu." This piece of evidence was and is still unchallenged in so far the evidence on record is intact. ~ 9 On the foregoing reasons, with due respect to Ms. Maira, I am constrained to find her arguments that without exhibit P3 no other evidence on record misconceived and misleading in the circumstances of this appeal, hence rejected and dismissed. That said and done, I agree with the learned Attorney that there is ample evidence on record proving the amount in dispute subject of the charge sheet to have been proved. Consequently, I find ground one of the petition of appeal without merits and is dismissed. This takes me to the 2nd and 3rd grounds of appeal jointly argued that the trial Resident Magistrate convicted the appellant without proper analysis of both evidence by parties and find out that the case for prosecution was not proved beyond reasonable doubt. As to the advocate for the appellant much as no written document showed the appellant was revenue collector by 2018/2019 and that much as DW 2 supported the case for the appellant deposited all what was collected and also that the Republic failed to tell what was agreed and when it stopped, then, the trial Resident Magistrate failed to analyse evidence and reached a wrong conclusion. On the other hand of the Republic, Ms. Julius had different view that the trial Resident Magistrate dutifully analysed evidence by both sides and came to the fair conclusion. In this, she pointed that it was done at ~ 10 pages 7-10 of the typed judgement. As to the arguments that the case was proved, she was of the strong submission that under section 28 of the PCCB Act, [Cap 329 R.E.2019] the prosecution is supposed to prove two ingredients, namely; one, that the appellant is a public servant/official and two, that there was embezzlement and misappropriation of public funds. In this she pointed out that no dispute it was proved and analysed that the appellant was a public servant employed by Kibondo District Council. And that, two, it has been proved that the money was misappropriated by the appellant. Having carefully considered these two grounds and having gone through the impugned judgement of the trial Court, I, with respect to Ms. Maira, learned advocate for the appellant, find this grounds want of merits in the circumstances of this appeal. I will account for my stance. One, as correctly argued by the

learned Attorney, the trial Resident Magistrate at pages 7-10 of the typed judgement considered both sides evidence, analysed them and came to the conclusion that the case was proved to the standards required in criminal cases. Which exercise I find nothing to fault the trial Resident Magistrate. Two, the learned advocate for appellant in rejoinder never disputed that the two ingredients were not proved by exhibit P2 and exhibits P4 and PS but his assertion was too general to constitute and pin point out what was not proved. 11 On the foregoing, I find no merits in these two grounds and same are equally dismissed for want of merits. That said and done, I find this appeal devoid of any useful merits, and consequently, is hereby dismissed in its entirety. I t i s s o o r d e r e d . Dated at Kigoma this 12th day of M 23 S .M . M A G O I G A J U D G E 12/05/2023 12

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