

TANZANIA / JUDGMENT

20150219 TZHC Mbeya

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TZHCDECIDED
19 February 2015

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IN THE HIGH COURT OF TANZANIA A. AT MBEYA. DC. CRIMINAL APPEAL NO. 83 OF 2014
(From Original Criminal Case No. 166 of 2013 of Mbozi District Court at Vwawa) ETOSEA s/p
JONAS • 1..... APPELNT VERSUS 'T'IE
REPUBI_11C ••••• RESPO:D:EN'r

JUDGMENT

1810212015 & 1910212015 A.F. NGWALA, J. On 16th July, 2014, the Senior Resident Magistrate of Mbozi District convicted the accused person now the appellant of two counts of forgery Contrary of Sections 333, 335 (d) (i) and 337 of the Penal. Code, CAP. 16 R.E. 2002. The Appellant was also convicted of two counts of Uttering false document contrary to Section 342 of the same code. On those separate counts a sentence of four (4) years imprisonment was imposed by the Magistrate on each count. The Magistrate ordered the sentences to run concurrently. That is the appellant should serve a four years imprisonment in all. 1 . y ,.

- -, -t The appellant who was represented by Mr. Shitambala, through him has taken five grounds of Appeal which may be summarised as follows:-

1. That the trial Magistrate erred in point of law and fact in convicting and sentencing the appellant while the prosecution side had failed to prove the case beyond reasonable doubt. That the trial Magistrate erred in law and fact in convicting and sentencing the appellant with forgery bases on uncorroborated expert evidence and cautioned statements. That the conviction and sentence imposed by the trial Magistrate is bad in law as it entails more than once punishment on the same offence. It is quite clear as rightly submitted by Mr. Mulisa the learned State Attorney for the Republic who supported this Appeal very eloquently that there were procedural irregularities in the conduct of the case in the trial court. He joined hands with the contentions by Mr. Shitambala that the procedures used by the trial court to admit the two exhibits, to wit the handover letter Exhibit PE1 was a photocopy which was admitted contrary to Section 67 of the Tanzania Evidence Act, CAP. 6. R.E. 2002. The Attorney cited further on the case of Waziri Abdallah Kibutwa and two others vrs. The Republic, Criminal Appeal 2 F / No. 18 1/2006 to support this argument. Mr. Mulisa insisted that PW2 Bedwin Nyalusi, the one who introduced the exhibit, the photocopy of the Handover letter did not put it clear if he had authority to tender it. The appellant had demanded to know the contents of that document; hence that record which was expunged

from the Records of the court proceedings could not have been relied to prove that the accused person was acting as the headmaster when it was temporarily admitted in court. Worse the original was never produced and admitted in court. The document, TSM 9 a form too was un procedurally admitted by the trial court; because the witness PW2 had no power to tender it. Mr. Mulisa went on to sUbmIt that there was no other photograph to compare with the photo in TSM 9 and or witness to prove that the photograph on the TSM 9 exhibit PE2 was not of Petro Myombe who was transfered from Msia Secondary School to Halungu Secondary School in Mbozi District. It is in the evidence of PW6 Asèistant Inspector Lameck Chinika that when he interrogated the Headmaster of Halungu Secondary School, he was told that he had no idea of the transfer. He was not a party to it. He just got the form. 3

Another procedurally irregularity that was pointed by Mr. Mulisa is that PW 1, PW2 or PW3 were not sworn. The ages of the prosecution witnesses were in the record. Mr. Mulisa emphasized on the importance to know the age of witness in order to understand if they were of extreme age or children requiring a voire dire test. He argued that the Magistrate seems to have largely relied on the inadmissible evidence of PW6 and was also influenced by the hearsay evidence of PW6. The information that was given to PW6 by Albert Friday Masebo who said that the photo was that of Reuben s/o Mwilenga who had never been transferred to another school. This Albert Friday Masebo was never called in court to testify in order to verify the truth of what he had told PW6. Had the trial Magistrate excluded the said inadmissible evidence, I doubt whether he would still have caine to the conclusion that the appellant was guilty of the said offences. In view of the foregoing submissions. I am inclined to; agree with the respective learned counsels for the Appellant and the Republic that the conviction cannot be allowed to stand. I hold so because the aforesaid procedural irregularities prejudiced the appellant. It must be understood that in law, the question of recording the age of witness is of paramount necessity and it should not be overlooked as it goes to the competency, compellability and priviledges of witnesses which affect or may 4 --

- I Y, pre judice a case. A person is Considered to be competent to testify . in Court when he or she is capable to give rat answers; and or when. hear she is a competent Witness ional to testify or not as provided for Under the provisions of Section 127 of the Tanzania Evidence Act, CAP. 6 R.E. 2002. Indeed the provisions of rule of law or practice on assessing the credibiljt of evidence of Children of tender age, age, disease, Unsound mind extreme old , Uflcorroborated evidence and how to receive evidence or recording the Proceedings in court should be of observed as provided for under the Crimi nal Procedure Act, CAP. 20 R.E. 2002 and the Tanzania Evidence Act CAP. 6 R.E.2002 For this reason the appeal is allowed. The conviction and sentence are quashed It is ordered that the appellant be set at liberty unless held for another lawful caused AJ'. NGWALA JUDGE ' ..r'• z:. 18 / 0 2/2015 11 5 I. UL _ _.- / Date: 19/02/2015 (j Coram: A. F. Ngwala - J. For Republic: Mr. Rogers State Attorney For Appellant: Absent Appellant: Present Court: Judgment delivered in court in the presence of the Accused person and the State Attorney - representing the Republic. Court: Right of Appeal to Court of Appeal of Tanzania explained. .. 447~_&_f I •I '1 .1- A.F. NGWALA .r JUDGE 19/02/2015 •-•" I.

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