

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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THE JUDICIARY OF TANZANIA TN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT
ARUSHA (CORAM: HON. AISHA BADE) CRIMINAL APPEAL NO. 000005725 OF 2024 HILARY
FREDINARD KOMBA AND OTHERS..... COMPLAINANT / APPELLANT /
APPLICANT I PLAINTIFF VERSUS REPUBLIC..... RESPONDENT / DEFENDANT

JUDGMENT

Fly Notes DPP s consent after adding particular of offence to the charge sheet, whether a new consent should have been attached

Facts

Appellants who were police officers were charged with abuse of position on the basis of conducting what is termed as illegal search Ratio Decidendi

1. The act of charging was on the basis of the offence, so changing particulars does not affect the DPP's consent if the offence is the same. 2. a search does not become unlawful for want of an independent witness does not vitiate the search 26th of July 2024 Hon. BADE.:
10/06/2024 & 26/07/2024 BADE, J. The Appellants together with five accused persons who are not party to this Appeal were arraigned at the Magistrates' Courts of Arusha at Arusha on two counts save for the 3rd accused at the trial court who was charged with the offence of Aiding and Abetting. The Appellants were charged with one, Corrupt Transactions, contrary to section 15 (1) (a) and (2) of the Prevention and Combating of Corruption Act, [CAP 329 R.E 2019] (the "PCCA"), and two; 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) both of the Economic and Organized Crime Control Act, [CAP 200 P. E 2019] (the EOCCA"). After a full hearing, the trial court acquitted the Appellants on the first count and 'onvicted them on the second count. They were both sentenced to serve twenty years in prison. Being aggrieved by the said conviction and sentence they lodged the instant Appeal. Before going to the merit of this Appeal I will briefly review a contextual background leading to the present Appeal. It was the prosecution's case that on 19/03/2021 at Usa River Area, within Arumeru District in Arusha Region, the Appellants did corruptly obtain from one Professor Justine Humphrey Maeda the sum of TZS 74,000,000 as an inducement to not take legal actions against him on an offence of unlawful possession of Government Trophies. That, on the same date, on the

same place, the Appellants being police officers of the Tanzania Police Force, in discharge of their functions did intentionally abuse their position by conducting illegal search on one Professor Justine Humphrey Maeda in violation of section 38 of the Criminal Procedure Act for purposes of obtaining undue advantage of TZS 74,000,000. To prove their case prosecution paraded 13 witnesses and 7 exhibits. Their case was based on allegations that, on the fateful date in the morning hours, PW2 who was the victim received visitors who were eight in number. They introduced themselves as police officers from the headquarters. Among them, there was one in a police uniform with a gun. They told him that they received information from an informer that he was dealing with the illegal business of Government Trophy and they wanted to search his place. He agreed with the search. PW2 opened the door of the main house for them to enter and conduct a search, but they seemed not interested in searching the house. PW2 took them to his farm where there were chicken Coops and a store, still, they seemed not interested in searching there, instead, they went to the building where beehives are normally kept. They searched this place and found two pieces of elephant tusk inside the beehives. After finding those two pieces of elephant tusk, they took a picture of PW2 holding those tusks. Momentarily, the one that was being called the boss by the other visitors who seemed to be leading the pack and who later on came to be known as the first Appellant told PW2 that being in possession of elephant tusk is a very serious offence and it is not bailable and it is economic sabotage “uhujumu Uchumi” and that he felt sorry for him because he is old. The leader of the group asked him to contribute TZS 200,000,000 as the costs that had been incurred by the officers from headquarters. PW2 told them that he did not have such an amount. The leader of the group left and went outside to discuss with one officer from headquarters, then he called him outside and told him that they would not accept anything less than TZS 100,000,000. He told them that he did not have such an amount and showed them his balance sheet. After hearing that, they took him to the Usa River Police Station, keeping him under tight watch, and around 14:00 hours he was handed to two police officers and was instructed to go to the bank to withdraw the money. He went to the CRBD bank and NMB bank where he drew a total of TZS 67,000,000, and handed it to the officer he was with. To make the total of TZS 100,000,000/= he went and borrowed the remaining amount from his nephew, one Timothy Maeda, PW3, who lent him TZS 27,000,000, he added this amount to the TZS 156,000 that he had in his pocket and returned to the police station. At the station, the first Appellant went outside to talk to other officers from the headquarters, and then the first and second Appellants came back and explained to PW2 that they decided to take only TZS 50,000,000 which would be handed to the officers from the headquarters and return the remainder of the amount because they felt sorry for him. However, later on, the first Appellant told him that he was required to leave TZS 20,000,000 for the expenses at the station and he would take TZS 30,000,000 but to his surprise, he was given back only TZS 26,000,000. He called the second Appellant whose number he had, and told him that the money was less than the TZS 30,000,000. In response, the second Appellant told him that he would discuss the matter with his colleagues and he would call him back. After the commotion was over, PW2 decided to report to the PCCB office where he was received by PW1, to whom he narrated the whole incident. At the PCCB

office, he mentioned the second Appellant whom he knew before the incident as he had come to his house two years ago on a theft incident that took place at his house. PW1 called on the second Appellant, and after interrogation, he mentioned other officers who were together in PW2's house. PW1 summoned them and after a long discussion they agreed to return the money within 3 days but they did not pay the money back. They were arrested and charged with the aforementioned offences and later on they were convicted on the second count. Being aggrieved they appealed to this Court on five grounds of Appeal in their joint petition of appeal to the effect that:

1. That the prosecution did not prove the offence of abuse of position against the Appellants beyond reasonable doubt as required by the law.
2. That, the trial magistrate erred in law by entertaining Economic Case No. 16 of 2023 without the consent of the Director of Public Prosecution as required by the law.
3. That, the trial magistrate erred in law and fact by grounding the conviction and sentence on the certificate of seizure which was never tendered and admitted in evidence.
4. That, the trial magistrate erred in law and fact by convicting and sentencing the Appellants based on the discrepancies in the search and certificate of seizure.
5. That, the court erred in law by failing to evaluate and consider the evidence. This Appeal was disposed of by way of written submissions. The Appellants were represented by Mr. Pendael Pedro Munisi and Mr. Alexander Shila, both learned advocates, while the Respondent was represented by Ms. Lilian Kowero, learned State Attorney. Starting with the 2nd ground, they submitted that for the Appellants who were charged under section 31 of the PCCB Act, the consent of the Director of Public Prosecution was mandatory as provided for under section 57 (1) of the PCCB Act. They further submitted that it is an undisputed fact that the prosecution filed the first charge sheet on 03/04/2023 with the attached Consent and Certificate of the Director of Public Prosecution dated 03/04/2023. However, as revealed on page 18 of the proceedings on 13/07/2023 before the commencement of the trial, the prosecution substituted the former charge with an amended charge sheet dated 13/07/2023 which did not contain the consent of the Director of Public Prosecution contrary to section 57 (1) of the PCCB Act and the Appellants were convicted and sentenced on that particular charge sheet. The Appellants' counsel contended that as an elementary principle of law where a charge is substituted the former or earlier charge ceased to exist, hence there was a need to procure a fresh consent of the Director of Public Prosecution as the amended charge was as good as a new one. To support his position, he cited the case of *Albanus Aloyce and Another vs Republic*, Criminal Appeal No. 283 of 2015 (2006). In their opinion, the consent of DPP given on the earlier charge which given on 03/04/2023 could not operate to apply in the new charge filed on 13/07/2023. In their view, the court had no jurisdiction to proceed with the matter for want of DPP's consent. To buttress, their position they prayed this court to be persuaded by the decision in the case of *Peter John Mollel and Another vs Republic*, Criminal Appeal No. 89 of 2017 (unreported). Moreover, counsels for the Appellants

submitted that having SCC11 IIII tllC court had no jurisdiction to hear the matter; the next question is whether the order for trial de novo is appropriate in the circumstances of this case. In their opinion, the trial de novo is inappropriate in this case as it will enable the prosecution to fill in gaps in its evidence imminent at the first trial as it was held in a plethora of authorities. Turning to the first ground of Appeal, counsels for the Appellants contended in proof of the offence of abuse of position, the prosecution is required to prove there was performing or failure to perform an act by the Appellants which was intentional and in violation of the law; and the Appellants intentionally use their position to obtain an advantage be it personally or for another person, insisting that in both situations, a guilty intention is an essential element. They contended that Appellants as led by the 1st Appellant who was a police officer of the rank of Assistant Inspector of Police, were entitled by the law to search, under section 38 or an emergency search under section 42 both of the Criminal Procedure Act, referring the court to page 40 of the trial court's judgment. That in searching for the house of PW2 the Appellants were executing powers conferred to them by law and not otherwise. The counsel insisted that to prove the said offence, the prosecution was not only required to prove beyond reasonable doubt that the search was illegal and not warranted by the law but also to prove the guilty intention on the part of the Appellants, which the prosecution failed to do. To cement their position, they cited the case of Andrea Gwandawe Sulle vs R, Criminal Appeal No. 53 of 2016 (unreported). The Appellants counsel contended that in convicting the Appellant on the second count, the trial magistrate reasoned that the Appellants were guilty because they took PW2 to the police station while knowing that nothing had been found at the search, referring the court at page 47 and 48 of the judgment. In their opinion, the trial magistrate was wrong as there was no evidence to prove that Appellants took PW2 to the police station. The contradictions between PW2, PW3, PW6, PW11, and PW12 on whether or not PW2 was taken to the police station should have been resolved in favor of the accused persons who maintained the same position that they did not take PW2 to the police station. Moreover, they submitted that the trial magistrate did not scrutinize the issue of undue advantage taking into account the fact that the prosecution failed to prove the first count of corrupt transactions. In their opinion, it is a gross error in law for the magistrate to conclude that the offence under section 31 of the PCCB Act, was proved beyond reasonable doubt. They referred to this court on page 47 of the trial court's judgment. It is further argued by the Appellants' counsel that the charge is in variance with the testimony of the prosecution witnesses on the offence of abuse of position. They argued that, since the Appellants were accused of violating section 38 of the Criminal Procedure Act, it was reasonably anticipated the prosecution would prove the illegality of the search under the said provision. However, the testimony of prosecution witnesses particularly PW1 who tendered seizure certificate (exhibit P1) clearly indicated that the search was conducted under section 42 of the CPA and as such it was an emergency search as opposed to section 38 of the Act where the Appellant was accused of violating. They referred this court to page 43 of the trial court's judgment. To bolster their position, they relied in the case of Tanzania Fish Processor Ltd vs Christopher Luhangula, Civil Appeal No. 21 of 2016 (unreported). Regarding the 3rd ground of appeal, counsels for the Appellants submitted

that the trial magistrate opined th there were two search/ seizure certificates that were filed, whereby one was filed at the scene of the crime ai notber one at the police station; and this is contrary to record since in the course of hearing the court admitted “only one search/ seizure certificate as exhibit Pl. The second inexistence search/seizurc certificate was inferred by the trial magistrate from theoretical testimonies of the prosecution contrary to the requirement of the law. They insisted that the Appellants were prejudiced by the misdirection on the part of the trial magistrate as he based a conviction on an inexistent document as the Appellants did not have any opportunity to see the second seizure certificate referred on page 47 of the trial court’s judgment. To cement their position, they cited the case ot Emmanuel Saguda @ Sulukuka and Another vs The Republic, Criminal Appeal No 422 of 2013. Arguing the 4th ground of appeal, they adduced and question whether procedural irregularities in conducting the search amounted to abuse of position as held by trial magistrate. They argue, it is a cardinal principle of law that when a search is conducted in the absence of an independent witness, the said omission simply erodes the credence of the said search, even when it is established that the police officer in question had an interest to serve. They are adamant that the said omission does not amount to an abuse of position, since procedural irregularities do not constitute a substantive anomaly in law. To support their position, they cited the case of Samwel Kibundali Mgya vs R, Criminal Appeal No. 180 of 2020 (unreported) and the case of Ndima Kasinje @ Joseph vs R, Ciiminal Appeal No. 447 of 2017 (unreported). While applying the principles in the cited case, the trial magistrate did not consider the testimony by the independent witness (PW6), who clearly seemed to have an interest to serve when cross-examined. He referred this court to page 87 of the proceedings. Arguing the last ground of Appeal, counsel for the Appellants submitted that the Appellants defense were not considered at all. That, no reasons were adduced by the trial magistrate for disbelieving the testimonies of the Appellants despite the legal stand that each witness is entitled to credence. To support their position, they cited the case of Goodluck Kyando vs R (2006) TLR 363. They argued that the trial magistrate did not even summarize or reproduce the testimony of DW9 who testified to have seen the 7th and 8th accused in court on the material day at the time when the prosecution alleged that they were with PW2 at Usa River Police Station. They insisted that had the trial magistrate accorded weight to the evidence of the Appellants and that of DW9 there would hardly be a miscarriage of justice. That, the trial court briefly summarized the testimonies of Appellants on page 45 ot the proceedings and then proceeded to evaluate and consider the prosecution’s evidence on its own. They finalized their submission by arguing that it is a cardinal principle of the law that failure to consider defense evidence is fatal and usually vitiates conviction. To give stance on their argument they cited the case of Leonard Mwanashoka vs Republic, Criminal Appeal No. 226 of 2014. Opposing the Appeal and responding to the 2nd ground of Appeal, Ms. Kowero refuted the claim that there was no certificate and consent of the DPD. She explained that the same was filed before the trial court and thus the trial court did not err in law to entertain the economic case before it, referring the court to page 1 of the typed proceedings. Referring to page 28 of the proceedings, she maintains the substitution of charge alluded to by the Appellants’ counsel was simply an amendment of particulars ot

offence and not a charging section; and that the amended charge and the substituted one had the same offences and same accused persons save for minor corrections on the particulars of the offence, which did not affect the consent and certificate filed at the first instance. Concerning the first ground of Appeal, Ms. Kowero argues the prosecution was able to prove the offence of abuse of position beyond a reasonable doubt. Referring to this court on pages 32 to 48 of the trial court's judgment, in which the trial court in analyzing the prosecution evidence about the well-established elements of such offence was satisfied that the prosecution proved such an offence beyond a reasonable doubt, cross referencing pages 40, 41, 42, 44 and 45 of the typed proceedings through the testimony of PW1, PW4 as well as pages 78 and 92 for PW7 testimony. Arguing against the 3rd ground of appeal, Ms. Kowero reckoned that this ground is a total misguidance since the certificate of seizure was tendered and admitted as exhibit P1 on page 40 of the typed proceedings. Responding to the 4th ground of appeal, Ms. Kowero submitted that, the trial court did convict the Appellants based on the prosecution witness's testimony and proof of such case beyond the required standard as she argued in the first ground. On the last ground, Ms. Kowero submitted that the trial court did evaluate and consider the defense evidence in reaching its fair and just decision as can be reflected on page 40 of the judgment. Going through the record of this Appeal, the grounds of the Appeal, and the rival argument by parties, I find the issues presented by the grounds of appeal are whether the trial magistrate entertained the economic case before her without the consent from the Director of Public Prosecution, and secondly, whether the prosecution proved the offence against the Appellants beyond a reasonable doubt. It is an undisputed fact that on 24/04/2023 the State Attorney who had the conduct of the case prayed for the amendment of the former charge of 03/04/2023, which prayer was granted allowing the amended charge to be filed and read on the same date before the accused persons. Obviously, the amended charge was not attached with the consent and certificate from the DPP. It is also on the record that on 13/07/2023 the State Attorney prayed for substitution of the charge as per section 234 of the CPA. This prayer was granted, and the charge was filed and read to the accused persons on the same day. The substituted charge was also not attached with the consent and certificate from the DPP. On the substituted charge of 24/04/2023, there were changes in the particulars of the second count, where it reads that Appellants did intentionally abuse their position by conducting an illegal search to one Professor Justine Humphrey Maeda in violation of Police General Order No. 226 read together with section 35 of the Police Force and Auxiliary Service Act, [CAP 322 R. E 2002] for the purposes of obtaining undue advantage of TZS 74,000,000. Meanwhile, in the substituted charge of 13/07/2023, the particulars of the second count read that the Appellants did intentionally abuse their position by conducting an illegal search to one Professor Justine Humphrey Maeda in violation of section 38 of the Criminal Procedure Act for the purposes of obtaining undue advantage of TZS. 74,000,000, which is similar to the former charge that contained the consent and certificate from the DPP. Now, the question is whether the omission to attach a new consent and certificate conferring jurisdiction to the trial court by the DPP to the subsequent charge is fatal. Considering the circumstances of this case, I am of the settled view that failure to issue a new consent and certificate after

having substituted the charge by 119111011131S of the offence under the charge filed on 24/04/2023 could not have vitiated the former consent and certificate as the jurisdiction which was conferred to the trial court in relation to the said offence remained undisturbed. See the decision of the Court of Appeal in the case of Peter Kabi and Another vs The Republic, Criminal Appeal No. 05 of 2020 (unreported). In other words, the consent and certificate issued in the substituted charge bore similar offence and provisions of the law from which the Appellants were charged as per charge sheet. Addressing the second issue that I have posed, it is the Appellants' counsel's contention that the prosecution failed to prove the offence of abuse of position against the Appellants beyond a reasonable doubt. The position of the law on burden of proof in criminal trial is settled. It is the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt. The guilt should not only be some rational inference but more importantly the only rational inference that could be drawn from the evidence offered by the prosecution taking into account the defense case if any. Section 31 of the Prevention and Combating of Corruption Act provides: Any person who intentionally abuses his position in the performance or failure to perform an act, in violation of law, in the discharge of his functions or use of position, for the purpose of obtaining an undue advantage for himself or for another person or entity, commits an offence and shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years or to both, " An offence under section 31 of the PCCA, in my opinion can be committed in two scenarios. First, by performing or failure to perform an act intentionally and in violation of the law, and two intentional uses of position for the purpose of obtaining undue advantage be it personally or for another person. In both scenarios, guilty intention is an essential element. In this case, the trial court based its decision on the reason that there were two certificates of seizure signed by the Appellant, one being that at the PW2's house, he was found with two pieces of elephant tusks, and another certificate was filed at the police station indicating that the search was conducted on the PW2's house and nothing was found. This allegation as correctly argued by the Appellants' counsel is not supported by evidence, taking into consideration that, there is no certificate of seizure tendered in court indicating that PW2 was found with two pieces of elephant tusk in his house. The other basis the trial magistrate used to convict the Appellants is that after having found PW2 was found without the alleged elephant tusks, the Appellants proceeded to arrest him and took him to the police station, and this amounts to abuse of the position. I could not find any evidence that supports this proposition, especially looking at the evidence of PW11 who was the former OCD of Arumcru District and that of PW12, OCS of the police station that PW2 is alleged to have been held, who both denied to have any knowledge of PW2 being at that police station. On another note, the trial court also based its reasoning on the fact that there was no independent person to witness the alleged search. Conducting a search without an independent witness does not necessarily prove the guilty intent on the part of the Appellants. Granted that it could be in the mind of the trial court that consciousness of guilt in being implicated in the 'actus reus', but this cannot be taken to suggest that the said omission to bring on an independent witness is the evidence proving that 'mens rea' or guilty intent is present. If the VIEW, It COLLIG 0111 be used to

establish the accused's involvement in the "actus reus" of a crime if the law made it so. At this point must annotate that this is if it were indispensable to have an independent witness to witness the search, having in mind the fact that one of the Appellant was at a rank where he could, by law, have conducted a search and seizure by his own right. At any rate, the court cannot start with the presumption that the police officers and records are untrustworthy in the absence of an independent witness. As a proposition of law, the presumption should be the other way around. This court would rather presume that official acts of the police officers are legally performed, and are well recognized and regulated by the legislature. The court would call for extra testimony, disbelieve the police witness and certainly take into consideration the fact that no other independent person was present at the time of search and seizure if it has good reason to suspect the truthfulness of such records and testimonies of the police officers, despite the law making it a requirement as such. I am inclined to hold it is not always legally required to produce an independent witness and that is why there has been instances as explained in various holding of the Court giving to circumstances where free agents requirement during search and seizure can be dispensed with. In view of above discussion, I find the prosecution have failed to prove the first ingredient of the offence. Turning to the second ingredient of the offence, as correctly argued by the Appellants counsel, the prosecution failed to prove what undue advantage the Appellants intended to get through the particular search, especially after they have been acquitted on the first count of corrupt transactions. Having said so this Appeal partially allowed to the extent explained above. It is ordered that the conviction and sentence passed by the trial court is hereby set aside. It is further ordered that Appellants be set free unless held in some other lawful cause. It is so ordered. Dated at ARUSHA ZONE this 26th of July 2024. AISHA BADE JUDGE OF THE HIGH COURT

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