

TANZANIA / JUDGMENT

iddi sogora vs republic

2009 tzhc 260 27 july 2009

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27 July 2009

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IN THE HIGH COURT OF TANZANIA AT ARUSHA IDDI
SOGORAAPPELLANT

- Versus — THE REPUBLIC RESPONDENT CRIMINAL APPEAL
NO. 21 OF 2008 (A ppeal from the decision of the District Court of Kiteto) (S. M, MMBAGA -
PDIVD Dated the 17thday of December, 2007 In Criminal Case No. 57 of 2007 l 81June. & 27“
July 2009

JUDGMENT

Mmilla. B. M. J.: The appellant, Iddi Sogora was join tly charged with three other persons including his wife Fatum a w/o Sogora, with the offence o f conspiracy to commit an offence c/s 384 o f the Penal Code, and in the second count he was alone charged w ith stealing b y servant c/ s 271 o f the same A ct. 'While all o f them were found to have no case to answer in respect the first count for which they were acquitted, the appellant was found guilty and convicted o f stealing by servant and was sentenced to three yearsr im prisonm ent term. The appeal is against both con viction and sentence. The appellant is being advocated for by learned counsel IVjulum i while the respondent R epu blic is being represented by Mr. Mzikila, learned state attorney. The appeal is being disposed o f by w ay o f written submissions. The appellant' s m em orandum o f appeal w hich, on the w ording thereof suggest quite strongly that it was prepared b y a lay hand, has raised six grounds out o f w hich only tw o are w orth consideration. U pon rephxaisement, the first ground seems to allege that trial m agistrate w rongly refused to disqualify him self from continuing w ith trial o f that case after the appellant had subm itted that he had no confidence in him , secondly that the con viction was based on insufficient evidence therefore that he was im properly convicted. I propose to start with the first ground touchin g on bias as I am o f the opinion that if upheld, it is capable o f disposing o f the entire appeal. ' ; ,v The appellant' s counsel Mr. N julum i has subm itted, and the trial cou rt' s proceedings bear evidence, that after the prosecution had closed its case the learned trial D istrict M agistrate cancelled appellant' s bail w ithout giving reasons for taking that stern measure. It is on record that in protestation the appellant subm itted that he had no confidence in him on the one hand and the public prosecutor on the other and asked him to disqualify him self from continuing w ith trial o f the case. The trial magistrate how ever, declined to disqualify him self and proceeded w ith the case to its final

conclusion which resulted in the appellant's conviction and hence sentence. It has been submitted that this was unfair. Learned counsel Njulum i cited the cases of Metropolitan Properties Co. (F G C) v. Lanenon and Others (1969) 1KB (sic: 1QB) 577, The King v. Sussex Justices; Ex Parte McCarthy (1924) 1KB 256 and Ernest s/o Ndesangio v. Republic (1980) T.L.R. 332. It is Mr. Njulum i's submission that in view of the alleged bias, this appeal should be allowed. On his part, learned state attorney Mzikila has submitted that this ground lacks merits on account that the trial magistrate was justified in rejecting the applicant's request for him to disqualify himself from continuing with the trial of that case because the former failed to advance proper reasons in support of his prayer. He relied on the case of Seif Sharrif Hamad v. Republic (1992) T.L.R. 277. He has requested this court to dismiss this ground. It is fortunate that the subject of bias is rich of precedents. While I agree with what I said 17 years ago in Seif Sharrif's case (then a Resident Magistrate Grade I II with Extended Jurisdiction) that a prayer for a magistrate to disqualify himself on the ground of bias requires an objective appraisal of the materials before the court, and that mere apprehension of bias is not of itself sufficient to warrant disqualification, also that the duty for him to disqualify himself for proper reasons is matched by an equal duty not to disqualify himself save for proper reasons, which expression is valid; I subscribe to the rule expounded by Lord Denning on the subject in Metropolitan Properties case (supra) that:- "Justice must be looked in confidence". This seems to agree, in a way, with the court's expression 85 years ago in the case of The King v. Sussex Justices (supra) in which it was stated that:- "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice". In our jurisdiction, this position was best elaborated in the case of Zabron Pangam aleza v. Joachim Kwaraka & Another (1987) T.L.R. 140 in which the Court of Appeal of Tanzania held that:- "Justice must not merely be done, but must be seen to have been done. The safest thing to do for a judicial officer, who finds his integrity questioned by litigants or accused persons before him, is to give the benefit of doubt to his irrational accusers and retire from the case unless it is clear from the surrounding circumstances and history of the case that the accused is employing delaying tactics". That court held further that:- "By insisting to hear the case against strong opposition of the appellant and proceeding to dismiss it, the magistrate not only confirmed appellant's worst fears of his having a personal interest in the matter, but also amounted to an error material to the merits of the case in involving injustice to the appellant". In that case, that court, allowed the appeal on this ground, but ordered for the case to be tried de novo before another magistrate with competent jurisdiction. It is on record in our present case that one of the reasons advanced by the appellant in protesting the trial magistrate to continue trying his case was the unexplained cancellation of his bail. As such, I am not persuaded by the submission of the learned state attorney Mr. Mzikila that the appellant failed to assign proper reasons for requiring the trial magistrate to disqualify himself. On the basis of that, this court cannot avoid saying that the act amounted to bias on the part of the trial magistrate. In the circumstances, I hold that this ground merits and succeeds. In consequence the conviction is quashed and the sentence, together with the resultant order for refund of the sum of money involved are set aside. Having quashed the conviction and setting aside the sentence along with the order for compensation, the next question is; what follows? Will it be appropriate to order retrial as was done in Zabron Pangamaleza's case? On the

point, I wish to be guided by what was expressed by this court (Hon. Maina, J., Rtd) in the case of George Mhando v. Republic (1983) T.L.R. 118. In that case, the appellant was charged before the District Court at Dodoma with stealing by person employed in the public service c/s 270 and 265 of the Penal Code. At the end of the trial the learned resident magistrate cT* wrote a summary of the evidence but he did not complete the judgment. He left a whole blank page, apparently intending to complete the judgment later on. Then he proceeded to sentence the appellant to seven years' imprisonment. The appellant asked the High Court to overturn the sentence of the learned resident magistrate, and that the appellant's counsel Mr. Mbezi submitted that a retrial would not be fair because the appellant had served a substantial part of the sentence. After taking into consideration the fact that the appellant had by that time already served about eighteen months out of the seven years' imprisonment imposed by the district court, also the observation which was made by Mnzavas, Ag. J. (as he then was) in Republic v. Suna (1971) H.C.D 208 that in ordering a retrial all the circumstances must be considered and each case must depend on its own facts, the court held in that case (George Mhando's case) that:- "it would not be unfair to order a re-trial in the case where a failure of justice has been manifested but where the appellant has not served a substantial part of the sentence." A retrial was accordingly ordered. With great respect, I am of the firm view that the above expressions represent the correct view of the law on the point. In our present case the appellant was sentenced to the said three years' imprisonment term 011 17.12.2007. As I am concluding this judgment on 27.7.2009, he has already served one year, seven months and ten days out of that which is almost half way to the completion of the said sentence. In this court's view, that is a substantial part of the sentence, thus that it will not be fair to order retrial in the circumstances of the case. As such, the appellant gets the benefit of doubt. It is thence ordered that he be released from prison with immediate effect unless he is otherwise being held for some other lawful cause. Appeal allowed. (Sgd) Mmilla, B. M. Judge 20.7.2009 Date: 27/7/2009 Coram :- B. M. K. Mmilla, J. For the Appellant: Miss Chacha/Njulum i. For the Respondent: Miss Chacha, SA. B/c : Shilla. Court: Judgment delivered this 27th day of July 2009 in the presence of Miss Chacha, learned state attorney who also held brief for learned counsel Njulum i for the appellant. The appellant was not in attendance. A T A R U S IIA . (Sgd) Mmilla, B. M. Judge

27. 7. 2009 Right of appeal explained. (Sgd) Mmilla, B. M. Judge

27. 7. 2009 I certify that this is a true copy of the original.

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