

TANZANIA / JUDGMENT

isack so john mwankenja vs republic 2016 tzhc 2289 23 february 2016

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IN THE HIGH COURT OF TANZANIA AT MBEYA DC. CRIMINAL APPEAL NO. 86 OF 2014 (Original Criminal Case No. 47 of 2013 of Kyela District Court) ISACK S/O JOHN M WANKENJA.....APPELLANT VERSUS THE REPUBLICRESPONDENT JUDGMENT Date of last Order: 09/02/2016 Date of Judgment: 23/02/2016 A. F. NGWALA, J. The Appellant one Isack John Mwankenja and three others were convicted by the District Court of Kyela of two offences of conspiracy to commit an offence c/s 384 of the Penal Code [CAP. 16 R. E. 2002] and obtaining money by false pretences c/s 302 of the same code. The Appellant together with other accused persons were sentenced to serve four years imprisonment. The sentences were ordered to run concurrently. The Appellant in this Appeal who was the 4th accused in the trial court was dissatisfied by the conviction and sentence. He has appealed to the High Court of Tanzania to challenge the said decision. 1 The facts of the case in brief are that the Appellant together with three other accused persons who have not appealed were charged with two counts as stated. Before the trial court all accused persons pleaded not guilty to the charge. The prosecution side produced four witnesses to prove its case. The defence side had no witnesses to call. Their trial resulted into the conviction and sentence as aforesaid. The Appellant, who is represented by Mr. Maumba the learned Advocate, filed seven (7) grounds of Appeal. In the course of hearing the Appeal, Mr. Maumba prayed to abandon three (3) grounds of Appeal. A total number of four (4) grounds of appeal remained. Mr. Maumba the learned Counsel for the appellant submitted that trial court had wrongly convicted and sentenced the accused persons. The appellant's properties were also wrongly confiscated which included the motor vehicle and his bank account. The order for confiscation was wrongly made in order to compensate PW1 (Pray God Mbaga). He submitted that the prosecution did not prove its case beyond reasonable doubt that the appellant conspired with the 1st, 2nd and 3rd accused persons. On the second ground of Appeal regarding the issue of obtaining money by false pretence Mr. Maumba submitted that the trial Magistrate only believed the testimony of PW1 cheated the court. He argued the Appellant took PW1 to a local medicine man because PW1 had a problem. PW1 was treated by that local medicine woman/witchdoctor who is his grandmother. 2 There is no doubt that the 1st, 2nd and 3rd accused persons were also local medicine men. He went on submitting that if Mbaga (PW1) would have recovered from his illness the case would not have been there. Mr. Maumba insisted on this point by saying that not all people who go to hospitals

are cured, otherwise people could not die in hospitals and there could not be graves. On the ground of analysis of evidence, the learned Counsel submitted that the trial Magistrate ought to have considered both the evidence of the prosecution side and that of the defense as well. He submitted that the trial Magistrate only relied on the evidence by the prosecution side. He ignored the evidence by the defence side which was adduced by the accused persons including the Appellant. He added the trial Magistrate became part of the prosecution side because there was no direct evidence to show that the appellant participated in giving the money to the 1st, 2nd and 3rd accused persons. The learned Counsel went on informing this court there is evidence that shows the amount of money was received. The case of James Bulolo and Another vs. Republic (1981) T.L.R. 283 was referred to support this contention. On the ground of Caution Statement, Mr. Maumba submitted that, the trial Magistrate wrongly relied on it. He convicted the accused persons together with the appellant despite the fact that the Appellant had complained to the court that the same was not his. 3 The learned Counsel on this issue he cited the case of Rashid and Another vs. Republic [1969] E.A. 138 which narrates the procedure of reading Caution Statements. On the ground of confiscating the properties of the accused person that was motor vehicle and Bank Account, he submitted that the order by the trial Court was arbitrary given. It was against the laws as it had no legal stand. The trial Magistrate did not provide the provision of the law that empowered him to do so. The case of Shija Swebe vs. Republic (2003) T.L.R. 398 in which it was stated that compensation order must be clear and precise and must show under which provision of the law it is made. The counsel prayed for this court to allow the appeal and quash the conviction. The Republic being the Respondent in this appeal was represented by Miss Catherine learned senior State Attorney. In her submission she supported the appeal by stating three grounds; the 1st being that the defence by the Appellant was not considered by the trial Magistrate. Under this argument she cited the case of Jeremiah John & 3 others vs. Republic Criminal Appeal No. 416/2013 Bukoba. Ms. Catherine senior State Attorney went on saying that the prosecution side failed to prove the money which was used by the appellant in buying the motor vehicle. She went on saying that it is true that there was money in the account but there is no proof to show when such money was deposited in the account. 4 She therefore supported the appeal and prayed the court to set aside the conviction and sentence. In view of the submissions of both parties to this appeal the following issues or questions are posed in order to reach at fair and just decision:- The first issue to determine is whether the trial Magistrate properly convicted and sentenced the accused persons including the Appellant? The second issue is whether the trial Magistrate was wrong to Order confiscation of the Appellant's properties? Starting with the first issue on whether the trial Magistrate was wrong to convict and sentence the accused persons including the Appellant. One has to look into the evidences tendered in the court of law together with the credibility of witnesses. It is a trite law in criminal proceedings that in order for the court to convict person accused of the offence; the court has to satisfy itself that both oral and documentary real connect the accused (s) persons with the offence charged with and that the prosecution side has proved its case beyond any reasonable doubt. In the present Appeal, the records show that the prosecution side had four witnesses together with documentary evidences. In oral evidences the prosecution had PW1 one PRAYGOD MBAGA who is the resident of Sinza - Dar Es Salaam and the victim in this appeal. 5 In his

testimony among other things he informed the trial court inter alia that the appellant is the one who convinced PW1 and connected him to other accused persons in order to be treated hernia. It was agreed that PW1 should pay Tshs.400,000/= for the preparation of the local medicine together with buying a cattle for the Ritual or offering to propitiate the spirits of the dead 'tambiko' and that PW1 had to pay Tshs.200,000/= as an advance money. (PW1) paid the same. This was paid to one Gwamaka who introduced him self as the assistant of the Grandmother (the traditional healer). All these accused are the residents of Ipinda Kyela. PW1 was accompanied by the Appellant and he had to travel from Dar Es Salaam to Ipinda for that medicine. After taking such medicine PW1 was asked to pay the remaining balance by Gwamaka the 3rd accused person. PW1 handed that money to the 1st accused person. Then the Appellant requested PW1 to give them forty million. It is when the PW1 took the said amount of money and handed to them after counting. Later on PW1 was told go back at Ipinda after six days to complete the doze to finish his problems. PW1 would have been refunded the said amount of forty million if nothing happened that is if there was no relief. This piece of evidence by PW1 was connected with the testimony of PW2. The Appellant in this Appeal was afforded time by the trial court to cross examine the witness but he did not do so. The appellant remained silent. 6 He did not exercise this important right of which he could have impeached the credibility of the witness and his testimony. This would have moved this court to interfere with the trial court's findings on the credibility. Lugakingira, J as he then in the case of Pia Joseph vs. Republic stated inter alia that the appellate court can not lightly interfere in the trial courts finding on credibility unless the evidence reveals fundamental factors of vitiating nature to which the trial court did not address itself properly. In view of the said decision it is my considered view that the prosecution side had credible witness before the trial court. On the third ground of Appeal the appellant's advocate raised the issue that the trial court erred in law and in facts by convicting the appellant while the case was not proved beyond reasonable doubt. With due respect, the Appellant participated in the commission of such offence. It is my observations that the Appellant was involved in the commission of the offence as provided for under Section 22

- (1) (c) of the Penal Code [CAP. 16 R. E. 2002], the Section reads as follows "When the offence is committed each of the following each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it, namely: -
- (c) Every person who aids or abets another person in committing the offence". 7 The leading authority that covers this Section of the Penal Code is the case of Zuberi s/o Rashid vs. Republic (1957) 1 E.A. 455. The evidence on the records shows clearly that the Appellant is the one who connected PW1 to the 1st, 2nd and 3rd accused persons. He is the one who travelled with PW 1 from Dar Es Salaam to Ipinda. He is also the one who also communicated with Gwamaka the (3rd accused), from the beginning to the end of the scenario. He is also the one who asked PW1 about forty million in the presence of PW2 one Frank Ntula. Here there is more than sufficient evidence of the Appellant's participation in the commission of the offence, save for the 1st and 2nd accused persons as there is a loose connection of item in the commission of the offence charged, and convicted with. See James

@ Shadrack Mkungilwa and Another vs. Republic, Criminal Appeal No. 214 of 2010 Court of Appeal of Tanzania at Iringa (unreported). It is my considered view that I also find the case against the appellant too, was proved beyond reasonable doubt. On the side of the seventh ground of Appeal, the learned Counsel for the Appellant stated that the trial Magistrate wrongly made an order of confiscation of the appellant's motor vehicle, Bank Account and personal effects by not naming the provision of the law or any authority to support his decision. This argument was also supported by the senior State Attorney one Catherine. 8 To her she submitted that she allows the appeal as the prosecution side did not prove when the money was deposited in the appellant's Bank Account; and that there was no enquires conducted. With due respect to the learned Attorney a substantial amount of evidence both documentary and oral which established the case against the Appellant beyond reasonable doubt. This can be exhibited by looking at the testimonies of PW1, PW2, PW3 and PW4 as well. To mention a little PW3 recorded the interrogations between him and the Appellant. The said interrogations was prayed during trial and it was never disputed by the Appellant in any way be it in cross examination or in Defence. The argument by the counsel that the Defence counsel was not considered is not in line with the holding in the case of Elias Stephen vs. Republic [1982] T.L.R. 313 that:- "The law is equally established that failure to consider the Defence case is fatal and usually lead to conviction being quashed The Appellant confessed to have obtained the money from PW1 and how he (the Appellant) drew the racket and the way he connected the other accused persons. Herein is part of the appellant's words. "I bought motor vehicle with Registration No. T687 BVS from what PW1 gave me". 9 This piece of evidence connects the fact that the Motor vehicle with Registration No. T687 BVS was bought through the money that was illegally obtained. Hence it is connected with the offence that the Appellant was convicted of. The exhibit tendered in the trial court specifically a blue card shows that the vehicle mentioned herein above was bought and registered in June, 2013 from the money he illegally obtain from PW1 which the Appellant took in April, 2013. This piece of evidence shows a link between the said vehicle and the money which was taken from PW 1 one PrayGod Mbagwa. It is a trite law that anything can be confiscated and becomes part of the exhibits to the court of law if such a thing has a direct connection with the crime before the court of law. The Appeal record shows that the Appellant bought the said Motor vehicle vide the money obtained from PW 1. The order of confiscation would not have been ordered if the court found that there is no a direct connection between the objects (property) confiscated and the case before it. See Leonard Sylvester @ Kisusi and three others vs. the Republic, Criminal Appeal No. 270 of 2009, The Court of Appeal of Tanzania at Tabora (Unreported). The order of confiscation was vacated by the reason that there was no proof that the motor vehicles were used to facilitate the robbery. Unlike in this appeal were there is both direct evidence (oral) that connects the motor vehicle and the offence that was before the trial court. 10 On the issue of Bank Account, it is the accused person himself who deposited the money in the said account. The exhibits (pay in slips) show that it is Isack John Mwakenja (the Appellant) who deposited the money in the account at different times. The different amount of money deposited in all these transactions was done in May, 2013. In connection with this, the Appellant himself

mentioned that the money was deposited in his account. It could be difficult for the prosecution to know that the Appellant had a Bank Account and that in that account he deposited the money. With these few remarks I find that the said bank account had a connection with the offences with which he was charged. The trial court properly issued the order to confiscate the account. For avoidance of doubt the Motor vehicle which was bought from the proceed of the money belonging to PW1 by the said Accused person/Appellant should be collected by PW1 PRAYGOD S/O MBAGA. In the final analysis I find that this Appeal is devoid of merit. It is hereby dismissed in its entirety. 11 Date: 23/02/2016 Coram: A. F. Ngwala, J. Appellant: Absent For the Appellant: Absent Respondent: Miss Makambe State Attorney Court: Judgment delivered in court in the presence of the Respondent. Court: Right of Appeal to the Court of Appeal of Tanzania explained. 12

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