

TANZANIA / JUDGMENT

20160301 TZHC Mbeya

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' IN THE HIGH COURT OF TANZANIA .2 • ATMBEYA DC. CRIMINAL APPEAL NO. 91 OF 2014
(Original Criminal Case No. 125 of 2014 from Resident Magistrate Court of Mbeya) MARTIN S/O
MATHEW APPELLANT VERSUS THE 1. EPtJBLIC. •1...[* • • • • • .
1. ESPONDENT

JUDGMENT

Date of last order: 31. 08. 2015 Date of Judgment: 18. 12. 2015 Dr. M. C. Levira, J The appellant
Martin s/o Mathew and his fellow Vicent s/o Mghuna Mwanga who is now the deceased were
jointly and together charged before the Resident Magistrate Court of Mbeya for seventeen counts.
The first count was Conspiracy Contrary to Section 32 of the Prevention and Combating of
Corruption Act, Act No. 11 of

2007. The 2nd, 3rd , 4th 2 5t h 2 6th, 7th, 8th and 9th counts were Abuse of Position Contrary to
Section 31 of the same Act and count No. loth 11th, 13th 2 14th, 15th 2 16th and 17th counts
for embezzlement and misappropriation Contrary to Section 28 (1) of the same Act.

However before the case was determined on merit the 1 st accused one Vicent s/o Mghuna
passed away resulting his charge to abate Page 1 of 13 Tel

- under Section 224A of Criminal Procedure Act Cap. 20 Revised " Edition 2002 and therefore
the appellant remained to be facing the charge as per charge sheet. The appellant was
convicted to all 17th counts as charged and was sentenced to pay of Tshs. 1,000,000/= in
default to suffer imprisonment for a term of three years for the first count of conspiracy. For
counts No. 2 to 9 th which is abuse of position the accused was sentenced to pay fine of Tshs.
1,000,0001= in default to suffer three years imprisonment in each count. For counts No. 10th
to 17th counts the accused was sentenced to pay fine of Tshs. 1,000,000/= in default to suffer
three years imprisonment in each count. It was also ordered that the sentenced of
imprisonment to run concurrently but the sentence of fine to run consecutively which
means the accused had to pay Tshs. 17,000,000/= for all 17th counts which he was convicted
that means to pay Tshs. 1,000,0001= for each count as convicted. The appellant not being
satisfied with the decision of the trial court preferred an appeal before this court for both
conviction and sentence. The prosecution evidence was that prior to his being charged,
convicted and sentenced the appellant was an employee of Mbeya City Council as a Ward
Health Officer of Iyunga Ward and that at the material time and date on 29. 12. 2010 while

accompanied by Page 2 of 13

- his fellow health' officer of Kyela who is the deceased one Vicent Mghuna Mwanga they went to MIST (Mbeya Institute of Science and Technology) college to investigate health conditions. While there, they inspected administration offices, dispensary, workers' quarters and then to the kitchen. It is upon this inspection when they found the environment of the MIST college not conducive for health and decided to close it. However it was contrary to their decision when the appellant decided to penalize them about seven persons who were providing catering services at the college for each to pay Tshs. 20,000/= giving the total of Tshs. 140,000/= but they were not given exchequer receipts and the same money were not paid/handled over to their office.. This is what later was considered to be contrary to Act No. 11 of 2007 and hence were charged before Resident Magistrate Court at Mbeya before M. Mteite the Resident Magistrate Incharge. In his defence the appellant told the trial court that on the material date they were at MIST college making health inspection and he found that the environment was generally dirt. So he educated them on public health and gave them a verbal reprimand and also gave them a grace period of two weeks to rectify their environments. After a careful evaluation of the evidence, the learned Resident Magistrate Incharge was satisfied and found as a fact that the Page 3 of 13 appellant had received money in the course of his duties, that he had not handled over to the respective place as he was supposed to do, and he had otherwise failed to account for the same. The trial Magistrate accordingly inferred that the appellant had converted that money in his own use and so convicted him as charged. In his petition of appeal, the appellant raised about four grounds of appeal as it appears on the petition of appeal. Before this court the appellant was represented by Mr. Mkumbe Advocate while the respondent Miss Catherine and Miss Prosister State - Attorneys appeared for the respondent. Both parties argued this appeal by way of written submission. The appellant as aforesaid earlier had four grounds of appeal and the main argument by the appellant was that the case was not proved beyond reasonable doubt in all counts on the grounds that people who were named in the charge sheet whom their money were taken by the appellant did not testify in court. The respondent on the otherside supported the appeal saying that the case was not proved beyond reasonable doubt in all seventeen counts and save for counts No. 1, 4, 5, 12 and 13. In determining the merits of this appeal I will only deal with ground 4 of appeal which alleges that the case against the appellant had not been proved beyond all reasonable doubts in all 17 counts Page 4 of 13 because other grounds of appeal are combined in this one ground of appeal. Counts number 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 are going to be determined first and later count number 1 which is about conspiracy will be determined at last. As aforesaid earlier that the appellant's grounds of appeal were four but since they speak about the same thing, I have combined them to form only one ground of appeal that is: "That the case against the appellant had not been proved beyond all reasonable doubts in all 17 counts because persons who were named in the said counts from whom money were taken did not testify as witnesses. ". In determining this ground of appeal I will first start with counts number 2, 3, 4, 5, 6, 7, 8, and 9 as how it was done by the trial court. When the trial court

was determining' offences in counts number 2, 3, 4, 5, 6, and 7 it relied on testimony tendered by PW1 one Keneth s/o Mwampashe, PW2 one Makata s/o Jumaa Abdalah who testified that the accused was given Tshs. 140,000/= by PW1 one Keneth @ Bonge which was kept in an envelope as contribution to each food vendor Tshs. 20,000/= to avoid their catering services to be collected next day. That this testimony was supported by PW3 Johari Donald Mwakatwila, PW5 Dornana Lyimo and PW6 one Odes Aron. Page 5 of 13) According to the charge sheet which the appellant was charged for counts number 2, 3).4) 5, 6, 7, 8, and 9 was abuse of position Contrary to Seétion 31 of the Prevention and Combating of Corruption Act, Act No. 11 of 2007. This Section reads that: Any person who intentionally abuses 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 anoter person or entity, commits an offence". At page 11 of the Blacks Law Dictionary the term abuse is defined to mean: "Abuse - To make excessive or improper use of a thing, or to employ in a manner contrary to the natural or legal rules for its use.

- To make an extravagant or excessive use, as to abuse one's authority". From the above meaning and as per charge sheet it means that the appellant being a Ward Health Officer of Iyunga used his position in a manner which was wrong. That the appellant took money to Shamsi Sadick Musiba, Olipa Peter Mtapu, Keneth Mwandenga, Domina Lyimo, Johari Donald Mwakatwila, Sarafina Aroon Muhelela, Hawa Ishaka Teaha and Samsoni Mwalumbi. However among these persons whom their money were taken by the appellant none of them was summoned before the trial court to testify Page 6 of 13 The trial court records show that witnesses who testified were PW1 Keneth Mwampashi, PW2 Makata Sumar Abdalah, PW3 Johari Donald Mwakatwila, PW4 Flora Muhanga, PW5 Dornana Lyimo, PW6 Rodes Haron and PW7 Rehema Mteta. Basing on these records from the trial court it is clear that the persons named in the charge sheet are not the ones who testified during trial. The prosecutor in proving the case found it proper to bring people who testified in court knowing that they were not the ones whom their money were taken by the appellant. He failed to summon people whom their money were taken by the appellant as alleged to be credible witnesses to prove their case. However this coUrt has made a thorough reading of the original records of the trial court and discovered that, there was a typing error on names of Dornana Lyimo while the proper name is Domina Lyimo who is PW5 and Johari Donald Mwakatwila. Therefore, this court is of the settled view that it is only PW3 Johari Donald Mwakatwila for counts number 5 and PW5 Domina Lyimo for counts number 4 whom their money were taken and are the ones who came to testify in court. Before making final decision on these counts this court referred the case of R. V. Golkadas Kanji Karia and another (1949) 16 EACA 116 where among other things it was held that, it is the duty of the prosecution not the court to determine which witness and how Page 7 of 13 many of them to call. The interpretation of this decision is that although it is the duty of the prosecution and not of the court to determine which witness to call but such duty should comply with calling key witnesses who will help the prosecution side in proving the case and not just feeding the court with a lot of witness whom at the end prove nothing. In support of it, there is the case

of Aziz Abdalah Vs. Republic (1991) TLR 71 which held that, the general and well known rule is that the prosecution is vendor prima facie duty to call those witnesses whom from their connection with the transaction in question are able to testify on material fact. If such witnesses are in reach but are not called without sufficient reasons being shown, the court may draw an inference adverse to the prosecution. Therefore PW1 one Keneth s/o Mwambashi, PW2 one Sumar Abdalah, PW4 one Flora d/o Muhenga, PW6 one Rodes Haron and PW7 one Rehema Mteta can not be called witnesses as their evidence supported nothing in this case: All key witnesses were not called in court while were in reach and all are within Mbeya District. I do not see the reason why the court should not draw an inference adverse to the prosecution. Since key witnesses in counts number 2, 3, 7, 8 and 9 did not testify in court as per the requirements of the law, this court is of the decision that those counts have not been proved beyond reasonable doubts. Page 8 of 13 On counts number 4 and 5 where Domina Lyimo PW5 who testified on counts number 4 and Johari Donald Mwakatwila who testified on counts number 5 as PW3 the issue is whether their evidence can support conviction. There is an evidence adduced by PW3 one Johari Donald Mwakatwila who informed the court that on 29/12/2010 at MIST College came two guests who were health officers namely Vicent Mwanga and Mathew. The rest is Mathew (appellant) and Vicent Mwanga was not before the court who was a health officer from Iyunga Ward who told them to close food services because the area was dirty. Then they were told each food vendor to pay Tshs. 20,000/= and they started contributing money and they gave it to Keneth to submit it to the appellant and Keneth @ Bonge gave it to the appellant but herself PW3 did not go there. The evidence as per PW3 shows that the appellant is a health officer of Uyole because the one Vicent Mwanga who was not in court (deceased) was a health officer of Iyunga Ward. This is contrary to the charge sheet in which the appellant was charged which shows that the appellant Martin Mathew was a health officer of Iyunga Ward while Vicent Mwanga the deceased was a health officer of Uyole Ward. But again although she participated fully in collecting money from food vendors and handled it to one Keneth @ Bonge there is no evidence to prove that the same money were given to the appellant as Keneth @ Bonge who is said to give money to the appellant did not testify in court. Page 9 of 13 On the testimony of PW5 Domina Lyimo who testified on count 4 she testified that on the material date each food vendor contributed Tshs. 20,000/= and they were handled over to health officers by Keneth who handled over to the appellant Tshs. 140,000/= and they did not receive receipt for payment. As afore said earlier the same does not show that the money collected were given to the appellant even if it may be true that were contributed. Therefore, the evidence on record of PW3 and PW5 with regard to 4th and 5th counts do not support conviction. Let me jump to counts number 10, 11, 12, 13, 14, 15, 16 and 17 of the charge sheet which is embezzlement and misappropriation. As per the definition of the term Magistrate at page 128 of the Osborn's Concise Law Dictionary 8th Edition the term embezzlement is defined as: The felony which consisted of the conversion of his own by a clerk or servant of property received by him on behalf of his master". As per Oxford Advanced learners Dictionary, New 8th Edition on page 944 the term misappropriation is synonymous to embezzlement and therefore having the same meaning. The general

meaning of these term is to convert to his own use money of the master. Now the issue here is whether the appellant embezzled or misappropriated the money given by Keneth @ Bonge at MIST college. Since there is no evidence or prove as per counts number 2, Page 10 of 13 3, 4, 5, 6 and 7 of this case as stated earlier; that no money were given to the appellant as there is no proof on the same It can not be said that the appellant misappropriated the money of his master because there is no evidence on that to show the money were entrusted or given to Martin Mathew the appellant. Therefore on court number 10, 11, 12, 13, 14, 15, 16 and 17 the same have not been proved because the prove of it depends on the results on counts number 2, 3, 4, 5, 6 and 7 on receiving the said money. The last count is on conspiracy which is count number 1. The trial Magistrate also convicted the appellant on the count of conspiracy as charged. In the case of John Paul @ Shida and another Vs. Republic, Criminal Appeal No. 335 f 2009 Court of Appeal of Tanzania, it was held that conspiracy is an offence in its own right and it has its own ingredients which must be proved. Since counts number 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and '17 have not been proved now let this court consider if the offence of conspiracy 'has been proved. This court has made a thorough reading of the prosecution evidence as per records of the trial court and found no where the prosecution witness testified on the issue of the appellant conspiring with the deceased to commit an offence. All evidence is about taking the money from food vendor and failure to issue receipt which the same were not proved. Therefore, I find no reason to regard this count as proved count Page 11 of 13 Ir while in real sense no evidence on its proof.. It is the settled decision that the same has not been proved Korosb J, in the case of Kisinza Richard Vs. Republic (1989) TLR 143 among other things it was held that in the standard of proof evidence should leave no doubt. This court is whole satisfied that the evidence on record has failed to attract this appellate court to uphold conviction. Having considered all counts as stated above, this appeal is hereby allowed. The conviction quashed and the sentence and orders are set aside. ..1 (/4;.. L1 Judge 01/03/2016 Page 12 of 13 Date: 01/03/2016 Corain: Dr. M. C. Levira, J Appellant: Absent For the Appellant: Appellant For the Republic: Mr. Starnbuli - State Attorney B/C: Mapunda Mr. Stambuli - State Attorney: The matter is coming for judgment. I am ready. Court: Judgment delivered in the presence of Mr. Stambuli learned State Attorney for the Republic. Right of Appeal Explained. -a-' /4P Dr. M. C. Levira Judge 'I 01/03/2016 Page 13 of 13

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