

TANZANIA / JUDGMENT

final Judgment NGIROLITI 1 1

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB- REGISTRY AT
MOSHI CRIMINAL APPEAL NO. 11099 OF 2024 (Appeal from the Judgment of the District Court of
Same at Same dated 19th March 2024 in Economic Case No. 23 of 2022) PAULO NGILORITI
TEVELI APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

20th August & 24th Sept. 2024 A.P. KILIMI, J. The Appellant Paulo Ngiloriti Teveli was charged before the District Court of Same at Same on two counts. First count was an offence of embezzlement and misappropriation contrary to section 28(1) of the Prevention and Combating of Corruption Act, Cap 329 R.E. 2022 “ the PCCA” read together with paragraph 21 of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200 R.E. 2019 “ the EOCOA” and on the second count it was the offence of 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) of the EOCOA. 1 The prosecution at the trial alleged that on diverse dates between 18th September, 2020 and 26th October 2020 at Same District Council, the appellant being employed as an accountant did dishonestly and fraudulently misappropriate a total sum of Tanzanian Shillings 8,377,000/= which was entrusted to him by virtue of his position as a public official. To prove the above offences the prosecution at the trial paraded eight witnesses and tendered nineteen (19) documentary exhibits, whereas in his defence the appellant fended himself and tendered five documentary exhibits. In the final the trial court was convinced with the evidence of the prosecution that have proved the offence charged, consequently the appellant was found guilty in all two counts and convicted. He was then sentenced to serve a minimum sentence of twenty years imprisonment for each count which were ordered to run concurrently. He was further ordered to restore the money he embezzled a total sum of Tshs. 8,377,000/= to Same district council. Aggrieved by such findings of the trial Court, the appellant before this Court has marshalled seven grounds of appeal which may be recapitulated as follows; 2

1. That the trial magistrate erred in law and fact as she failed to consider a testimony from appellant that the Internal Auditor Report was not correct as it was based only on one system of GOTHOMIS while in Same district council there are two systems operating (FARS & GOTHOMIS) for collection and expenditure and the appellant used FARS system.

2. That the trial magistrate erred in law and fact by failed to consider a testimony of the appellant that a report of the Internal Auditor did not cover Hati ya Mapokezi ya Maduhuri which the appellant used to collect money from cashiers but only Daftari which cashiers uses in order to establish correctness of it as there was irregular expenditure without compliance to use of public funds regulations.
3. That the trial magistrate erred in law and fact when held that the charges against the appellant were proved beyond reasonable doubt.
4. The learned magistrate erred in law and fact by convict the appellant based on Report of the Internal Auditor which was not vetted by any External Auditors and the Office of the Controller and Audit General (CAG) as required by law.
5. That the trial magistrate was bias as she has refused to adjourn hearing of case in order to allow new engaged advocate by the appellant to go through the matter so that to accordingly represent him and also on 18/10/2023 the trial court ordered proceed with hearing of the case without an advocate for the appellant.
6. That the trial magistrate failed to evaluate and analyze defense evidence thus delivered a partial judgment.
7. That the charge sheet against the appellant contravened Section 4(3) of the Criminal Procedure Act Cap 20 (The CPA) as amended by section 23 of the Written Laws (Miscellaneous Amendments) Act No. 1 of 2022 and also caution statement was bad in law as the appellant was not afforded an opportunity to call his advocate or relative. 3 When this appeal was called for hearing, the appellant was represented by Mr. Lengai S. Loita, learned advocate whereas Mr. Ramadhani Kajembe, learned State Attorney appeared for the Republic. With the leave of this court, this appeal was argued by way of written submissions, and for Republic the same depicts to be drawn by Ms. Edith C. Msenga learned State Attorney. I applaud them for their research and I will refer to them in due course as the need arises. However, for a reason that will become apparent soon, I endorse to commence with the fifth ground of appeal stated above. In this ground in the outset the appellant has faulted the trial court's procedure of refusing to adjourn hearing of case in order to allow new engaged advocate by the appellant to go through the matter before hearing and secondly on 18/10/2023 the act of the trial court to proceed with the hearing in the absence of appellant's advocate. Arguing in support of this ground Mr. Loita submitted that the trial magistrate erred in law by denying the appellant right of adjournment because his advocate presented a letter informing that he was attending another case in the court of high ranking at Moshi on 18/10/2023, as a 4 result the hearing proceeded the act which denied the appellant the right to be represented. To buttress his claim the counsel referred Article 13 (1) of Constitution of the United Republic of Tanzania of 1977. (the Constitution). Mr. Loita further argued that the trial court again acted against the rule of law by denying appellant's Advocate namely Mr. Isack Samson a chance of making perusal of the record of the file as he was newly engaged by the appellant. It was Mr. Loita's opinion that the same denied the appellant his

Constitution Right of being given opportunity of his Advocate to prepare himself fully in order to defend him accordingly. To bolster his assertion the counsel referred to article 13(6) (a) of the Constitution and cases of *Ndesamburo vs Attorney General* (1977) TLR 137; *Ramadhani Salum Mtei vs Republic* (1985) T.L.R 223; and *Kulava Daudi vs Rebeca Stephen* (1985) T.L.R 116. In reply, Ms. Msenga resisted the appeal. She then started by conceding the Appellant's counsel argument that having legal representative is part of fair and just hearing which is also a constitutional right given under Article 13(6) of the Constitution, but contended that right was not prejudice to the appellant because. He was legally represented 5 from the first day of hearing, however she argued further that appellant first Advocate Mr. Goodluck Waziri started to miss court dates on two consecutives dates which was 21st February 2023 and 16th March 2023 which caused delay of Court's proceedings, but later on 24th March 2023, the Appellant engaged a new advocate called Advocate George Magoti who started representing him, and on later dates the court kept adjourning due to some excuses advanced by the appellant. Ms. Msenga argued further that it was on 12th October 2023 when Appellant engaged a new counsel who introduced himself as Advocate Isack Samson who immediately asked for an adjournment so as he may familiarize with the case. The learned state Attorney proceeded that due to the persistent adjournment of Court's proceedings caused by the Appellant and owing to its power and responsibility to control proceedings the Court refused further adjournments and ordered to proceed the hearing, in her opinion, she was of the view that the trial court was right to do so. Thus, prayed this court to dismiss this ground. In his brief rejoinder Mr. Loita persistently argued that the appellant was denied fair and just hearing which is a Constitutional Right. He then vehemently denied respondent's submission and compared the two missing 6 days of the appellant and the respondent who missed six days but he was not counted that he caused delay, thus the learned counsel concluded that according to the trial court proceedings it is clear that appellant was discriminated and denied fair and just hearing contrary to the Constitution of United Republic of Tanzania (supra). I have considered the above rival submissions of both learned counsels in respect to this ground, thus in view the crux of this ground is whether the appellant was denied right to legal representation by the trial court. And if the answer will be in affirmative what would be the effect of conviction entered by the trial court against the appellant. According to section 310 of the Criminal Procedure Act, Cap 20 (the CPA) stipulates that: "Any person, accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court subject to the provisions of any other written law relating to the provisions of professional services by advocate" 7 Expounding the above provision the court in *Lucas Gisland vs Republic* (Criminal Appeal No.89 of 2021) [2023] TZCA 17465 (TANZLII) had this to say; "Certainly, the provision gives an accused person before a criminal court, the right to be defended by an advocate. Indeed, the right to legal representation which applies to both civil and criminal proceedings is fundamental as stated in various cases of this Court." (See also, *Thomas Mjengi vs. Republic* [1992] T.L.R. 157, *Laurent Joseph and Another vs Republic* [1981] T.L.R. 351, *Hassani Mohamed Mkonde & Another vs Republic* [1991] T.L.R.148 and *Pascal Kitigwa vs Republic* [1994] T.L.R. 65 and *Samwel Kitau v. Republic*, Criminal Appeal No. 390 of 2015

(unreported). Samwel Kitau vs Republic (supra) the court observed that; "The right to legal representation is a human rights issue. It is of prime importance for an accused person to have a fair trial. Access to counsel is therefore very important" ⁸ Now back to the proceeding of the trial court, I find apposite to revisit the record to check what transpired in lieu of the claim by the appellant; according to the claims there are two occasions where he was prejudiced, the first one was on 12th October, 2023 this is shown at page 27 as follows; "Date; 12/10/2023 Coram: H.E. HOZZA-SRM P.P. Susan SA for Republic Accused: Present C/C: Dativa SA; The case is for hearing. We have three witnesses. We ready to proceed. Advocate I sack Sam son: Your honor, I'm appearing for the accused, he has instructed me to represent him. He just instructed me this morning. I haven't been able to go through the matter so that to accordingly represent him I pray for an adjournment to another hearing date" Then at page 28; "SA; Your honor, the accused has been engaging various counsels and has withdrawn them. And we were proceeding with hearing. He hasn't formally ⁹ written a letter to withdraw them. This matter is backlog case and it is on session hearing. Court; the accused at different time has shown intention to proceed with hearing, particularly on 28/7/2023 he said on next hearing date thus 30/8/2023 he would have procured an advocate. On separate adjournments there from i.e. 30/ 8/2023, 7/9/2023 / 10/10/2023 no any information concerning his Advocate was communicated to this court until today. Thus, the court is of the view that the accused had enough time to instruct his Advocate, let the matter proceed to hearing as set besides he hasn't informed the court concerning the counsel who formally appeared." [Emphasis added] According to the excerpts above, in the outset there is no dispute that the appellant had an advocate, but according to him he prayed to know the case before he proceeds since he was engaged on the same date on the morning. The question which have I asked myself is whether refusing to give the said advocate that opportunity, did prejudice the rights of the appellant in the circumstances of this case. ¹⁰ In my view had the trial Magistrate considered appellant's advocate prayer could have given even few hours for appellant to be acquainted with this case. I am saying this because, his prayer that he wanted to go through the matter, is not only grasping information from the accused person/ appellant but it might go further for perusal of the trial court record to know the testimonies of the witness and the documents tendered, which by then were in the custody of the trial court, taking regard on that very day was the day of continuation with the hearing of the first witness one Edwin Samwel Mulumba (PW1) who by then had already tendered eleven (11) documentary exhibits. Nonetheless, the trial Magistrate did not take trouble even to ask the accused/ appellant himself in order to know when did he actually engage him, this was important in order to ascertain whether it was true he engaged the said advocate on that morning as said or not. Thus, in my view by not making such an inquiry to the appellant, she also denied him of his right to be heard. (See Abbas Sherally & Another vs Abdul Sultan Haji Mohamed FazaI boy, Civil Application No. 33 of 2002 (unreported). ¹¹ From the above, it is my firm observation that, the appellant's denial of such opportunity was prejudicial to the appellant's rights. This is because legal representation is important component for a fair trial, thus there cannot be a fair trial if the advocate instructed to make the said legal representation did not access necessary information in respect to the matter

against the appellant which is in the court of law. (See *Lucas Gisland vs Republic* (supra). For the foregoing, I am settled that the appellant was denied a fair trial when the trial court order the appellant's advocate to proceed representing his client without being acquainted with the case. The second occasion which the appellant faulted the trial court was on 19th October, 2023. I find also pertinent to revisit the record as envisaged at page 40 and I reproduced the same hereunder as follows; "Date; 19/10/2023 Coram: H.E. HOZZA-SRM P.P. Susan SA for Republic Accused: Present C/C: Dativa 12 "SA the case is for hearing; we have three witnesses we are ready Accused; I'm ready to proceed. Court; this court received a letter from Advocate Isack Samson for accused the letter propose to show the learned counsel is before Hon. Dr. Mongela. J. in the High Court of Moshi. However, the reference case thus Civil Case No. 11/ 2023 as per JSDS is before Hon. Simfukwe, J and schedule on 1/11/ 2023 in that event the court sees the contention by the counsel as means to half hearing of this matter. Thus, hearing shall proceed this day order accordingly" [Emphasis is mine] From the above extract, it is my opinion the point for determination is whether the act of the trial court to proceed with the hearing of the case in the absence of appellant's advocate prejudiced the right to legal representation for the appellant. As alluded hereinabove, the right to legal representation is a prime importance for an accused person fair trial. (See *Samwel Kitau vs Republic* (supra). It is undisputed the record above depicts that 13 appellant's advocate acted as Gettleman when he communicated with the trial court through his letter of absence. I am aware the said request of the advocate may be rejected or allowed by the trial court, but in doing so the trial court must judiciously exercise its discretion to reject or to allow. Since each case should be decided by its own circumstances, I think the discretion of the trial court in this matter was required to take into account the degree of prejudice to the appellant vis-à-vis continuation of hearing the case in the absence of appellant's advocate. In other words, there must be a delicate balancing of the interests of the republic and those of the accused. In view of the above analysis and the essence of accused right legal representation as alluded by the authorities referred above, I think even if the advocate was not believed by the trial court through that letter, under the circumstances stated above balance of convenience brings in the right of the accused to be represented paramount. Thus, by proceeding with the case in the absence of his advocate mean the appellant was punished by inaction of his advocate if at all the said inaction existed. Therefore, in my settled view the trial court flawed when proceeded with the hearing, since 14 under the circumstances of this matter appellant as a party to the case was not required to be punished for inaction or mistake of his advocate. From the foregoing, I am of settled observation that the trial court did not properly exercise its judicial discretion, in continuing with the case in the absence of his advocate which in fact prejudiced the right of the appellant. Be that as it may, the extract above shows the reasons advanced by the learned Senior Resident Magistrate in rejecting the said request through the said letter. As highlighted above, she said that the said reference case Civil Case No. 11/2023 as per JSDS was before Hon. Simfukwe, J and schedule on 1/11/2023 then concluded that the contention by the counsel through his letter means to half hearing of this matter. From this conclusion I in my view the next point for determination is whether the trial court afforded right to be

heard before reached the said

conclusion.

It is a trite law any decision arrived at without a party getting an adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard. This was the observation of the court of appeal in the case of Director of Public Prosecutions vs Rajabu Mjema Ramadhani (Criminal Appeal No. 223 of 2020) [2023] TZCA 45 (TANZLII) upon citing with approval the English case of Ridge vs Baldwin [1964] AC 40 in the case of Mbeya - Rukwa Autoparts and Transport Ltd vs Jestina George Mwakyoma [2003] T.L.R. 251 when the court further observed that: "In this country, natural justice is not merely a principle of common law; It has become a fundamental constitutional right Article 13 (6)

- (a) includes the right to be heard among the attributes of equality before the law, and declares in part:- (Wakati haki na wajibu wa mtu yoyote vinahitajika kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu.)" I have considered the said conclusion, apparently the learned trial Senior Resident Magistrate got the said result after consulted the JSDS and not the appellant's advocate who sent the request to her. I am not saying 16 that the said JSDS was not correct, but in my considered view had the trial court consulted the appellant's advocate and hear him, could have known why the said case is before another judge and whether the date said that he was required to be at the High court is different from the one depicted in his letter compared to one available on JSDS. By so doing, I think she could have gauged whether his request was worth to be believed or not. I am saying this because it may happen in abnormal situation whatever fed in electronic system, not the one to displayed when requested, this may happen due to computer principal known as Garbage in Garbage out, which simply means data inserted in a computer, the same is to be displayed when requested, therefore if it happen there is a human error then the same error will be displayed. In view of the above, it is my considered view, it was necessary for the trial Magistrate to hear from the appellant's advocate before concluding basing only on JSDS. Therefore, by decide to proceed denied his right to be heard which resulted proceeding hearing of the case in his absence. In the case of Director of Public Prosecutions vs Rajab Mjema Ramadhani, (Criminal Appeal No. 223 of 2020) [2023] TZCA 45 (TANZLII), the court of appeal had this to say; 17 "Time without number, the Court has consistently insisted on the need to guard against contravention of the right to be heard (audi alteram partem) in adjudicating the rights of parties. It is a rule against a person being condemned unheard. Any decision arrived at, without a party getting an adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard." [Emphasis added] Having considered the above breakdown, I am not in agreement with Ms. Msenga learned State Attorney contention that it was the persistent adjournment of Court's proceedings caused by the Appellant which caused the trial court to exercise its power and responsibility to control proceedings thus, refused further adjournments and ordered to proceed with the hearing. As alluded above that was the discretion of the court

but the same was not exercised judiciously under the above circumstances. Essentially, I am on all fours with counsel for the Appellant in his contention that, the trial court by denying a prayer of adjournment by the 18 advocate through the said letter amounted to denial of fair hearing hence breached Constitutional Right of being represented by the Advocate contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania which read as follows; - "When the right and duties of any person are being determine by the court or any other agency the person shall be entitled to a fair hearing". According to the import and tenure of this article of the Constitution, as analysed herein above, leaves me without doubt that, denial of opportunity for legal representation was done in both two occasions stated above, and since the same is an essential component of a fair trial as already discussed above. I am settled that the appellant was denied a fair trial, thus, the appellant was prejudiced. Therefore, the first issue I raised above is answered in affirmative, as well as the second one, because as plainly state absence of fair trial, the appellant conviction cannot be left to stand firm. Hence its decision is rendered a nullity. This is because the requirement of abiding by the principles of a fair trial cannot be profligate. The same was observed in the case of Kanisilo Lutenganija vs The 19 Republic, Criminal Appeal no. 25 of 2010 (unreported) where the Court of Appeal stated as follows: - "Lack of a fair trial contravenes a person's Natural as well as Constitutional Rights. A conviction emanating from such contravention is illegal and an appellate court such as the Court, is empowered to correct that illegality " [Emphasis supplied] (See Director of Public Prosecutions vs. Yassin hassan @ Mrope, Criminal Appeal No. 202 of 2019 and Margwe Erro and Two Other vs. Moshi Bahalulu, Civil Appeal No. 11 of 2014 (all unreported). On the whole, and on account of what I have endeavoured to discuss hereinabove, I hereby find this fifth ground discussed has merit thus sustained. In the circumstances, having find this ground of appeal to have merit. I find that the determination of this appeal its consequence is sufficient to dispose this appeal and I find no need to consider and determine the remaining grounds of appeal. 20 Having decided as above, I have entirely considered the circumstances of this matter as alluded above which caused the trial to be defective, but also other facts as revealed by the prosecution at the trial court. I am of considered view that in this matter, in the interests of justice requires that I should order retrial from where the said defectiveness started, which I hereby order forthwith. (See Fatehali Manji vs R [1966] E.A 343; Shaban Said vs Republic Criminal Appeal No. 267 of 2009 and Mussa Abdallah Mwiba and Two Others vs Republic, Criminal Appeal No. 200 of 2016 (unreported). Consequently, in respect to the scope of the retrial, I am aware according to the record, it was on 12/10/2023 when the testimony of PW1 proceeded defectively as alluded above. Therefore, I hereby nullify all prosecution proceedings of the trial court recorded from that date of 12/10/2023 up to the close of prosecution case. Also, I nullify the defence case proceeding dated 16/2/2024 due to its impact on the nullified proceeding said above. Subsequently I quash the conviction, and set aside the sentence and all orders imposed against the appellant. I further order an expedited retrial before another Magistrate who should start with the testimony of PW1 to the scope I have instructed above. 21 In the circumstances, I order the immediate release of the appellant from the said conviction and immediately be sent at the trial court under the

custody of Republic for trial in compliance with the above orders of this court. It is so ordered. DATED at MOSHI this 24th day of September, 2024. X JUDGE Signed by: A. P. KILIMI Court: Judgment delivered today on 24th day of September, 2024 in the presence of Mr. Lengai Loita learned counsel for the appellant and Ms. Edith Msenga learned State Attorney for the Republic, also appellant present in person. Sgd; A. P. KILIMI JUDGE 24/09/2024 Court: Right of Appeal explained. Sgd; A. P. KILIMI JUDGE 24/09/2024 22

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