TANZANIA / JUDGMENT

rashid mohamed sellungwi vs republic 2023 tzca 179 4 april 2023

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DECIDED
4 April 2023

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IN THE COURT OF APPEAL OF TANZANIA AT MTWARA (CORAM: MKUYE, J.A.. MWANDAMBO, J.A. And RUMANYIKA. 3.A.1 * CRIMINAL APPEAL NO. 456 OF 2021 RASHID MOHAMED SELLUNGWI..... APPELLANT VERSUS THE REPUBLIC..... ....RESPONDENT (Appeal from the Decision of the High Court of Tanzania at Mtwara) (Nawembe. 3^ dated the 19th day of 3uly, 2021 in Criminal Appeal No. 5 of 2021 3UDGMENT OF THE COURT 20* & 4hApril, 2023 MKUYE. J.A.: The appellant was charged with and convicted of obtaining goods by false pretences contrary to section 302 of the Penal Code, by the Resident Magistrates' Court for Mtwara Region. Upon conviction, he was sentenced to a conditional discharge for a period of one year. The appellant was also ordered to pay compensation to the complainant to the tune of Tshs. 37,000,000/= and in case of default, to serve a custodial sentence of four years, in addition, to pay the compensation that had been awarded. The facts leading to the present appeal are that the appellant and one, Abdallah Yusuph Omary (PW1) entered into a contractual agreement whereby the latter sold to the appellant a consignment of a thousand pieces of timber at a contract price of Tshs. 37,000,000/=. The transaction was witnessed by a sale agreement dated 15/6/2017. It was a term of the contract that the appellant was to effect payment upon the whole consignment reaching Mkuranga. As borne by the evidence on record, the consignment reached its destination as agreed but the appellant failed to honour his part of bargain to pay for the same. The complainant made concerted effort through other machinery to have the appellant pay but the same bore no fruits. It suffices to say that a criminal charge was preferred against the appellant leading to his arraignment, conviction and sentencing. Aggrieved by that decision, the appellant lodged an appeal in the High Court. However, before the appeal could proceed on merit the respondent took issue that the sentence on the compensation order had not been complied with. The first appellate judge made a ruling remitting the matter to the trial court for it to satisfy itself if the appellant had complied with the sentence. Whilst the Order of the High Court subsisted, the appellant on 7/6/2021 applied before the High Court for the taking of additional evidence under section 369(1) of the Criminal Procedure Act (the CPA). The application for the taking of additional evidence was granted but the appellant failed to procure the intended witness and the appeal proceeded to hearing as scheduled. Upon hearing the parties, the first appellate court observed that the appellant had an intent to defraud the complainant right from the beginning, the contract notwithstanding.

Ultimately, the appeal was found to lack merit and was dismissed. The appellant, aggrieved by the decision of the High Court, he has now appealed to this Court based on five grounds of appeal which can be paraphrased as follows:

1. That the High Court erred for not considering all grounds of appeal hence reaching to a wrong decision.
2. That the High Court erred for improperly evaluation of evidence hence reaching to a wrong conclusion.
3. That the High Court erred in ordering the payment o f TZS 37,000,000.00 to the complainant (PW1).
4. That the High Court erred for not considering that the appellant was not accorded fair trial before the Resident Magistrate Court of Mtwara.
5. That the High Court erred in affirming the trial court sentence and subsequent imprisonment while the appellant had already served a conditional discharge sentence. When the appeal was called on for hearing, the appellant enjoyed the services of Mr. Jebra Kambote assisted by Mr. Hosea Chamba, both learned counsels, whereas the respondent was represented by Ms. Jacqueline Werema assisted by Mr. Gideon Magesa, both learned State Attorneys. We must state at this juncture that, both sides made oral submissions at length in support and opposition in respect of all grounds of appeal which, we commend them for their energy and industry. However, for a reason to be apparent shortly, we do not intend to enumerate all what they submitted. Instead, we shall concentrate on the area we consider to be decisive of the appeal touching on the complaint in the 4th ground of appeal involving the fairness of the trial and its bearing on the resultant conviction and sentence. Both Mr. Chamba and Mr. Kambole submitted on the 4th ground. Mr. Kambole contended that the trial of the appellant was far from being fair, based on two matters; one, that even upon making a request under section 9 (3) of the CPA, the appellant was never supplied with the complainant's statement. According to Mr. Kambole, the appellant was adversely prevented from adequately preparing his defence in that he failed to contradict the evidence of PW1 with the statement he made to the police and to compare it with the 4 evidence of both PW2 and PW3 which had been given in his absence. On this, the learned counsel wound up insisting that the word "shall" appearing in section 9 (3) of the CPA was not intended to mean "may" Two, that the appellant was denied the right to recall witnesses. It was his submission that, at one point in time the appellant was absent but his surety was present who informed the court that the appellant had fallen sick. Notwithstanding the reason for the appellant's absence, the trial court proceeded with hearing in terms of section 226 (1) of the CPA during which, PW2 and PW3 gave evidence. According to Mr. Kambole, the appellant was not accorded a fair trial. Supporting his colleague, Mr. Chamba argued that such omission was a fatal irregularity which calls for the intervention of this Court under the provisions of section 4 (2) of the Appellate Jurisdiction Act (the AJA) to nullify the proceedings and quash the judgment. In reply, Mr. Magesa conceded that it is a reality that

the first appellate court did not address the ground on unfair trial despite having been argued by parties. However, he insisted that, in view of the absence of the appellant from attending trial, the provisions of section 226 (1) of the CPA were properly invoked. While agreeing that the trial court relied on irrelevant considerations for declining the request to recall PW2 and PW3, Mr. Magesa strongly maintained that, the recalling of witnesses has its conditions under section 147

(4) of the Evidence Act. In a brief rejoinder Mr. Chamba insisted that the appellant was not fairly tried. The appellant's complaint in ground No. 4 raises the issue that the appellant was not accorded a fair trial. The infractions upon which the unfairness of trial is pegged, are, that, One, failure to be supplied with the complainant's statement which would have assisted the appellant in his defence so as to contradict the evidence of PW1. Two, that the evidence of PW2 and PW3 was taken in the absence of the appellant. Three, the refusal by the trial court to recall both PW2 and PW3 who testified in the appellant's absence. This complaint featured before the High Court as ground No. 9 in the petition of appeal. The appellant complained that the trial violated the fundamental right to a fair hearing. Unfortunately, the first appellate court did not address it despite the fact that it was argued by both parties. As submitted by Mr. Chamba, the first appellate court was duty bound to address the 6 complaint in the ground of appeal and make a finding on it. Since this was not done, we shall determine it ourselves as mandated by section 4 (2) of the AJA. We shall begin our discussion with the complaint on the trial court's failure to supply the appellant with the complainant's statement. Section 9 (3) of the CPA provides as follows: "Where in pursuance o f any information given under this section proceedings are instituted in a magistrate's court, the magistrate shah\ if the person giving the information has been named as a witness, cause a copy o f the information and of any statement made by him under subsection (3) of section 10, to be furnished to the accused forthwith" In the present matter, the record shows that at the commencement of the defence case, the appellant through counsel requested to be supplied with the complainant's statement who testified as PW1. The request was objected to by the respondent and a ruling was delivered declining to grant the prayer. The reason for declining was that it was not mandatory to do so but it was also declined in order to avoid complications in the future. In our view, given the fact that the request was duly made for the supply of the witness statement, it became mandatory for the trial court to supply the same. Section 9 (3) of the CPA is couched in mandatory terms and not as was observed by the trial court. (See Daniel Kivati Monyalu v. Republic, Criminal Appeal No. 224 of 2019 (unreported). Now, the issue for our consideration would be whether the appellant was prejudiced by that anomaly. Mr. Kambole maintained that, the appellant was prejudiced as he was denied the opportunity to contradict the evidence of PW1 and to compare that evidence with that of PW2 and PW3, which was given in the absence of the appellant. It seems to us that the appellant intended to impeach the witness (PW1) by contradicting his statement made to the police and what he stated in evidence in court. In our opinion, if that was the intended purpose, the request ought to have been made earlier prior to PW1 giving evidence. It would not have served the intended purpose as the request

was made at the commencement of the defence case. Besides, as gleaned from the record, the appellant was able to marshal a formidable defence. Under the circumstances, we hold the view that the appellant was not prejudiced and the anomaly is curable under section 388 of the CPA - see Elibariki Naftal Mchomvu v. Republic, Criminal Appeal No. 332 of 2019 (unreported). I The record of appeal also bears that on 28/9/2020 the evidence of PW2 and PW3 was taken in the absence of the appellant. On that respective hearing date, the appellant did not attend but his surety was present who informed the court that the appellant was sick and he had with him, documents to prove so. The respondent would not agree and implored the court to proceed with hearing. The trial court proceeded with hearing under the provisions of section 226 (1) of the CPA. Section 226 (1) of the CPA, upon which the complaint is predicated provides as follows: "If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shaii be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and acquit the accused with or without costs as the court thinks fit/' It is plain from section 226(1) of the CPA that the continuation of trial where an accused does not attend hearing is an exception to the general rule 9 that, all evidence in any trial shall be taken in the presence of the accused as per the provisions of section 196 of the CPA. In the present matter, the appellant's surety was present and informed the court that the appellant was sick. In our opinion, notwithstanding whether the proof of his sickness was sufficient or not, that was enough to put the court on notice of the appellant's whereabouts. Prudence would have dictated, as suggested by Mr. Kambole to adjourn the hearing of the matter. It will be noted from the record of appeal that on an immediate preceding date, that is, on 15/9/2020, the appellant was present in court and he informed the court that he was sick. In our view, with that backdrop, we are inclined to hold that the appellant's absence was from causes over which he had no control. We are alive to the observation we made in the case of Moses Mayanja @Msoke v. The Republic, Criminal Appeal No. 56 of 2009, where we stated that: "One of the basic and uncompromisabie tenets of due process of a fair trial is that evidence in a criminal trial ought to be tendered in the presence and hearing of an accused person unless the latter for any reasonf decides to absent himself." 10 Next for consideration is what then is the effect of the taking of evidence in the absence of the appellant. In the case of Joseph Raphael Maruma v. Republic, Criminal Appeal No. 287 of 2015 (unreported), the Court had the occasion of interpreting section 196 of the CPA. In that case the appellant was convicted on the basis of the prosecution evidence that had been taken in his absence and the appellant complained that he was not given a fair trial. The Court in agreeing with him stated as follows: "Our firm position in agreeing with both parties in the appeal is predicated on the concept of due process. Due process is not oniy weii encapsulated in section 196 of the CPA, but more importantly in Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1997 ("the Constitution") which safeguards the right to a full hearing ("fair trial') ...conviction would have been unsustainable, as part of the evidence had been taken in his absence, in contravention of the dear and mandatory provisions o f the CPA. The

appellant, therefore, was not given a full hearing or a fair trial." In yet another scenario in the case of Haji Masanja @Makinga v. The Republic, Criminal Appeal No. 216 of 2012 (unreported), this Court had li occasion to put emphasis on the importance of a fair hearing. In that case, some prosecution witnesses gave evidence in the absence of the appellant in which a particular witness stated to have identified the appellant. The Court in finding that the appellant had not been accorded a fair trial stated: "The prosecution should also have seen the danger of proceeding with the case in the absence of the appellant under the circumstances. For this reason, we entirely agree with both the learned advocate and the learned State Attorney that the right o f the appellant to full and fair hearing was infringed. The appellant had the right to see the person who said he identified him and cross examine him" In the upshot, we agree with Mr. Kambole that the trial court hastened into invoking the provisions of section 226(1) of the CPA. As a result, the appellant was not given a fair trial which in essence was a fatal irregularity with the effect of rendering the proceedings and judgment of the High Court a nullity. Ground No. 4 is thus allowed to the extent indicated above. Consequently, acting under the Court's revisional powers in section 4 (2) of the AJA, we are constrained to nullify the proceedings of the trial court from the moment PW2 and PW3 testified to the end of the trial and quash the 12 resultant judgment and conviction resulting into setting aside the sentence as well as the order emanating from it. Similarly, the proceedings and the judgment of the High Court are hereby set aside. Having done so, we direct the High Court to remit the record to the trial court for continuation of hearing immediately after PWl's testimony before another magistrate expeditiously. It is so ordered. DATED at MTWARA this 31st day of March, 2023. R. K. MKUYE JUSTICE OF APPEAL L. X S. MWANDAMBO JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL The Judgment delivered this 4th day of April, 2023 in the presence of Henry Mwinuka holding brief for Mr. Hosea Chamba for the Appellant and Mr. Melkiory Hurubano, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

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Prepared on 13 October 2026 · Esheria