

TANZANIA / JUDGMENT

selemani kidunale brighton vs republic 2021 tzhc 7506 3 december 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA CRIMINAL APPEAL NO. 109 OF 2019 (C/Farusha Resident Magistrates Court Economic Case No. 2 of 2016) SELEMANI KIDUNALE BRIGTHON..... APPELLANT
VERSUS REPUBLIC..... RESPONDENT

JUDGMENT

25/ 10/2021 & 03/ 12/2021 MZUNA, J.: Selemani Kidunale Brighton who at the time of his conviction, was the Olkokola Ward Agricultural Officer, the appellant herein, is challenging the decision of the Resident Magistrates court of Arusha (the trial court) which found him guilty on two counts, one being for Abuse of position c/s 31 of the Prevention and Combating of Corruption Act No 11 of 2007 and the second being of Occasioning loss to a specific Authority c/paragraph 10(1) of the 1st schedule and Section 57(1) and 60(2) of the Economic and Organised Crimes Control Act, [Cap 200 R.E 2019]. At the end of the day, he was sentenced to pay a fine of Tshs 1,000,000/= or to serve one year imprisonment for each count, the sentence which was ordered to run consecutively. The sentence which was also imposed to his co-accused Mesiaki Mathayo Mollel, who was the Lemanyata Village Executive officer. Particulars of the charge in the first count alleged that, Mesiaki Mathayo Mollel and Selemani Kidunael Brighton on diverse dates between 1st January 2013 and 31st December 2014, at Lemanyata Village within Arusha District Council in Arusha region, being Lemanyata Village Executive Officer and Olkokola Ward Agricultural Officer respectively while discharging their duties did intentionally abuse their position by failing to distribute agricultural input subsidies to the beneficiaries of Lemanyata Village as a result they obtained undue advantage of Tshs 3,750,000/= from the agricultural inputs. The particulars for the second count were that, Mesiaki Mathayo Mollel and Selemani Kidunael Brighton on diverse dates between 1st January 2013 and 31st December 2014, at Lemanyata Village within Arusha District Council in Arusha region, being Lemanyata Village Executive Officer and Olkokola Ward Agricultural Officer respectively, by their wilful acts caused the Arusha District Council to suffer pecuniary loss of Tshs 3,750,000/=. The brief facts of the case shows that, the appellant and his colleague, above mentioned, in their capacities, were entrusted with the duty to oversee the delivery of subsidies to the needy villagers who were estimated to be 100. The Agricultural inputs which includes fertilizers and seeds were placed into the store by the

agent one Lesion who was tasked that duty by the District council of course under supervision of some village members. It came out that some villagers saw the two convicts transporting the said subsidies by a tax car. There occurred a scuffle which necessitated intervention of the Police to rescue the two. They were also accused of selling the agricultural subsidies to the villagers who were not the beneficiaries or the needy. In his defence the appellant denied to be responsible in distribution of the subsidies. He insisted that the agent is the one who is responsible not him. Based on the above evidence, the accused persons were found guilty of all the counts they stand charged with and subsequently sentenced as above shown. Being aggrieved the appellant preferred four grounds of appeal which in effect bolds down to one ground that the conviction and sentence was based on a charge which "the prosecution side had completely failed to establish its case without reasonable doubts to the required standards." This major complaint had under it the following shortfalls, according to him: One; Failure of the prosecution "to bring before it the alleged agricultural subsidies used to be carried in the tax car or to bring the said tax car as an exhibit or to bring before it the taxi driver who drive (sic) the said alleged tax car" Two; "Failure to bring before it the agent who was the key witness in the case before it to verify if there was the theft o f agricultural subsidies took place (sic) in his store." Three; Failure "to state how such alleged loss was occurred (sic)." During hearing of the appeal which proceeded by way of written submission, the appellant was represented by Mr. Frank Wilbert Makishe learned advocate whereas the respondent enjoyed the service of Ms. Akisa Mhando who strongly opposed the appeal. Submitting in the support of the appeal, Mr Frank stated that the standard of proof in criminal offence is beyond reasonable doubt according to Section 112 of the Evidence Act Cap 6 R. E 2019, citing as well the case of John Makolobola v R [2002] TLR 296. Amplifying further the learned counsel stated that, the prosecution alleged a loss of Tshs 3,750,000/= but he stated that nothing was tendered in court or established as a fact to show the said loss or the occasioning of loss. To cement his submission, he referred this court to the case of Kilamei Ramadhani v Republic, Criminal Appeal No. 128 of 2004 HC at DSM (unreported). Again, Mr. Frank stated that the car or the soien subsidies were never tendered in court as exhibits and neither was the letter sent to PW1 tendered in court as exhibit. He cited section 62(1) of the Evidence Act Cap 6 R. E 2019 to augment his submission. The learned counsel touched as well the evidence adduced by PW1 who stated that the role of the Agricultural officer is to oversee the quality of agricultural items and advice the farmers on their best agricultural practice and it was not established whether the appellant neglected his duties and caused loss or abused his position. Based on the above grounds, Mr. Frank prayed for this court to set aside both the conviction and sentence imposed on him. In response, Ms. Mhando touched on the evidence which implicated the appellant including that of PW1, PW7, PW8, PW9 and PW12. She further stated that since there was loss which occurred it was due to the appellant and his colleague, for non adherence on the procedure of the distribution of the subsidies. That the appellant was correctly convicted and the charge was proved beyond reasonable doubt. In opposing the 2nd ground of appeal, Ms. Mhando stated that, it was not in dispute that the driver and tax car that was used to transport the agricultural subsidies was not brought before the court. He stated that it was the evidence of PW2, PW3 and PW4 as well as exhibit P4 that the appellant was arrested by the citizens on allegation that he was transporting village agricultural inputs. Further, as per the evidence of

PW4, the appellant did confess his guilty. She thus termed the evidence by PW2, PW3 and PW4 being direct evidence on what they saw from the villagers and what they heard from the villagers. To cement his submission, he cited the case of Vuyo Jack vs. The director of Public Prosecutions, Criminal Appeal No. 334 of 206 CAT Mbeya (Unreported). In contesting the 3rd ground of appeal, Ms. Mhando replied that on page 63 of the typed proceeding it proves that the prayer to tender the statement of one Lesson Merelenga Mollel who was reported dead who was an agent was denied, however the testimony of PW11 clarified to the court that the agent is dead. Ms. Mhando thus prayed that the appeal be dismissed because the prosecution case was strong enough to warrant the conviction of the appellant with the alleged offences. That the charge was proved beyond reasonable doubt. In a brief rejoinder by Mr. Frank, stated that, the appellant being a Ward Agricultural Officer of Olkokola, his main role was delineated to his skills and expertise than executive functions and thus the entire role of the appellant was to oversee the proper use of agricultural practice in the area and it was not established if he neglected to accomplish his duties or abused the same. Mr. Frank also stated that, the prosecution alleged loss of Tshs 3,750,000/= but nothing was tendered in court to show the loss, he thus stated that an agent who was the keeper of the store keys was not joined in the suit and again it was not established if the store was broken or not. He reiterated his submission in chief. I have keenly followed the written submission for and against this appeal. I thank both counsels for their painstaking submissions. The issue calling for determination of this court is whether the charge was proved to the required standard of proof. The general rule in criminal prosecution is that, the onus of proving the charge against the accused which is beyond reasonable doubt, lies on the prosecution. This is part of our law, and forgetting or ignoring it is unforgivable and is a peril not worth taking, See the case of Jonas Nkize

- v. R [1992] TLR 214. 7 Reading from the available evidence, PW1 stated that the appellant was the Ward Agricultural officer of Olkokola ward and was the one who was to oversee the exercise of distributing the agricultural inputs and PW12 elaborated how the appellant received the agricultural inputs and Exhibit P5 was tendered that is the audit report. Concerning the people who did not receive the agricultural subsidies he submitted that PW7, PW8 and PW9 testifies that they were the beneficiaries but they did not receive the subsidies while PW5 adduced evidence that he was not entitled to benefit but he bought 5 bags of seeds of 2kg for Tsh 15,000/= from the appellant. Regarding the issue of loss, I tend to agree with Ms. Mhando that, PW 12 stated to have handled the appellant 40 bags of fertilizer and 1000kg of maize seeds and a delivery note was admitted as exhibit P5. After the conduct of a stock taking PW12 realised that out of the 36 bags of fertilizer only 4 bags were seen and out of 1000kg of maize only 260 kg were found and after making the price valuation they were valued Tshs 3,750,000/=. If I may hasten to add, PW2 James Augustino, the Ward Executive Officer, said that the agent delivered the inputs by issuing a delivery note. When he was cross examined, he said that the inputs store keys were kept by Village Agricultural Officer, the appellant. When the appellant and his colleague were ambushed by the villagers when they wanted to beat them on the date of their arrest, the store keys were taken from the appellant, according to the evidence of PW3 Ally Khalifa Mchana. This was done in the

presence of police. So, to shift the burden to the Agent under such strong implicating evidence cannot be accepted by a court of law worth such a name. The appellant alleges that he was convicted despite there being no proof of the alleged loss, the respondent replied that loss was established. As per the evidence of PW12 who is an investigator employed by the PCCB in the course of his investigation he discovered that the appellant was handled with 40 bags of fertilizer make DAP as well as maize seeds 1000 kg and evidenced by exhibit P5 a delivery note and after a stock check it was discovered that some of the subsidies were missing. This being said, and since the subsidies were sold to other persons instead of the beneficiaries then loss was established and proved as per the tendered documentary exhibits. It should also be remembered that the charge is one of Abuse of position c/s 31 of the Prevention and Combating of Corruption Act No 11 of 2007 which connotes two elements which establishes the offence being intentionally abuses his position in the performance of his duties and or obtaining undue advantage for himself. All these elements were proved including occasioning loss of Tshs 3,750,000/- to the specified authority, the District council, a subject matter in the second count. Failure to call the agent was also given explanation that he is dead and his statement was not tendered after receiving an objection. That omission nevertheless, this court is alive on the fact that, "no particular number of witnesses shall in any case be required for the proof of any fact." See section 143 of the Tanzania Evidence Act Cap 6 R.E 2019. The evidence by PW2 the Ward executive officer stated that the appellant was arrested by the citizens and while they were taking him to his office, they assaulted him and PW2 prevented the citizen from assaulting the appellant and thereafter they went to the store and found some subsidies missing from the store. Again, PW3 adduced evidence that, while he was at the crime scene, he saw the appellant being surrounded by civilians and the said testimony was collaborated by the evidence of PW4 who stated that the appellant confessed to have sold the subsidies but promised to refund the same. Regarding the issue that the tax car and subsidies were not taken to court as well as the agent not being joined as part of the case, the respondent's 10 view is that despite the fact that the agent or missing subsidies were not presented before the court, there is direct evidence from witnesses who witnessed the crime. I agree entirely with her analysis. Basing on the evidence on record, I tend to agree with the learned State Attorney Ms. Mhando that, the evidence on record proved on the fact that the appellant was arrested by the citizens in relation to the offences he was tried and convicted with. Moreover, the evidence adduced by PW5 that he was not among the beneficiaries but yet he bought the seeds from the appellant and that evidence from the beneficiaries of the said subsidies like PW6, PW7 proves that some of the beneficiaries did not get subsidies which they were entitled to .-^ The allegation of the defence that PW4 was behind the move to dissolve the village members who were dealing with subsidies is also unfounded. Such question was not put to him. The appellant was convicted on direct evidence. The cited case of *Kilamei Ramadhani v. Republic*, (supra) which dealt with identification of the real suspects is distinguishable. The advantage of a direct evidence, as in the case under consideration is that a witness to the fact to be proved, speaks the truth from what he saw and or done thus the issue that the tax car, driver or the agent were not presented before the court 11 does not hold water. It was

held In the case of Goodluck Kyando v. Republic [2006] TLR 363 that:- "Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing a witness." The whole case is based on credibility and reliability of witnesses which the trial court was better placed to assess. I see no reasons to defer. That being said and done, this appeal lacks merit. Appeal dismissed. 12

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