IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 138 OF 2017

(Originating from District Court of Babati at Manyara, Criminal Case. No. 106 of 2016)

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

WILLIAM SAID TARIMO .... RESPONDENT

JUDGMENT

Date of Last Order: 14/05/2018
Date of Judgment: 23/11/2018

BEFORE: S.C. MOSHI, J.

The respondent one William Said Tarimo was the head teacher of Matufa Primary School found within Matufa village in Babati district in Manyara region. By virtue of his position he was also the secretary of the school committee which is responsible to approve all expenditure of the school funds before being forwarded to the District Education Officer for primary schools who is responsible for

authorization of payments in respect of all development activities for primary schools among other things. Therefore, in order for the payments to be made the Head Teacher had to first, sit with school staff for the purposes of analysing the needs and later on call for school committee meeting for approval of the requests and lastly to submit payment vouchers and request letter for authorization to the Education Officer who actually is supposed to do so upon being satisfied with the details. Again the committee had to approve the purchased materials before they are registered by the store keeper in the ledger before they are being used.

It would appear that there were complaints in respect of the respondent in his capacity as far as school funds transactions are concerned. The PCCB were informed whereby they mounted a criminal investigation which led to the arrest of the respondent and who was later on arraigned to answer a charge in Criminal Case no 106 of 2016 before the District Court of Babati at Manyara. Thereat he was charged with thirty-two (32) counts whereby the first fifteen counts concerned forgery of payment receipts on divers dates, contrary to sections **333,335 (a) and 337** of the Penal Code, Cap **16**

R.E. 2002, and the following fifteen counts that is 16 to 30 were in respect of use of documents intended to mislead the principal by presenting the said receipts to the Principal of Babati District Council, which is contrary to section 22 of the **Prevention and Combating of Corruption Act** No. **11** of **2007**. The 31st count was all about abuse of his position contrary to section **31** while the last count concerned the offence of embezzlement and misappropriation contrary to **section 28(1), both sections** which are to be found under the **Prevention and Combating of Corruption Act** No. **11** of **2007.**

The respondent denied the charge. Hence the case proceeded to a full trial.

At the trial, eight (8) witnesses testified for the prosecution while the defence had three (3) witness in all. I have found the evidence of PW1 Raphael Baha, PW2 Menuja Beihumira Byase, PW3 Mary Consolete Mahere, PW4 Zakayo Oleserepepi Molel, PW7 Wilson Mashauri Makaranga and PW8, Petro Rahael Horombe, on the face of it, to be the most damning.

Thus the most convenient starting point in summing up the prosecution case is the assertion by PW8 that, the allegations came from the complaint that the respondent was misleading by stating that he purchased different materials at Matufa Primary School from vendors while in reality such properties were no received at all. This was established by collecting aiding tools such as receipt books, receipt used for purchase and delivery notes. Besides, that in the course of his investigation he wrote a letter to TRA, and Town Council to get information on the purported vendors who claimed to have had sold different materials to Matufa Primary School as per exhibit P11. The information sought was in respect of TIN numbers of the vendors, business dealt with, ownership, when the business started and which materials were sold in those business. Referring to exhibit P1, PW8, said the same was among documents which he collected during investigation and it depict the receipts with no numbers from Sia stationary dated 20/01/2012 that listed things which amounted to TZS. **99,000/=.** It was discovered that such things were not listed in the school ledger and the school store keeper confirmed to them that he only received receipt without properties. Also the members of the

school committee denied to have received the materials. Besides, they discovered that the owner of the said stationary was the respondent and attended by his daughter Rosemary who was also the head teacher at Matufa Primary School. Another receipt no. 0029 from Mkulima Hard ware showed that the listed materials were never received at school while another cash sale receipt from Sia stationery dated 23/01/2012 valued at TZS. 18,300/= shows the materials which were not received neither entered in the store ledger despite being claimed so. It was thus upon further interrogation that the respondent admitted the receipts came from his shop and issued by his daughter who upon interrogation said she received instructions from the respondent. Yet, another receipt no.0013 from Frank W.Akyoo to show that electric materials were bought at TZS. 428,400/= while the materials were never received as they were not registered in the ledger and the respondent agreed that the items were not listed in the ledger. Upon looking at the TIN for Akyoo at TRA the same showed that it was his, however it was dealing with agricultural products business. The same was observed for exhibit P7 and exhibit P9 also had the same reflection. To him, the use of such receipt is nothing but a

forgery by the respondent and also presenting them to his principal was nothing but falsity. Also as the head teacher, he improperly used his powers to his advantage and therefore embezzled TZS. 1,618,200/=. This kind of evidence met another version of evidence from PW1-3 whose assertion were that they happened to approve payments on divers dates on receipts which according to PW7 Wilson, from TRA they were bearing TIN numbers which depicted different business activities than the items listed there-in.

In the mean while according to PW4 Zakayo, the owner of anodal stationery whereby one of the receipts were from the said stationary was found in the saga, was of the view that the receipt allegedly belonging to him was actually not. His reasons were two folds first, that his stationary had never transacted with the Matufa primary school and secondly that the TIN number in the receipt were printed ones while the alleged receipt was not printed. The same was verified by exhibit P8, his receipt book.

The respondent gave his sworn evidence in defence. He vehemently denied the allegations. Despite the fact that he agreed

to be responsible for ensuring that school materials are available as the money was issued to him as a head teacher who in turn had to find tenders responsible for buying the material. He was also particular that where the amount is below TZS. 200,000/= they had to buy directly without quotation while in the event that the amount exceeds TZS. 200,000/=, it is when they had to look for quotations from three suppliers. This is as per paragraph 4.3 of the regulation. It was his evidence that he used to issue the money to the teacher responsible for store keeping who was permanently dealing with purchases. He named them to be one Eliakim Urrassa who was replaced by PW5 Rashid Mohamed Tindi. He also admitted that the committee was responsible to view the purchased material and authorise them for use. His evidence was supported by DW2 Helena, who was responsible for accounts and who was among committee members and DW3 Rosemary his daughter.

The trial court found that the assertion that the receipts were forged for intention of showing that the items there in were not purchased and never reached school for use was not proved. Its analysis was that, the respondent denied to have had instructed DW3

Rosemary to record the receipt. The trial court added further that DW3 Rosemary, testified to have issued receipts to a store keeper responsible for purchases one Tinde (PW5. Besides, it was analysed that from the evidence of PW1-PW3, they authorised payments upon satisfaction that the requests were legal and were accompanied by receipts. On the evidence that the materials were not listed in the ledger book, the trial court was of the view that there was a teacher responsible for purchases and store keeping there was hence no evidence to prove that the respondent was responsible to keep the store ledgers. Therefore, the fact that the materials were not purchased came from only the prosecution assumption that if there were no records then the materials were not purchased.

Therefore, the trial court, concluded that the defence had raised a reasonable doubt that the accused person was not responsible for purchases and that the materials were allegedly presented and actually used by the school. The trial court, went forth to draw an adverse inference as to why the prosecution did not labour to charge DW3 who was issuing the receipts allegedly to be forged. Hence forth the prosecution failed to prove the offence of

forgery and consequently failed to prove that there was intention to mislead the principal. Lastly, it found that there was neither abuse of position nor misappropriation or embezzlement of government fund. The respondent was thus acquitted of all 32 counts by the trial court.

Aggrieved by the acquittal of the respondent by the trial court, the DPP has preferred this appeal, containing only two grounds of appeal namely:

1. *The trial Magistrate erred in law and in fact for failure to analyse the prosecution evidence in respect of counts number 16 to 32.*

2. *The trial Magistrate erred in law and fact by acquitting the Respondent in respect of counts number 16 to 30 and 32 without considering the overwhelming evidence against the Respondent.*

Before this first appellate court, this appeal was heard by way of written submissions which were dully filed whereby the appellant's submission and rejoinder were filed by Ms. Elizabeth Swai learned Senior State Attorney while the respondents' submission was written down and filed by Mr. Samson Rumende learned Advocate.

In respect of the first ground of appeal the appellant wrote that the trial courts' reasoning depended on the proof of the offence of

forgery but on the forgetful ness of the fact that each offence has its ingredients distinct from each other such that the provisions of section 22 of Act no. 11 of 2007 contains different elements from that of forgery. It is the appellant's further submission that while the offence of forgery requires the offender to have been involved in the making of false document, that is not the case in the offence under section 22 of the Act no 11 of 2007 authorship of the document is not relevant, the offence is established if the offender used the document with knowledge that its content is a product of falsity and use them with intent to deceive or mislead the principal. According to the appellant, the respondent did not dispute this fact during preliminary hearing(PH). What is contained in the memorandum of undisputed facts which according to him are treated as proof. Hence it is proved that he presented the receipts to show that he had purchased the items listed therein. Also according to the appellant the 16th to 30th counts were proven by the prosecution taking note that most of the receipts tendered in evidence as were attached in exhibits P1,2,3,4,5,6 and 7 came from his stationary and such items were not purchased at all since they were not mandatorily registered in the

ledger store books which were also tendered as exhibit P8 and P9. Further to that, some of the goods in particular were not sold at his stationary and some were purchased from non-existent business entity while other receipts were disowned by a vendor one Adonal stationary and lastly the respondent had full knowledge of falsity. It was thus appellant's settled opinion that had the trial magistrate considered the ingredients of each offence he could have evaluated the evidence and arrive at a different conclusion that the respondent embezzled the capitation funds and also abused his position.

On the second ground of appeal, it is the appellant brief submission that there is overwhelming evidence which the trial court could use to convict the respondent in respect of the 16th to 30 counts and count no. 32 on the contemplation that the respondent knew that the document was a product of falsity and misleadingly presented to his principal intentionally.

On the other hand, the respondent in his submission in reply maintained that the prosecution failed to prove the offence of forgery as the documents were genuine and there was no witness who

testified that the respondent authored the documents so as to mislead the principal or for embezzlement. It was further stated that most of the witnesses with exception to PW4 and 5 were responsible for authorization and endorsement so that the respondent could withdraw money and that all respondent's requests were successful. It is the respondent's submission that the evidence by the prosecution is hearsay otherwise expert of hand writing and auditors report were required. He contended that the trial court considered any piece of evidence adduced in depth. It is his submission that it was not proved by the prosecution that the documents were actually used to mislead the principal and thus the trial court was right to acquit the respondent and therefore urged this court to uphold the trial court's findings. Reference was made to section **69** of the **Evidence Act, Cap 6 R.E 2002,** section **50** and **51** of the **Local Government Finance Act, Cap 290 R.E 2002** and the case of **Joseph Mapema vs. R [1986] TLR 148.**

The appellant re-joined by insisting that the submission by the respondent fell into the same trap of the trial court's reasoning to the extent that since the offence of forgery was not proved, then the

offence of using documents containing false material particulars with intent to deceive or mislead the principal was equally not proved. As in respect of the contention that there is no audit report, it was their submission that such submission has no legs to stand and it was nothing but a misdirection as the proof did not require audit reports and that the respondent did not state any law to that effect. It was appellant insistence that under section 22 of Act no. 11 of 2007, it was sufficient to prove that the respondent used the documents knowing that they were falsified. It was thus prayed at the end that this appeal be allowed forth with by entering conviction to the respondent in respect of the 16th to 32 counts.

I have gone through the entire proceedings in the trial court as well as the impugned judgment and Counsel's written submission. The pivotal issue for determination is whether this appeal has merit. I will deal with both points of appeal together because they revolve around the question of analysis of evidence.

The common ground of complaint by the appellant is to the effect that the trial court failed to analyse the prosecution evidence

in respect of counts number 16 to 32 and thus the acquittal in respect of counts number 16 to 30 and 32nd counts was done without consideration of the overwhelming evidence against the respondent. As prefaced in this judgment, counts number 16 to 30 were all about the offence of using of documents intended to mislead the principal contrary to section **22** of the **Prevention** and **Combating of Corruption Act no. 11 of 2007(The Act)** while count 31st count was all about the offence of abusing position contrary to section **31** of the same Act and lastly 32nd count which was all about embezzlement and misappropriation contrary to section **28(1)** of the very Act.

To start with I wish to observe the regime which establish the three offences contained in counts 16 to 32. This is the Prevention and Combating of Corruption Act(supra), which in no doubt is a substantial law which creates the offences and leave the procedure for trial under the **Criminal Procedure Act, Cap. 20 R.E 2002 (CPA).** First is the provisions of section 22 of the Act(supra) which provides as follows:

> A person **who knowingly gives to an agent** or **an agent knowingly uses with intent to deceive, or defraud his**

> **principal any receipt,** account or other documents such as voucher a profoma invoice, an electronic generated data, minutes relating to his principals affairs or business and **which contains any statement which is false or erroneous or defective in any material particular and which to his knowledge is intended to mislead the Principal** commits an offence and **shall be liable on conviction to a fine not exceeding seven million shillings or to imprisonment for a term not exceeding five years or to both.**

In the instant appeal, the prosecution were of the view that the receipts tendered on various dates between 1st January, 2011 and 30th August, 2014 contained false information because upon collection of receipt books and, receipts used for purchases, delivery note, invoices, store ledgers payment vouchers, bank statements and different minutes of Matufa Primary School. That they also inquired at TRA in respect of the vendors who claimed to have supplied the items only to find that the TIN numbers either dealt with quite different business or non-existent. Such receipts were tendered in the trial court and verified that they were submitted to the PW1,2 and 3 who were respondent principles so that they could authorize payments, which they did. The prosecution was of the firm view that the respondent

admitted these facts during PH and therefore they required no further proof as they deem to be proved.

I am well aware of the provisions of section 192 of the CPA in respect of the rationale and consequences of the preliminary hearing. That is to accelerate trials and where a fact is agreed then it is deemed to be proved. Section **192(3)** and **(4)** of the CPA, reads thus;

> (3) At the conclusion of a preliminary hearing held under this section, **the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.**
>
> (4) **Any fact** or document admitted or **agreed** (whether such fact or document is mentioned in the **summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved**; save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved.

I have referred to this section because the appellant stated that the respondent had actually admitted in the memorandum of facts that he presented the documents to his principal showing that he made those purchases on divers dates hence there was no need of any other evidence to prove the offence under section 22 of the Act. I have observed the said memorandum of undisputed facts which was signed and at the bottom stressed with the phrase "*section 192(2) and (3) C/W.*" It is conspicuous that by eyes one may find that the memorandum was actually written down and in fact the parties signatures are shown. However, it is not shown whether the memorandum of undisputed facts was actually read over and explained to the respondent in the language that he understands as mandatorily required by section 192(3) of CPA. Hence forth the said subsection was not fully complied with. What is the effect now?

The law is now settled on failure to read over and explain to the accused person in the language that he understands. in **MT. 7479 Sgt Benjamin Holela V. Republic, (1992) T.L.R. 121.** It was held that:

> ***"Section 192 (3) of the Criminal Procedure Act, 1985, imposes a mandatory duty that the contents of the***

memorandum must be read and explained to the accused. Since the requirements under section 192 (3) were not complied with, the provisions of section 192 (4) of the Criminal Procedure Act cannot apply".

See also the case of **Libert Hubert V. R, Criminal Appel no. 28 of 1999 (CAT, MWANZA, Unreported)** where the Court of Appeal held the same view and discounted the evidence admitted during PH as follows:

> **"With respect, we agree that generally, the signing of a document signifies that one signing it, understands the content of the document. However, the issue in this case is the requirement of law not being complied with. As it is not shown on record that the contents of the memorandum were read over and explained to the appellant, it may well be that it was not done. To resolve the doubt, we discount the evidence pertaining to the post mortem examination report (Exh. P. 1) and the sketch plan (Exh. P. 3).**"

It is the same here, it is doubted whether the law was complied with. This doubt counts and so the evidence is discounted and the section **192(4)** cannot be applied to justify that the facts are deemed to be proved as the appellant capitalized in his submission beforehand. Therefore, there is no gainsaying that the facts admitted in respect of counts no 16 to 30 required no further proof.

Besides, even if the law could have been dully complied with, I do not agree with the appellant that such admission sufficed to establish the offence of presenting document intending to mislead the principal as argued by the appellant. This is because in interpreting section 22 of the Act as cited here in above; it is plain that for the offence of using of document by the agent intending to mislead the principal; a person or the agent who uses the document with intent to deceive the principal must **first**, know that the document contains a false, erroneous or defective in any material particular and **second**, he has full knowledge that such false, error or defect is intended to mislead the principal. So while I would agree that the ingredients of forgery are distinct from this kind of offence, whether they were presented or not such presentation is honest until it is established that the agent first knew that the receipt contained false, error or defect and therefore he presented as such with the intention of misleading the principal. So the main question here is whether the respondent knew that the receipts contained false OR forged TIN numbers and actually went on to present them to the District Education Officer with the intention of misleading him.

From the evidence of PW8, the investigator from PCCB, it came to his knowledge that the receipts were bearing different business establishment from TRA and therefore containing items from those which were registered in TIN numbers. Also through investigation they learned that some receipts were bearing TIN number from non-existent businesses. He also interrogated the members of school committee who denied to have seen the materials. However, besides the fact that Sia stationary belonged to the respondent, PW8 did not inquire its TIN number at TRA to verify whether the respondent was the owner and also the materials sold there at were those which the business was registered. Besides, the members of the school committee who were interrogated by PW8 were not called to testify. Instead, only one member of the committee, a teacher of Matufa Primary School, who testified for the defence as DW2 Helena Hendry whose testimony lucidly portrayed what was actually being done in the process. I quote part of her testimony here under:

> ***"I am also a member of school committee dealing with financial issues. I was accountant of the school committee from 2010 to 2015. I was responsible to go to take money if the head teacher is not present. We were***

participating in the meeting to approve school finances for the purchase of school materials, repairs, payment of trips, examination. *As a member of committee I do not remember of meetings which I attended. I can identify minutes for the meetings I attended exhibit P7 shown to me contains the minutes which shows that I was a member in that committee. I was listed as number 5. .....*

The decision made in those meetings were correct. After receiving the money requested the same was handled to the store keeper to purchase the required materials and thereafter the members to the committee were responsible to approve the purchased material before being issued. The store keeper was Rashid Tinde. I was not responsible for purchases.

This evidence corroborates the evidence of the respondent whose evidence was that;

"then the money was to be issued for the purchase of school materials. The money was issued to the head teacher who has to issue the same to the teacher responsible to purchase school materials..... so that he purchases the same. He was permanent dealing with purchases. The teacher responsible to keep the school materials/store keeper was to be appointed during the teachers meeting. From 2012 the store keeper was Eliakema Eliapenda Urrasa but he is not a deceased. Then teacher Rashid Mohamed Tinde was appointed in that position until the case was filed the store keeper was Rashid Mohamed Tinde. The school committee was responsible to view the purchased

materials and authorise them to be issued for using them. There was no time when the store keeper was not present."

Even during cross examination, the respondent insisted that he used to give the money to the store keeper to purchase the materials of the school interchangeably with the teacher dealing with finance and in re- examination insisted that the store keeper was the one who was purchasing the material. DW3 Rose his stationary attendant testified that it was her who issued the receipts in respect of Sia Stationary to the store keeper and she was not influenced in whatsoever by the respondent. Further to that, DW3 testified that at all times she was at the stationary, she was actually issuing the receipt to the teacher who purchased the materials namely Teacher Tinde. It is my view that this piece of evidence, casts doubt as to whether the respondent presented the documents knowing that they contained falsity, defect or error for the intention to mislead the principal to approve Capitation fund. It is obvious that he submitted in his capacity as a head teacher and the secretary of the school committee. Anything therefore in respect of falsified document ought to have been directed to the store keeper who according to

evidence was the one given money and procured the materials. I do therefore find that appellant's contention that the trial court failed to analyse the prosecution evidence in respect of counts number 16th to 30th contrary to section 22 of the Act(supra) has no basis.

Secondly, in regard to the provisions of section 31 of the same Act, in respect of abuse of position, the law is clear that a person must be doing so intentionally in order to get advantage. The only fact here which connect the respondent is the fact that some of the materials came from Sia Stationary, which he admitted to be his. The question here is how did he abuse his position if at all the evidence on record provides that the materials were purchased by the store keeper and he was actually the one who was supposed to register the materials in the ledger. Unfortunately, the store keeper turned hostile, hence his evidence could not be considered.

It follows therefore that the prosecution failed also to prove that from such facts, the respondent could have embezzled or misappropriated the capitation fund. Again much as I agonize with the prosecution, still I cannot find what is called overwhelming evidence against the respondent. It should also be recalled that this is a criminal case where by the burden always lies on the prosecution

and it never shift. In the case of **Hussein Said Nampanga V. R, Criminal Appeal No. 117 of 2011(CAT, DSM, unreported)** it was insisted that:

> *"We wish to re- state the principle that the burden of proof in criminal cases lies on the prosecution side, the standard of which is proof beyond all reasonable doubt, meaning* ***the proof that leaves no thread of doubt"***

The duty of the accused is nothing but to cast a reasonable doubt See **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda V. R. [2006] T.L.R 395**.

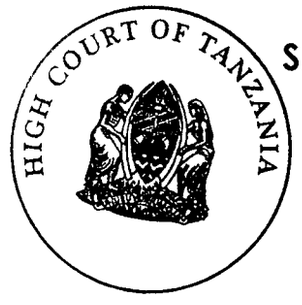
Besides, in **Juma Hamis Kabibi V. R, Criminal Appeal no. 216 of 2011(CAT- Mza, unreported)** the court went further and amplified that;

> ***"With respect, a criminal accusation ultimately stands or falls on the strength of the prosecution case. Where the prosecution case is itself weak, it cannot be salvaged from the tatters of the defence. It is quite plain that, false statements made by an accused person, if at all, do not have substantive inculpatory effect and cannot be used as a make weight to support an otherwise weak prosecution case. The fact that an accused person had not given a true account only becomes relevant, to lend assurance, in a situation where there already is sufficient prosecution material"***

From the foregoing analysis of the evidence, I find no reason to differ with the findings of the trial court which found that the prosecution failed to prove the case against the accused person beyond a

reasonable doubt the standard that is required in criminal cases. Both two grounds have no merits they are dismissed. The decision of the trial court is therefore upheld.

It is so ordered.



S.C. MOSHI.

JUDGE

8/10/2018.