IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA J.A., MMILLA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 346 OF 2015

FARAJI AUGUSTINE CHAMBO ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Teemba, J.)

Dated 4th day of December, 2013

In

Criminal Appeal No. 54 of 2013

JUDGMENT OF THE COURT

27th July & 12th August, 2016

MZIRAY, J.A.

Before the Resident Magistrate's Court of Dar es salaam at Kisutu the appellant Faraji Augustine Chambo together with one Kajala Masanja who did not wish to appeal, were charged with three counts namely conspiracy c/s 32 of the Prevention and Combating of Corruption Act, 2007, Act No. 11 of 2007, Transfer of proceeds of Corruption c/s 34(5) of the same Act and Money Laundering c/s 12 (b) and 13 (D) of the Anti-Money Laundering Act, 2006, Act No. 12 of 2006. After a full trial the appellant was convicted of all

the three counts whereas his co-accused was convicted of the first and second count only. On the first count each was sentenced to pay a fine of Tshs 5,000,000/= or two years imprisonment in default and for the second count each was sentenced to pay a fine of Tshs 8,000,000/= or five years imprisonment in default. On the third count the appellant was convicted and sentenced to pay a fine of Tshs 200,000,000/= or a term of five years imprisonment in default. The co-accused, one Kajala Masanja is the wife of the appellant.

Aggrieved, the appellant and his co-accused preferred a first appeal to the High Court of Tanzania at Dar es salaam where they were unsuccessful, hence this second appeal by the appellant alone.

The appellant's memorandum of appeal raised seven grounds which run as follows:

1. *That, the learned appellate Judge erred in law and fact to sustain conviction and sentence on the appellant in respect of 1st count without noticing that the three essential ingredients necessary to constitute offence of conspiracy were not proved.*

2. That the learned appellate Judge erred in law and fact to sustain conviction and sentence on the appellant in respect of the 3rd count, whereas the alleged prohibitory note was not served upon the appellant but noteworthy fact is that even the purported 2nd prohibitory note was illegal as was meted out upon act of ultra vires.

3. That the learned appellate Judge erred in law and fact to sustain conviction and sentence on the appellant in respect of 3rd count without considering that the case was instituted without written recommendation nor there was any witness from Financial Intelligence Unit to verify whether there were sufficient reasonable grounds to suspect or suggest that the alleged transaction involved the proceeds of crime.

4. That, the learned appellate Judge further erred in law and fact to sustain conviction and sentence on the appellant in respect of 3rd count, whereas no any witness from the involved banks and other Institutions came to testify about the alleged money transaction as to corroborate the allegation laid against the appellant.

5. *That, the learned appellate Judge erred in law and misdirected herself to sustain conviction and sentence in the case where the charge sheet was defective for duplicity.*

6. *That, the learned appellate Judge erred in law and fact to sustain conviction and sentence based on the uncorroborated evidence of PW6 as regards Exh. P4 (statement) which was obtained without adhering to the required law.*

7. *That the learned appellate Judge erred in law and fact to sustain conviction and sentence without directing herself to exhaustively re-assess the evidence of PW1, PW2, PW3, PW4, PW5, and PW6 which was of the weakest kind to sustain conviction.*

At the hearing of this appeal, the appellant appeared in person, unrepresented, while the respondent Republic was represented by Mr. Awamu Mbagwa, Learned Senior State Attorney.

The appellant had nothing to add to the memorandum of appeal he filed. On his part Mr. Mbagwa learned Senior State Attorney started off by supporting the conviction entered by the trial court and the sentence passed. He also argued the appeal generally. On our part having carefully gone through the substance of the grounds of appeal we are at one with Mr. Mbagwa that the best way to dispose of this appeal is to combine all the grounds of appeal and argue them generally.

To appreciate the gist of the case we will give the facts in brief. According to the charge sheet and the evidence in support thereto, the offence was committed in 2010. It was alleged that the appellant and his co- accused Kajala Masanja having been served with a six months prohibitory order, conspired and contravened the Order. According to the evidence of PW6 Grace Kwanju, PW7 Geoffrey Makunda and PW8 Moses Kisaka, after the sale of the alleged corruptly acquired house, the appellant within a short time made several transactions by depositing money in his bank account at BOA Bank, Sinza, which its source were unjustifiable. Apart from this evidence, we have the evidence in the record of PW4 Monika Timber, PW5 Abdila Mkenyenje and PW6 Grace Kwanju who were handed with the two prohibitory orders and served the first prohibitory order to the appellant in

person and the second prohibitory order issued in February, 2010 was attached directly at the gate of the appellant's house. It is on the basis of this evidence that the appellant was convicted as charged.

Like the trial court, the first appellate court relying on evidence on record was also convinced that the prosecution case was proved beyond reasonable doubt. In making her finding on the case, the learned judge of the first appeal held:-

> *"... I am satisfied that the evidence adduced by PW1, PW2, PW3, PW4 PW5 and PW6 corroborated that the appellants were served with prohibitory notice and that the appellants sold the house to PW2 while knowingly that there is a prohibitive order. However, PW8 Moses Kisaka testified as to the bank statement of the 1st appellant in the Bank of Africa (BOA) Sinza branch. He gave evidence about the transactions in that there were many transactions involving big amounts of money within a short period of time. The first transaction on that account was on*

25/8/2008 and the last one was on 31/12/2008. I have considered the evidence adduced by the 1st appellant on the source of money which passed through his account but it is unjustifiable. He said his salary with NBC was 600,000/= per month. He also told trial court that he was doing business but no proof of the business was tendered in court to march the transactions in his BOA account because his account from 25/8/2008 to 31/12/2008 had a total of Tshs 256,000,000/=. In short, his allegation did not raise any doubt to the prosecution case."

It is pertinent to mention that this appeal before us, is a second appeal wherein the court confines itself to determination of matters of law. But, there are circumstances where the court can on a second appeal like the present appeal is, venture into concurrent findings of facts by two courts below. As this Court restated in **Julius Ndahari V. R**, Criminal Appeal No. 215 of 2004 (unreported), the Court can interfere with concurrent findings of facts by the courts below if there is a misdirection or non-direction on

matters of facts by the courts below. It is this principle that shall guide our determination of this instant appeal before us.

Upon our perusal of the court case record, the allegation against the accused persons in the trial court was that there was money corruptly obtained and credited in the account of the appellant and it is this money which led to the institution of the charge against them. It was alleged that the credited money into the appellant's account was proceeds of crime. It is further alleged that the appellant diverted money belonging to Tanzania Telecommunication Company Limited (TTCL) and credited it in the account of the Trade Union Congress of Tanzania (TUCTA) which money was supposed to be paid to Tanzania Revenue Authority (TRA).

Be that as it may, going through the entire evidence, surely there is no proof that the money was corruptly obtained. To ascertain this, the prosecution could have gathered evidence from TTCL to show that they were the source of the money which is in issue and also evidence from the Bank to show that they transacted the money which came from TTCL and that the same was diverted to TUCTA instead of going to TRA. However, TRA officials could have been called to testify whether they were expecting money from

TTCL. These were material witnesses to substantiate the prosecution case, but for unknown reasons the same were not called to testify. A court may be invited to draw a "permissible" adverse inference against the prosecution case where a crucial or material witness who is within reach and who could have testified against a critical or decisive aspect of its case is withheld without sufficient reason. (See Aziz Abdallah V. R [1991] TLR 71; Ali Amsi V. R, Criminal Appeal No. 117 of 1991, Mwinyi Juma Naifaka V. R, Criminal Appeal No. 8 of 1997. (both unreported).

On the basis of the preceding authorities cited herein above and the fact that officials from TTCL, TUCTA, Bank and TRA were not called to testify, the trial court would have drawn an adverse inference against the prosecution case.

That said, in our view, the money found in the account of the appellant as per evidence of PW8 must not necessarily have come from TTCL especially so when considering the defence case. In defence, the appellant stated that he got the money from his business and by selling the house that was bequested to him by his uncle and the one he built at his own efforts in Mugumu, Serengeti. Had the courts below carefully considered the evidence

adduced as a whole and the defence case in particular, they would have reached a different decision. It seem to us that the defence case was not given the deserving weight.

As to the complaint of failure to comply with prohibitory order there is no dispute that the same was issued on 15/7/2009 for six months and had to expire on 15/1/2010. The second prohibitory Order was issued on 19/2/2010 which purports to be an extension of the first prohibitory Order. With great respect, they did not indicate under which law they issued the second prohibitory order. If the law would have allowed extension it would have plainly said so. We seek inspiration from other laws which have clauses of limitation of time to do certain acts, for instance, the Law of Limitation Act generally, Order XXXVII rule 3 of the Civil Procedure Code on Injunctions and section 51 of the Criminal Procedure Act, just to mention a few. These laws explain what to do next after the limitation period has expired. In that case therefore, the second prohibitory Order was illegal because the house was sold on 14/4/2010 after the expiry of the first prohibitory Order. The sale, in our view, was valid as there was nothing in force to prevent the appellant from selling the house after the expiry of the first lawful prohibitory Order.

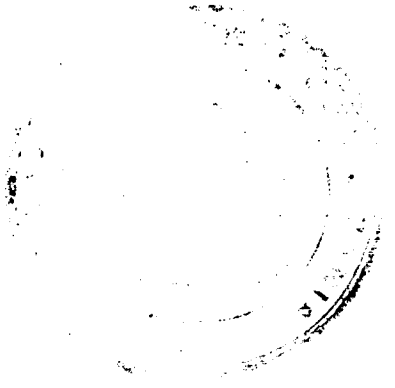
Having argued to that extent, we are settled in our minds that the evidence viewed as a whole does not convincingly prove the prosecution case beyond reasonable doubt. In these circumstances, it would be unsafe to uphold the appellant's convictions. We, therefore uphold the appellant's grounds of appeal and proceed to allow the appeal by quashing the convictions and setting aside the sentences imposed against the appellant. The appellant is to be set free forthwith unless is held for other lawful cause.

We think that it will not be proper to conclude this judgment without discussing the conviction and sentence passed on the second accused who did not wish to appeal. She was jointly charged with the appellant in count 1 and 2 of the charge. The evidence leading to her conviction is the same to that adduced against the appellant. What has disturbed us much is whether her conviction and sentence could continue to stand even after we have found the appellant not guilty of offences under counts No. 1 and 2. Taking into consideration the above, we are of the settled view that the yard stick we used to determine the fate of the appellant should also be used to determine the fate of the second accused. Much as she did not prefer an appeal but with all fairness, as the evidence adduced to support the charges

in counts 1 and 2 was insufficient, then, like the appellant, her conviction and sentence cannot also be allowed to stand.

In the circumstances, we invoke the revisionary jurisdiction conferred to us under section 4(2) of the Appellate Jurisdiction Act -- Cap 141, R.E. 2002; the conviction and sentence imposed against the then 2nd accused Kajala Masanja in count No. 1 and 2 of the charge are hereby quashed and set aside.

DATED at DAR ES SALAAM this 9th day of August, 2016.



B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL