

TANZANIA / JUDGMENT

john so joseph kusanja vs the republic 2023 tzhc 17311 17 may 2023

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TZHCDECIDED
17 May 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF TABORA AT TABORA DC. CRIMINAL APPEAL NO. 62 OF 2021 (Originating from the District
Court of Tabora in Economic Case No. 2/2017) JOHN S/O JOSEPH @ KUSANJA.....
APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 16/5/2023 Date of Judgment: 17/5/2023 MATUMA, J. The appellant John s/o Joseph @ Kusanja stood charged together with several other accused persons who are not subject to this appeal in the District Court of Tabora vide Economic Crimes Case No. 2 of

2017. They were alleged to have violated various laws of the land which constituted five counts of the charge but finally were found guilty, convicted and sentenced for only two counts namely;

- i) Abuse of office contrary to section 96(1) of the Penal Code, Cap. 16 R.E. 2002. 1 ii) Occasioning loss to a specified Authority Contrary to paragraph 10(1) of the first schedule to, and section 57(1) and 60(1) of the Economic and Organized Crimes Control Act Cap. 200 R.E. 2002. They were sentenced to serve two years jail term on each count and the sentences were ordered to run concurrently. The appellant being aggrieved by such conviction and sentence has preferred this appeal under seven grounds which were however condensed into two at the hearing of this appeal namely;
- i) That the prosecution case was not proved beyond any reasonable doubts against the appellant. ii) That the appellant's defence evidence was not considered and accorded a deserving weight. The background towards the charges and finally conviction of the appellant and his fellows in the two counts supra can briefly be summarized as follows; The appellant at the material time acted as the manager of the cooperative society namely Western Zone Tobacco Growers Cooperative Union (WETCU) which runs its activities in accordance to the Cooperative Societies Act and the Cooperative Societies Regulations. According to the two laws, the board of the cooperative society and its management staffs including technical staffs cannot execute anything beneficial or prejudicial to the society unless the Annual General Meeting resolves and approve the activity-t-e be done. 2 Some of

the actions must be approved by the Registrar of the Cooperative Society prior to its implementation even if the Annual General Meeting would have agreed and approved the same. In the instant matter WETCU intended to buy a car. The Annual General Meeting resolved that the board should use Tshs. 40,000,000/= to buy the intended car. As the resolved amount supra exceeded the amount that does not require the approval of the Registrar, the Registrar's approval was sought and obtained that WETCU should buy the vehicle of such amount. It was alleged that the appellant and his fellows however convened another meeting and agreed that they should buy Land Cruiser V8 at the value of Tshs. 269,000,000/= and subsequently bought it at that price without the sanction of the AGM and the approval of the Registrar of Cooperative Society. In that respect they were considered to have abused their respective positions and as a result occasioned loss to WETCU of the surplus amount that exceeded the approved budget of Tshs. 40,000,000/=. It is upon this background the appellant was convicted and sentenced as reviewed herein above. At the hearing of this appeal, the appellant was present in person and had a representation by Mr. Kanani Chombala learned advocate. The Respondent was represented by Mr. Robert Kumwembe and Mr. Steven Mnzava learned State attorneys. Mr. Kanani Chombala learned advocate for the appellant arguing on the first ground submitted that the appellant jvas not a board 3 member of WETCU Cooperative Society but a mere secretary of the Board who had no any active role to whatever decisions the board took. He was in the Board just to record the minutes and not otherwise. The learned advocate referred this court to the evidence of PW3 Isack Jacob Kasonso at page 132 of the proceedings and that of PW4 Mr. Rajabu Hamis Msengesyi at page 150 of the proceedings who mentioned the names of board members in which the appellant is not one of them. The learned advocate stressed that although the appellant attended both meetings; that of Annual General meeting which sanctioned the purchase of the vehicle at the tune of Tshs. 40,000,000/ = only, and the board meeting which sat to rectify the society's budget affecting the approved budget for buying the vehicle from Tshs. 40,000,000/ = to Tshs. 269,000,000/ = , he was a mere secretary for recording the minutes of the meeting. He had no any authority to make any decision or query the Board's decision and therefore could not be liable for whatever the Board did, be it good or bad. The learned advocate referred this court to exhibit P4 to see the coram of Board members. To him, it was the chairman of the Board who was posing the agenda, explaining it and responding to any raised issue but not the appellant who was a mere secretary. . 4

Responding on this ground Mr. Steven Mnzava learned State Attorney submitted that the appellant was not a mere recording officer of the minutes. That the appellant was not only fully involved in both meetings but also participated in the process of buying the vehicle at the higher price contrary to the resolution made by the Annual General Meeting and without seeking an approval of the Registrar. The learned State Attorney added that the appellant was nominated as a compliance officer to the process of purchasing the vehicle and therefore was duty bound to advice the Board in its decisions. He then referred me to page 3 of exhibit P4 where the Board chairman conceded that they bought the vehicle without approval of the Registrar of Cooperative societies. Whether or not, the loss was occasioned I join hands with the learned trial magistrate that so long as the Board members

and leaders of WETCU purchased the vehicle at the higher price of Tshs. 269,000,000/= contrary to the sanction made by the Annual General Meeting and without approval of the Registrar of Cooperative Societies, the amount used for the purchase of the vehicle exceeding the sanctioned amount of Tshs. 40,000,000/= was a loss to WETCU because such amount was used and or spent contrary to the approved budget, I am aware that the purchased vehicle was brought to and for the use of the society (WETCU) and thus one may argue that there is no loss but since the procedure and rules were violated towards the purchase of such vehicle, the amount used without 5 approval was a loss within the meaning of paragraph 10 (2) (b) of the first schedule to the Economic and Organized Crimes Control Act which disregards the recovery of the loss. Loss is loss despite of having been made good so long as it was occasioned. I thus agree with the learned trial magistrate in his findings as such at page 37 of the trial court judgment. It is not in dispute that the approval of the Registrar was sought extraneously because by the time they sought such approval they had already implemented what they were seeking to be approved. In Swahili we may simply say; “walikuwa wanamcheza shere mrajisi wa vyama vya ushirika” that means they were just enjoying him. That is why we find a bitter response from the Registrar vide exhibit P5 in that; “Chama chenu kimefanya ununuzi wa gari bila ya kupitishwa na mkutano mkuu wa wanachama na kuidhinishwa na Mrajisi wa vyama vya ushirika. Hatua hiyo ni kinyume cha kanuni ya 51 ya kanuni za vyama vya ushirika za mwaka 2004”. The Registrar then required them to explain such violation at not later than 31/07/2015. That being the case and the fact that exhibit P4 which was signed by among others, the appellant herein acknowledges the breach of such statutory duty, there is no question whether or not the offence of abuse of office and or occasioning loss was committed. No doubt that the two offences were committed because the buying of the vehicle at Tshs. 269,000,000/= was contrary to the resolution of the Annual General Meetings of WETCU 6 which had sanctioned the vehicle to be bought at the value of only Tshs. 40,000,000/=. In the circumstances whoever made such a decision and subsequently implemented the same by buying the vehicle contrary to the guiding principles of Cooperative Societies, committed the crime for abuse of office for acting ultra-vires and occasioned loss for spending Tshs. 229,000,000/= over and above the approved budget by the AGM. The remaining issue is whether the appellant had any active role in the violation of the guiding principles and in buying the vehicle contrary to the sanctions of the Annual General Meeting and without seeking the Approval of the Registrar of Cooperative Societies. The appellant through his advocate contends that he was a passive member in the Board meeting which made the decision of buying the vehicle in contraventions to the guiding procedures supra. That he was a mere recording officer of what transpired in the meeting without any authority to alter or query the decision of the Board. The learned State Attorneys on their side argued that the appellant was not a passive member but an active member who made the impugned decisions which became subject to the current charges. According to the evidence on record, the appellant was the Manager of WETCU Society. In accordance to the definition clause regulation 2 of the Cooperative Societies Regulations, 2004 the “manager”; “is 7 an officer of a Cooperative Society vested with the powers to manage and supervise day to day affairs of that Cooperative Society. ”

Under that circumstances, the Board of a Cooperative Society cannot do anything without the involvement of its manager. The manager of a Cooperative Society is thus an automatic member of the Board whose duty is to manage and supervise the day to day affairs of the Cooperative Society. Be it as it may, in the instant matter whether the appellant was a member of the Board or not, it is in evidence that he took an active role towards the purchase of the vehicle which is subject to the instant matter. There are several active roles he personally took towards the purchasing of the vehicle in question but I will discuss two of them which in themselves I find that they suffices to end this appeal. Looking in the evidence of PW4 Rajabu Hamis at page 151 of the typed proceedings the chairman of the board and the appellant who was the manager induced the board members to accept and approve the buying of the vehicle in question which was a Land Cruiser V8. While the chairman was explaining that they have made a profit of Tshs. 407,000,000 which they should accept to use for the purchase of such vehicle to strengthen the Union and enhance the Union status, the appellant was displaying the pictures of such vehicle to the members; 8 "The pictures were produced by John Kusanya the 2nd accused person and give them to the 1st accused person who distributed to the members of the board." PW4 who attended the meeting further testified that the board members including him were suspicious of the proposed deal because the same violated the sanctions of the AGM resolutions but the chairman assured them that there will be no problem because they will seek approval of the Registrar before buying the vehicle. Under that inducement they agreed and approved the proposal. PW4 was appointed to be among the team members who will go to Dar es Salaam for the purchase of the car but they agreed that they should pass to Dodoma for approval by the Registrar of Societies. In that team the appellant was among them. When they reached at Dodoma, they deceived PW4 that they have communicated with the Registrar and agreed that the approval shall be made in Dar es Salaam. PW4 did not doubt them because the Registrar has two offices one in Dodoma and the other in Dar es Salaam. They thus continued with the journey to Dar es Salaam. On reaching at Dar es Salaam they picked a lodge and slept but early in the next morning his fellow team members including the appellant deserted him and drove off without even notifying him. When he phoned them they did not pick his phone until late hours when the Vice chairman picked the phone and required him to relax as things were going well and that they decided to leave him" at the lodge 9 because they thought he was tired of the journey all along from Tabora to Dar es Salaam. On the evidence of PW4 the appellant was an active member in the deal as stated supra by supplying the board members photos of the vehicle to induce them to approve the supplementary budget and by joining the purchase team to Dar es Salaam but on reaching there they escaped PW4 and concluded the deal by themselves. Such PW4's evidence has not been challenged on this appeal nor argued by the appellant. The same evidence was given by PW3 at page 135 of the proceedings to the effect that it was the appellant who brought to them the pictures of the vehicle in question on the Board meeting to solicit the Board members to endorse rectification of the budget. The involvement of the appellant in the deal is not only on the two areas I have demonstrated but on several other actions. But as I have said area I need not reproduce them all in this judgment. I reiterate what the learned trial

magistrate held against the appellant on the matter. I therefore disagree with the appellant's contention that he was a passive member in the meetings of the Board at the time the crimes were committed. I proceed to dismiss the first ground of complaint and uphold the decision of the trial court to the effect that the appellant abused his office by contravening the rules and procedure for running cooperative societies regard being that he himself was the manager of WETCU Cooperative Society whose affairs were entrusted to him for proper management in accordance to the Cooperative Societies Regulations, 2004 and the Cooperative Societies Act. In respect of the second complaint the learned advocate argued that the trial magistrate did not consider and determine the defence evidence of the appellant and did not accord it the weight it deserved. The learned State Attorneys did not agree with the appellant. They argued that the defence evidence as a whole was properly considered. On my perusal of the records of the trial court, I find that the learned trial magistrate considered fully and determined the appellant's defence. What might have skipped the minds of the learned advocate for the appellant is that we have no single style in composing judgments. All what is important is to comply with the ingredients of a proper judgment in accordance to Section 312 of the Criminal Procedure Act, Cap. 20 R.E. 2022. In the instant case, the learned trial magistrate did not pick the evidence of each accused and determine it separately. He made analysis of the defence evidence as a whole to find out their general key defence points in their respective defences. At page 7 of the typed judgment, the trial magistrate starts to address the key defence points in the defence case generally including the appellant. He stated; "To the minds of the accused persons, their innocence were vivid. Their believes were grounded into nineteen assertions." n He then started to jot down what were the key assertions in the defence of the accused persons including the appellant. He noted nineteen grounds advanced in the defence case of all accused persons including the appellant. The learned trial magistrate then started to address the defence case along with that of the prosecution. At page 26 for instance the trial magistrate in taking on board the defence of the appellant who stood as the 2nd accused had these to say; "According to the 1st, 2nd and 6lh accused persons the permit was sought and obtained. Their assertion rooted from the registrar's act of approving the supplementary budget which had an item of the disputed car." He then discarded the appellant's assertion when he went on; "Since the said letter was among the exhibit tendered. I had time to go through its contents to ascertain the assertion inside the approval letter he (Registrar) asked the board to give reasons why it purchased the car without his approval". The learned trial magistrate then concluded at page 27 in discarding the appellant's defence; "It is crystal clear that the car was purchased on the 1st day of July, 2015 and the registrar was visited for approval fifteen days later. To that end, the car was purchased without the approval." From such findings it is obvious the trial magistrate considered the appellant's defence in relation to the offence of abuse of office and 12 occasioning loss in which he was convicted. Likewise he considered the appellant's defence in respect of the rest counts, accepted such a defence and acquitted him of the three counts. In the circumstances, the complaint that the defence of the appellant was not considered is not true. Or else it was open for the appellant to be so specific which kind or piece of his defence evidence was not considered and or was not

given the weight it deserved. His general allegations that his defence evidence was not considered is unfair allegation against the innocent magistrate who accepted his defence against the counts of conspiracy to commit an offence and forgery. I therefore proceed to dismiss the second ground of appeal which marks the end determination of this appeal. Consequently, this appeal is hereby dismissed in its entirety. The trial court decision is hereby upheld. ORDER Judgement delivered in chambers in the presence of Mr. Robert Kumwembe, learned State Attorney for the Republic, Mr. 13 14

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