

TANZANIA / JUDGMENT

20160822 TZHC Dar es Salaam

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22 August 2016

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM
CRIMINAL APPEAL NO. 157 OF 2016 (From the Conviction and Sentence of the Resident
Magistrates Court of - Dar es Salaam Region at Kisutu in Economic Criminal case No. 12 of 2015)
ULIAN CHENGULA.....APPELLANT VERSUS THE
REPUBLICRESPONDENT

JUDGMENT

MKASIMONGWA, 1. In the Resident Magistrate's Court of Dar es Salaam UUAN CHENGULA, SALHA SALUM SAAD, SALUM SAAD ALLY and BAKARI MAUUD KINYOGOU stood jointly and severally charged with Conspiracy to Defraud contrary to Section 306 of the Penal Code, [cap. 16 R.E 2002], Stealing contrary to Sections 265 and 258 of the Penal Code, Stealing by Servant contrary to Sections 258 and 270 of the Penal Code, and Occasioning loss to a Specified Authority contrary to Paragraph 10 (1) and (4) of the First Schedule to and Sections 57 (1) and 60 {2} of the Economic and Organized Crimes Control Act [Cap. 220 R.E 2000]. In particular LILIAN CHENGULA was charged with 2 counts of Conspiracy to Defraud, ,82 Counts of stealing by Servant and 1 Count of Occasioning loss to a Specified Authority. In each of the 82 counts of Stealing by Servant the accused a Senior Revenue Accountant employed by TANESCO was alleged to have stolen a certain sum of money the property of the public namely the Tan-hia Electricity Supply Company Ltd {TANESCO) and in the offence of Occasioning loss to a Specified Authority it was alleged that the accused person by her willful act caused TANESCO to suffer a pecuniary loss to the tune of Tshs. 312,717,717/77. 1 In the Judgment of the court delivered on 25/5/2016 the trial court found only UUAN CHENGULA guilty of Stealing by Servant and occasioning loss to a Specified Authority. The court's finding is in the following words:- "The evidence clearly . leads that the 1st accused was the employee of TANESCO when the offence was committed and the company suffered loss as a result. As regards the 1st and 2nd counts conspiracy as aforesaid the offence need to stand if those three elements were met, thus

- (1) Agreement of more than one person (2) to do unlawful or lawful act by unlawful means and (3) the person charged must be part of the agreement. Since the 2 nd, 3", and 4 th accused have already been acquitted because they were not part to the commission of the offence, those two counts can't stand as well, therefore 1 st accused is acquitted in the 1 st and 2 nd counts. However as regards other counts of offences she is charged with 82nd count which is

stealing by servant to 163" 164-167 (86 counts) and that one of 164th occasioning loss to a specified authority, the court find her guilty and convict forthwith. I so order". She was accordingly sentenced to five (5) years imprisonment for each count which sentences were ordered to run concurrently. The court also ordered as follows:- "On top of that she should pay back the amount of money stolen as per charge sheet and In case of default her properties should be trespassed (sic) as per the law and procedure". Lillian Chengula (Appellant) is aggrieved by both the conviction and sentences Imposed. She therefore appeals to this court based on the following grounds:-

1. That the Honourable Principal Resident Magistrate erred in law and in fact in failing to deliver judgment according to the provision of the law.
2. That the Honourable Principal Resident Magistrate erred In law and in fact in failing to evaluate and analyze the evidence which he relied in convicting the appellant 2
3. That the Honourable Principal Resident Magistrate erred in law and in facts for failure to pay due regard to the inconsistencies, discrepancies and contradictions to the prosecution's case and its legal effect thus occasioning injustice.
4. That the Honourable Principal Resident Magistrate erred in law and in fact in basing the Audit Report which was procured in total disregard of the principles of natural justice. S. That the Honourable Principal Resident Magistrate erred in law and in fact in finding that the appellant was the only one who could access the LUKU system contrary to the evidence and in the absence of evidence that her particular system credentials (password) was used to commit the offence.
6. That the Honourable Principal Resident Magistrate erred in law and fact in failing to consider the unchallenged evidence on the applicable procedure for purchase of LUKU by vendors, which evidence exonerates the Appellant.
7. That the Honourable Principal Resident Magistrate erred in law and in fact by failing to correctly analyzing evidence to find that the prosecution had failed to prove its case beyond reasonable doubt" - On the basis of the above grounds, the appellant prays the court that the appeal be allowed, the conviction be quashed and the sentence passed thereon be set aside and she be released forthwith from prison. The Respondent republic opposed to the appeal. At the hearing of the appeal before me there appeared Mr. Walter Chipeta assisted by Mr. Alex Mgongolwa, learned advocates, on behalf of the appellant whereas the Respondent/ Republic was represented by Mr. Patrick Mwita, the learned State Attorney. In his submissions Mr. Chipeta argued the 1st and 4th grounds of appeal independently and the rest were argued jointly/together. In respect of the first ground of appeal Mr. Chipeta faults the judgment of the trial court. He referred the court to the mandatory provisions of Section 312 (1) of the Criminal Procedure Act (CPA) and submitted that the contested judgment has no points for determination and reasons assigned to the decision on those points. In a case the 3 involving 87 counts and the evidence of 15 witnesses the trial court purported to analyze the evidence in fifteen (15) lines from which analysis it entered conviction against

the accused person. It, the trial court, did not determine if there was theft committed by the appellant and If any whether it was of the LUKU units or money. He submitted that, failure to submit a report to her boss apart from several demands in itself that is without considering the testimony that was leading to another conclusion, did not prove the offence against the accused person. Similarly being an employee of an entity that suffers loss cannot be the basis for conviction In the court of law as it was a case in this matter. As the court failed to analyze the evidence on the record, the court did not provide for reasons for the decision. He referred this court at Page 137 of the Chamber Dictionary 1998 Edition where the Term "Reason" is defined. As such the judgment falls short of the requirements set out in section 312 (1) of the CPA which was also judicially considered in the case of JEREMIA 5HEMWETA V /5 (1985) TLR 228. Mr. Chipeta also submitted that in a Criminal trial, the prosecution must adduce evidence with a view to proving each count the accused faces in court. The court must analyze such evidence In convicting the accused person. Here was not the case with the judgment now contested of as the accused was convicted as if she was charged with a single count. Suffice it to say that the judgment under discussion is defective by reason of noncompliance of the requirements of the law. Mr. Chipeta referred the court to the case of DEREGO 5/0 ATIYA AND ANOTHER V /5 REGINAM; CRIMINAL APPEALS NO. 22 and 23 of 1953 - (The Court of Appeal for Eastern Africa), and submitted that the judgment is incurably defective. On the basis of the above facts and authorities cited Mr. Chipeta prays the judgment and conviction of the appellant to be quashed. Coming to the second ground of appeal Mr. Chipeta contended that again the trial court did not properly analyze the evidence given in the case. The prosecution witnesses had given contradictory stories of evidence as to procedure followed by TANESCO In selling LUKU units. In that regard, the evidence given by PW.1 differs from that of PW.7. PW.3 narrated the procedure as that narrated by the appellant in defence. In its conclusion the court held that the appellant was the only person who had access to the LUKU System. It did not consider the other testimony available in the record which would lead to a different conclusion. The court was told of a password which was never disclosed to it even by PW.11, the Auditor. On 13/9/2010 the appellant was written a letter which she tendered in court as Exhibit 0.3 transferring her to the Head Office. She is however alleged to have undertaken transaction on 21 st, 23rd and 28th September, 2010 on which dates she was already transferred to the Head Office. The court however did not consider this piece of evidence which removed the influence of guilt on the part of the appellant. Mr. Chipeta also submitted that the case against the Appellant was built on circumstantial evidence. The evidence should be such one that points to the guilt of the accused person to the exclusion of any other person: KURWA MAUNGANYA V /5 REPUBUC, CRIMINAL APPEAL NO. 338 OF 2007 (CAT) was referred to and prayed that the judgment be quashed under this ground. In respect of grounds 5, 6 and 7 of the Appeal Mr. Chipeta contended that their complaint is on the standard of proof which in criminal cases is beyond reasonable doubt as it was clearly shown in the case of KURWA KIMWAGA V.R CRIMINAL APPEAL NO 119 of 2005. It is likely that the accused person/Appellant was convicted on ground that as she had the password then it is her who stole the money. However proceedings (at page 42) show the process in selling LUKU units. It required first

all an approval after verification done by different persons. It is after such approvals the Appellant would have mandate to release LUKU Units. There is no proof in record to the effect that this procedure was breached. Here the court lowered the standard of proof on holding that the complainant company had suffered loss and as the Appellant was its employee hence she is liable. Mr. Chipeta submitted that PW.6 who is an ITC expert followed up the matter. He found that the machines in the system were defective. PW.10, PW.12 and PW.13 Police Officers who had investigated on the matter found nothing connecting the appellant with the allegations leveled against her. Resort was 5 therefore to the Audit Report which Mr. Chipeta submits that it does not support the conviction for even If It shows loss being occasioned it is silent if it is the appellant who caused it. The learned advocate referred the court to the case of HARUNA SAID V .R.

- (1991) RR 124. He added that even the evidence adduced by the prosecution witnesses does not suffice sustaining the conviction. He said the accused person/Appellant was charged with stealing a specific amount of money in each count court. However the entire evidence speaks of LUKU units. There was variance between the charges and the evidence given to the court. That is a major defect and it constitutes a serious inconsistency which must be resolved in favour of the appellant as It was stated by the Court of Appeal of Tanzania in the case JUSTINE KAKURU KASUSURA @ JOHN LAIZER, CRIMINAL APPEAL NO. 175 OF 2010 when was confronted by this similar situation. Mr. Chipeta added that the fact that the people alleged to have received the LUKU Units were not called to testify and that the evidence brought does not support the charges the accused was facing in court and that the LUKU Units value was not stated and established in evidence render the offences of stealing not proved. With regard to the offence of occasioning loss, It Is Mr. Chipeta's submission that the only evidence produced was the Audit Report which according to him suffers defects. He said that the Report has Appendices [Exhibit P.3], Bank pay In slips [Exhibit P.4] which are twelve only In number. It is not known why 12 only were produced in more than 80 charges. The Report also annexes the Bank Statement which PW.11 had tendered In court for identification purposes and Marked Pld.1. The learned advocate also questioned the procedure adopted by the court in admitting electronic evidence. He referred the court to Sections 78 and 79 of the Evidence Act as it was amended by the Written Laws (Miscellaneous Amendment) Acts No. 2 of 2006 and 15 of 2007 which were given judicial consideration in a case of EXIM (T) LTD V /5 KIUMANJARO COFFEE CO. LTD, COMMERCIAL CASE NO. 29 OF 2011 where the court held that a printout tendered In court as evidence must be accompanied by a certificate that it is a true copy kept as the Bank Books. PW.13 a Customer Service employee of the Bank 6 signed the statement she tendered in court. The court yet admitted It and Mr. Chipeta submitted that the same ought to have been admitted in evidence and if it was admitted the same ought not to have been given any evidential value. As to the forth ground of appeal the learned counsel for the Appellant contended that the court did rely on the Audit Report in convicting the Appellant. He submitted that the Audit Report was doubtful unqualified, and was prepared in breach of the principles of Natural Justice. It only qualifies to be an Internal Report

prepared by a person who does not have qualification as an Auditor as PW.11 had also admitted. When preparing the Report, the author admits that he chose not to listen to the appellant who was being complained of. The court should have warned itself, under such circumstances, on the dangers for relying on one sided Report. A right to be heard is fundamental. It vitiates any actions taken by any authority against it - *MAGWE ERO V MUSHI BAHALULU*: CML CASE NO. 111 OF 2014 OF 2014 ARUSHA and *ABASI SHERAU V/5 ABDU S. H. M. FAZALBOY*: CIVIL APPEAL NO. 33 OF 2002. Mr. Chlpeta concluded that all the irregularities create a substantial doubt. Where there is such doubt it ought to have been resolved in favour of the Appellant. Any suspicion does not found a conviction of an offence however strong it is - *KURWA MAUNGANYA* case (Supra); *ABDALLAH WENDO AND ANOTHER V. REGINAM*

(1953) 20 EAC 166. He invites the court to look into the record as at the closure of the prosecution, the effect of the plea of no case to answer and resolve that to restrain on it on ground that the decision will make parties know the outcome of the case not proper. He prays the court that it grants the appeal with the reliefs sought in it:- On the other hand Mr. Mwita, the learned Senior State Attorney prayed the court not to consider the complaint that the trial court did not decide of the submission to no case to answer. This is because this was not pleaded as a ground of appeal and that the appellant did not seek for and obtain leave of the court to add it as a ground of Appeal. So it should be dismissed. 7 As regards to the contents of the judgment; they are provided for under Section 312 (1) of the Criminal Procedure Act (CPA). Mr. Mwita, submitted that the judgment, a subject of this appeal is proper in the eyes of the law. The judgment mentions the accused persons, the offences they were facing in court, the evidence given and the decision of the court. These are the required contents of a Judgment. Alternatively Mr. Mwita submitted that failure to comply with the provisions of Section 312 of the CPA does not vitiate the proceedings/judgment for it is curable under Section 388 of the CPA read together with Section 387 of the Act. Where the court finds that accused has been prejudiced by the judgment which does not conform to the provisions of Section 313 of the CPA the solution is not as that suggested by the learned counsel for the appellant, but the court has powers in such a situation to re- evaluate the evidence. The learned State Attorney referred the court to the decision in *AMIN MOHAMED* case (supra) and invites the court to adopt the decision and re- evaluation the evidence and come to the proper decision. Regarding to the weaknesses in the prosecution evidence, the learned State Attorney contended that contrary to what has been submitted by the learned advocate for the appellant that it is PW.14, the Banker who produced to the court the Bank Pay- In-Slips as Exhibit, the record shows that this witness only tendered the Bank Statement. It is PW.11 who tendered the Bank Pay-in-Slip and the Audit Report. Those documents were tendered by persons competent to do so. The learned State Attorney also contended that it has been submitted by the counsel for the Appellant supported by the decision in *EXIM BANK (1) LTD* (Supra) on how electronic evidence is produced in court. In his view, Mr. Mwita submits that such evidence is produced and admitted in evidence in terms of Section 40A of the Evidence Act

which does not require that which is discussed in the case above which discussion was premised in a wrong provision of law. Mr. Mwita admits that It Is true that PW.11 admitted in evidence that he Is not a Certified Public Accountant that is a CPA holder. However there is no law in this country which obliges Audit Reports to be prepared by 8 CPA holders and that Is why the learned counsel for the Appellant has not cited that a law. The learned State Attorney also admits that the court below did not refer in any way to the defence case. He therefore invites the court that It goes through the evidence; re-evaluate it as it was In the case of AMIN (Supra) though not binding to this court. By way of rejoinder, Mr. Mgongolwa, learned advocate contended that the court ought to have acted under the mandatory provisions of Section 230 of the CPA to determine whether or not the accused had a case to answer. Although this was not one of the grounds of appeal, that being the requirement of the law and this court being a court of law It has powers to determine It under the supervisory jurisdiction. Regarding to the judgment contested under Section 312 of the CPA, Mr. Mgongolwa contended that this court has to ask itself whether failure to comply with the provisions of Section 312 of the CPA has occasioned Injustice or not. He submits that according to the authorities they have cited where the evidence has not been evaluated by the trial court .and Where the trial court does not provide for reasons for decision the decision becomes fatally defective. Under such a situation an appellate court cannot step into the shoes of the trial court to evaluate the evidence and Sections 387 and 388 of the CPA are therefore Irrelevant. In respect of the 3rd , 5th , 6th and 7th grounds of appeal Mr. Mgongolwa submitted in rejoinder that they have shown that the evidence given by the prosecution does not prove the case beyond reasonable doubt. The Audit Report was not properly prepared for the Appellant was not involved in the preparation process. As to the admissibility of Electronic Evidence, Mr. Mgongolwa admits that it is true that it is done under section 40A of the Evidence Act. The criteria for admitting Electronic Evidence are as it Is provided for under Sections 78 and 79 of the Evidence Act. That Is why they applied the decision in EXIM BANK (T) LTD and submit that the criteria were not met in the case before the trial court. Mr. Mgongolwa contended further that the learned senior State Attorney submitted that the court should look Into the defence case. He submitted that the defence case Is as the evidence given by PW .1. The Appellant was not the only person in the process of LUKU sale. In its totality there was no evidence that linked the accused person with the offences she was facing in court. He reiterates prayers that this appeal should be allowed, the decision of the lower court be quashed and the appellant set free from jail. That is all from the parties. Going by the record and submissions by the parties, I find it is not disputed that the accused stood before the Resident Magistrates Court of Dar es Salaam at Klsutu charged with:

1. Two counts of Conspiracy to Defraud contrary to Section 306 of the Penal Code.
2. Eighty three (Eighty Four) counts of Stealing by Servant contrary to Sections 258 and 270 of the Penal Code, and
3. One count of Occasioning loss to a Specified Authority contrary to paragraph 10

- (1) and {4) of the 1st Schedule to and Sections 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act. The court did not find her guilty of the two counts of Conspiracy to Defraud and was accordingly acquitted. She was, however, found guilty of counts related to Stealing by Servant and that of Occasioning loss to a Specified Authority. According to the charge sheet in each count of stealing by servant, it was alleged by the prosecution that the appellant being a Senior Revenue Accountant employed by TANESCO did steal a specific sum of money in Tanzania shillings the property of the Public namely TANESCO. In the offence of occasioning loss to a Specified Authority it was alleged that the accused, did willfully cause TANESCO to suffer a pecuniary loss to the tune of Tshs. 1,312,717,717/17. The particulars of the offence do not state what the accused did that amounts to a "willful act". However, one may closely come to understand that upon going through the evidence or facts of the case comprehended from the adduced evidence. The facts are as short as that the appellant is an employee of TANESCO. She was a Senior Accountant who was heading the Revenue Department of TANESCO at Its Klnondoni North Region; she was working under MARY CHEDIEL KIMWERI (PW1). 10 Among her duties, was to dispense LUKU units to Vendors who had been authorized by TANESCO and deposited a sum of money in the Company's Bank Account with the NBC. The Appellant was suspected of having released LUKU units to vendors in excess to what they had paid for. In order to clear the suspicion, one EVARIST LUGUSI (PW11), the Principal Internal Auditor, audited the transactions. He detected from the audit that:-
- Some vendors were provided with the LUKU power/units through the LUKU System although they had not paid for,
 - Other vendors had paid less money for LUKU units they were given,
 - There were vendors who never paid money at the Bank but the Accountant gave/provided them with the power. In such transactions, the TANESCO had suffered a loss amounting to Tshs. 1,312,717,717/17. The applicant was implicated for she was said to be the only person who had access to the LUKU System possessing a password only known to her. PW4 SALOME SIMON MTANDOLA confirmed this story of evidence. She however is recorded to have said that "However another one may know how to do it" From this piece of evidence It Is clear that the accused/Appellant was suspected of releasing LUKU units to vendors who have not paid for them, or to vendors who paid less to the value of the units released to them by the appellant. One now may understand from these same acts that the appellant was charged with Stealing by Servant and Occasioning loss to a Specified Authority. The first question I will attempt to answer is whether under these circumstances the accused could be charged with the two offences altogether. My answer is no. I so answer in view of the provisions of Paragraph 10 (3) of 1st schedule to the Economic and Organized Crime Control Act which reads that:- "For the avoidance of doubt it is hereby declared that where any person charged with stealing anything, or any other offence under any written law, in relation to as specified authority is acquitted he may be subsequently charged and tried for an 11 offence under this paragraph even if the subsequent charge under this paragraph is

based on the same acts or omission upon which the provision charge was based. It is my understanding of this sub-paragraph that one act may constitute the offence of theft as well as occasioning loss to a specified authority. When a person does such an act the prosecution may charge him with theft or occasioning loss. Where a person is charged with theft, it depends on the decision of the court for the prosecution to decide whether or not to subsequently charge him with occasioning loss. It is only when such a person is acquitted of theft he can be charged with occasioning loss and a plea of outrefois acquittal cannot stand. According to the paragraph if the accused person is convicted of theft in such circumstances he cannot be charged with occasioning loss. This means therefore that the offence of theft and occasioning loss cannot be charged together. They can only be charged in the alternative. In this matter the court, therefore, erred in law when charged and convicted the appellant for offences under Sections 258 and 270 of the Penal Code and paragraph 10 (1) and (4) together. The two offences ought to have been charged in the alternative. As to the offence of theft, I have gone through the evidence and I am inclined to agree with the Appellant's learned Advocates, that although in each of the theft counts, a specific sum was alleged to have been stolen there was no evidence led in court by the prosecution that proves in each count that the appellant did steal the alleged money. The evidence given in court by the prosecution witnesses speaks of LUKU Units which were not referred, in any way, to the charge sheet. I agree with the defence counsels that the evidence given varied from the allegations leveled against the appellant in the charge sheet. A keen and competent prosecutor could have, in my view, noted the variance and move the court to order for amendment of the charge in terms of section 234 (1) of the CPA where it is provided that: "Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just". It is unfortunate that the prosecution and the court did not think of applying this section of the law in the situation they were faced with. This left the adduced evidence not supporting the charges of theft against the appellant. The trial court erred in law, therefore, when it acted upon the evidence which does not support the charges leveled against the accused. In this regard the conviction entered against the appellant in respect of all counts of stealing by servant is hereby quashed and the sentences imposed are set aside. As to the offence of occasioning loss to a Specified Authority (Taking it as an alternative Count) the available evidence shows that the appellant did supply LUKU Units to the vendors who had not paid for or who had paid less amounts. The procedure adopted, as per the evidence given, was that the vendors were required to deposit in the TANESCO Bank Account a sum of money equivalent to the value of the LUKU Units. The vendor then submits the Bank Pay In Slip to the Revenue Office of TANESCO for verification before the appellant releases the Units to the vendors. It is alleged that this procedure was not followed. In support of the allegation the prosecution tendered in court the Bank Pay in Slip and the

Bank statement to show the cash flow. Of interest here Is the Bank Statement which shows the status of the payment in its final destination. This was produced in court by the Auditor as 10.1. There was no anytime the same was admitted in evidence as an Exhibit. As the Bank Statement was not admitted in evidence the same does not have any evidential value. It could not therefore be acted upon. This renders the prosecution evidence to have remained with a doubt whether all LUKU Units released by the appellant were paid for or not. Had the trial court led its minds in that fact I am certain that It could have found "doubt on the part of the prosecution case, which doubt could lead it to resolve the matter in favour of the appellant for the same was reasonable. Again It is my view that 13 • the erred when It found that the case against the appellant had been proved beyond reasonable doubt. It Is Important to note here that the learned counsels for the Respondent as well as the Appellant did a good job in their submissions. It is unfortunate that I thought to approach this matter the way I have done a result of which I have not engaged myself in discussing those precious and of great assistance submissions by the parties in -determining this appeal. In the premises I find merit in the appeal. I subsequently allow it and therefore quash the decision of the lower court and set aside the imposed sentences. It is ordered that the appellant be released forthwith from jail if she is not therein for other lawful reasons. Dated at Dar es Salaam this 22 nd day of August, 2016. E. ~~~wa - JUDGE 22/8/2016 14 • Date: 22/8/2016 Coram: Mkasimongwa, J For the Appellant: Mr. Walter Chipeta assisted by Mr. Mgongolwa, Advocates For the Respondent: Miss Lupia State Attorney Court Clerk: Miss Judith Court: Judgment delivered in chambers this 22nd of August, 2016 in the presence of Mr. Walter Chipeta and Alex Mgongolwa, advocates for the appellant and of Miss Lupia, learned Stated Attorney, for the Respondent. Right of Appeal is fully explained. E.J.~ JUDGE 22/8/2016

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Prepared on 13 October 2026 · Esheria