

TANZANIA / JUDGMENT

republic vs kagwa ansi luoga and 2 others 2021 tzhcced 6687 21 september 2021

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IN THE HIGH COURT OF TANZANIA CORRUPTION AND ECONOMIC CRIMES DIVISION AT PAR
ES SALAAM ECONOMIC CASE NO. 06 OF 2020 THE REPUBLIC Versus

1. KAGWA ANSI LUOGA
2. MATHEW ANDREW MKULA
3. EDSON BENJAMINI KIYAULILO

JUDGMENT

16/08/2021 & 21/09/2021 E.B. LU VAN DA, J. The accused persons namely Kagwa Ansi Luoga (first accused), Mathew Andrew Mkula (second accused) and Edson Benjamini Kiyaulilo (third accused) are arraigned for leading organized crime contrary to section 4(l)(d) of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002 as amended (first count); stealing contrary to sections 258 and 265 of the Penal Code Cap 16 R.E. 2002 (second count); interfering with necessary services contrary to sections 3(d) of the National Security Act Cap 47 R.E. 2002 read together with Paragraph 12 of the First Schedule and sections 57(1) and 60(2) of Cap 200 R.E. 2002 (third count); occasioning loss to a specified authority contrary to Paragraph 10(1) of the First Schedule to, and sections 57(1) and 60(2) of Cap 200 R.E. 2002 (fourth count). It is alleged in the particular of offence that on 7/10/2017 at Lumumwe Mpanga Vilage within Kilombero district in Morogoro region, the accused persons jointly and together intentionally furthered the object of criminal racket by interfering with necessary service and occasioning loss to specified authority, stole three thousand nine hundred (3900) litres of fuel from locomotive No. DE 3009 the property of Tanzania Zambia railway Authority (TAZARA), which is a necessary service thereby causing accident and damage of the said locomotive and TAZARA railway infrastructure. The accused persons denied the information. In this matter, the prosecuting officers were Ms. Neema Mwanda learned Principal State Attorney, Mr. Nassoro Kaluga and Ms. Grace Komba learned Senior State Attorney appeared for the republic and on the defence side Mr. Edson Kilatu learned Counsel and Mr. Emmanuel Ukashu learned Advocate appeared for all accused persons. Issue for determination, is whether the prosecution managed to prove the information beyond reasonable doubt. There were some notable events which were registered to had took place prior train number 736 was involved in

accident at 520 kilometer, where locomotive No. 3009 had overturned sideways and plunged on the valley 35 metres from the railway, 17 wagons overturned, copper poured/scattered on the ground, 3 wagons derailed, four wagons and brake van including locomotive DE 3010 remained on the railway. Episode one wagon No. 833 had defective brake, Lawrence Lupumko Mpogole (PW1) erstwhile foreman at Makambako station, explained that on 6/7/2017 at 15.30 hours he received cargo train No. 736 which had two locomotive No. DE 3010 and DE 3009 with twenty four train wagon and one brake van. One train wagon had defective brake, it was fixed by the technician and was ready for departure at 21.000 hours. But in actual fact it was not fixed, as according to Joseph Ezekiel Mushi (PW9) who is the train examiner stated that they inspected one wagon after another, where they discovered one wagon DSO 833 at the middle had a brake problem, it was tight by lashing wire at a brake beam head which was damaged (cut). PW9 opened that wire and let all air to pass direct, that is they closed a cock which allow air to proceed to tyre, as such they closed brake to stop it entering the tyre, meaning the said wagon was moving without brake, which according to PW9 professionally had no effects provided is placed at the middle of other wagons. This fact was supported by Sadick Anthony Minja (PW10) stated that it is permissible to attach a wagon which have no brake (called piped only wagons), on train stock provided does not exceed 6% of number of wagons on that train and majority of wagons in that train apply brake properly. The first accused picked up as a defence and insisted that to attach a wagon with defective brake is fatal. But this complaint was without base, as operation rules are clear, it is permissible for piped only wagons to be attached at the middle of a stock of train wagons. Item E24(l) Section E of General Appendix to Train Working Regulation of Tanzania Zambia Railway Authority, provides, I quote, 'Wagons loaded with goods requiring isolation of automatic brakes or wagons with defective automatic brakes are allowed to be marshalled on a goods train by dosing their cut-out cocks. However the total number of such wagons (called "piped-only wagons") marshalled on a train shall not exceed 6% of the total number of wagons in the train (the figure should be brought to the nearest whole number)' On re-examination, PW10 stated that 6% of 25 wagons is equivalent to one point something. Meaning that a wagon No. 833 which was the only one attached while had defective brake, was within the permissible range. Episode two regarding handing over of fuel. It was the testimony of PW1 that when one M. Dyanyuma handed over the train to the first accused at Makambako, each locomotive to wit DE 3010 and DE3009 had 4,000 litres of fuel (diesel). But thereafter PW1 witnessed the first accused cancelling the entry recorded during handing over and replaced with a less figure of 3900 for each locomotive, as reflected in a crew handing over of fuel book exhibit Pl. The defence by the first accused was that he cancelled the fuel figure because it was consumed during repair where the train remained on rumbling from 15.00 hours to 21.28 hours when it departed at Makambako and some fuel were consumed during testing after repair. Of course, PW9 stated that they conducted brake test/short inspection of brake by checking air on brake van. But according to Batoni Amoni Mwaipungu (PW4) who is a retired locomotive driver (long experienced locomotive driver), was of the opinion that testing brake for twenty minutes it can use a very little fuel not more than ten liters. He added that 200 litres can travel for a distance of 100 up to 200 kilometres. A glance on a crew handing over fuel book exhibit Pl, reveal that on entry dated 6/10/2017 the first accused did not indicate reason for cancelling the amount of fuel he received and for

substituting with a less figure. The prosecutions were of the view that this constitute an element of stealing. To my view, the use of 200 litres of fuel diesel at Makambako was unjustifiable. The act of the first accused to alter entry made during handing over, after the driver who handed over to him (Dyanyuma) had departed, is suspect and at any rate is not commensurate to a conduct of an honest man. This is because there was no evidence indicating that after repair and testing, the first accused had checked fuel in the tank to have decreased to that level, rather he just cancelled arbitrarily. I will revamp back when discussing the issue of stealing. Episode three, at 526 kilometer the train stopped over sudden for three minutes, it is unauthorized station, thereafter a train departed at a high supersonic speed. According to Casto William Mdapo (PW2) who was the train guard, he observed air gauge it was reading zero, a train poured all brake. He got outside at a corridor, where he was thrown out at 520 kilometer and a train overturned. PW2 explained that when there is a need to stop at unofficial station, if there is a problem, the driver ought to hoot horn heavily, but he did not get those signals prior stopping. A story that if a train stop at unauthorized station, then the driver must alert the train guard by hooting horn, was supported by PW4 (erstwhile locomotive driver). A fact that after a train had stopped at Kimbwe 526 kilometer (which is unauthorized station) was supported by PW3 Cpl Benjamin Steven Sein and DC Exzavery Sanga PW6, police escort, who said it stopped for no more than three or four to five minutes. PW3 stated that the train guard wanted to establish why the train stopped and what was going on. A speed was too high, where the train guard told them that the train brake had failed. When the train guard was about to apply handbrake, to stop or slow down the train, they heard heavy bang, and a train stopped. PW6 stated that the train guard illuminated torch light in front, but the train was still moving too fast. It is to be noted that the train guard had testified as PW2 and was silent as to the fact that he attempted to apply handbrake or that he illuminated torch light in front. What PW2 said is that on attempt to establish why the train stopped and was moving on high speed and after he had observed air gauge reading zero and a train poured all brake, he(PW2) got outside at a corridor, where he was thrown out and lost conscious for about three minutes. To my view, if the train guard had displayed a signal by illuminated torch light in front or attempted to apply hand brake, he could had said so on explicitly terms. This is because to display proper signal to the driver is an exclusive domain of the train guard. Equally if the train guard had displayed a proper signal and the driver disregarded a stop signal, he ought to embark to a next stage of applying the emergency brake valve, as the circumstances suggest that the train was moving fast which could invariably amount to endangering the safety of train working. This is provided under rule 32(a)(5) and (7) paragraph or item five of the Train Working Regulation of Tanzania Zambia Railway Authority. I will revamp back to this theme when tackling episode four. Episode four, at 520 kilometer the train locomotive No. DE 3009 overturned and plunged into a gully including 17 wagons which also overturned, copper poured/scattered on the ground and 3 wagons derailed. Prosecutions witnesses in particular PW12 Haji Amoni Mboneko heaped blame to the first accused as to why after he had managed to stop at Kimbwe 526 kilometer though unauthorized station, he departed instead of applying hand brake and protecting the train by stoppers to restrain it from moving, while knowingly that ahead there was steep slope, forest and sharp corners with a curve of radius 200, although PW14 said it was a smooth corner. The first and second accused persons defended that there was a brake failure and that after he managed to

stop, and when he was troubleshooting to detect a problem in view of informing the train guard and while the second accused was at the verge of placing protectors, a train started to move slowly, then gained momentum. A fact that a train overturned because of brake failure was supported by PW2 (train guard). There was a question of the driver to alert the train guard by hooting heavily (stated by PW1, PW2) or hooting continuously nonstop (as put by PW12), which was not done. The first accused defence is that he was struggling to establish the fault first, and then to inform the train guard after detecting a problem. According to him, to stop does not require use of signal, rather he use signal or summon the train guard after detecting the problem. I think the first accused was aligning his defence to rule 116 of Train Working Regulation of Tanzania Zambia Railway Authority, which is all about audible signals given by locomotive whistle, at paragraph eight in the table, in aggregate provide that one whistle continuous long sounds, is an indication of alarm signal, which is applied at the time when a train is compelled to stop in section and unable to restart and it is necessary to inform the guard. As such an argument that the driver ought to inform the train guard prior stoppage is novel, seems to be missing or not provided for in the rules of operation. Presumably the train guard desisted to apply emergence brake after revealing that air gauge was reading zero. Rule 32(b) of Train Working Regulation of Tanzania Zambia Railway Authority, provide '... If the emergency brake valve is to be used while the train is working on a long and heavy descending gradient, the air gauge must be checked first. If the needle of the gauge indicates that the specified air pressure is already reduced by one kilogram, the emergency brake valve must not be applied' Herein, the train was moving fast at a heavy descending gradient and air gauge was reading zero. Episode number five regarding three jerry cans (including one t-shirt which had blood stain, one rubber shoe which had blood stain) found inside locomotive DE3009 which had overturned; eight jerry cans whereby one jerry can contained diesel and one polysack bag found near the scene at 516 kilometer (exhibit P14); three jerry cans and a trouser found after locomotive DE 3009 was uplifted (exhibit P15). This area was a gray area for discrepancy on the part of prosecution witnesses on who and how these jerry cans were found and located. PW3 said during inspection led by Nicas (PW18) which was done immediately after arrival of rescue team, they managed to see three empty jerry cans blue colour with capacity volume of 20 litres each, a pair of shoes which had blood stain, a white singlet (vest) with blood stain, which were found at the valley where there was a locomotive. PW18 said he peeped inside locomotive DE3009 and managed to see those three jerry cans, where he entered inside and took them. Lucas Philemon Mnyegewa (PW5) who was accompanied by PW18 said upon arrival at the scene they saw people from civil department repairing railway and some holding three jerry cans which were aside a locomotive DE 3009. Godfrey Abel Mwakyonde (PW7) who visited at the site alongside with PW5 and PW18, said they (PW7) inspected the train wagon which had plunged in the valley where they saw three blue jerry cans. The testimony of PW7 resemble PW6 who said Nicas (PW18) and his colleague conducted inspection, where PW6 saw them coming with three empty jerry cans, one pair of shoe, white singlet. It is to be noted that PW18 stated that he descended alone to a gulley where locomotive DE 3009 had overturned. Regarding eight jerry cans found at 516 kilometer, PW18 said he went there on foot alone and recovered the same and carried them alone back to 520 kilometer. It is to be noted that one jerry can had contained 25 or 30 litres of diesel, where PW18

said he carried them alone including those seven empty jerry cans and one polysack bag then walked on foot four or five to six kilometers (an aggregate of ten kilometres go and return). PW5 who was throughout in company of PW18 where they departed together from the scene to Mlimba, thirty minutes after PW7 had left, surprisingly PW5 said nothing regarding those eight jerry cans. PW7 stated that on 7/10/2017 he was dialed call by the driver of schoma which was sending railway sleepers for repair, one Pastoli Lipangahela, that when he arrived at 516 kilometres he met with acting gang foreman of Lumumwe one Mr. Issa Poyo alleging to have seen eight jerry cans, one had contained diesel 25 litres. PW7 directed them to collect them and handover to Nicas (police officer) at Mlimba. The alleged Pastori Lipangahela and Mr. Issa Poyo were not summoned to testify. Regarding those three cans and a trouser (exhibit P15) which were found after locomotive DE 3009 was uplifted as stated by Insp. Haji Idd Kingazi (PW19) and PW10, but PW7 who was also there when DE3009 was uplifted said nothing regarding the three empty jerry cans alleged to have been compressed or damaged by a locomotive. Another issue was introduced by PW5 regarding seeing people of civil department observing how their railway was damaged and making attempt to repair. This fact was boldly stated by PW5 alone. The rest witnesses who were in company of PW5 to wit PW7, PW18 denied seeing those people of civil department repairing railway. But the evidence of PW3 was suggesting that after the rescue team had arrived, some of them picked PW2 who was injured and took for treatment and some remained there at a train. To my view this confusion and discrepancy was created because the first people to visit at the scene of accident who were alleged to be a rescue team who ferried PW2, remained anonymous undercover and were excluded to testify in court. The rescue team was excluded in the whole process of investigation, while they were the first group to arrive at the scene after occurrence of accident and certainly, they have more details and information compared to other groups or team. Conceptualization of all discrepancies depicted above has the devastating effects on the prosecution case and in totality it rendered the prosecution story suspects as to who was stating the truth, in regard the manner those jerry cans were found and seized at the scene. Paradoxically, jerry cans which were recovered and seized at the scene, to my view formed a cornerstone of prosecution case. Therefore, anything wrong or mishandling them, distort the entire story. Coming back to the issue of brake application which formed the point of contention during trial. The first and second accused including PW2 opined that the accident was caused by brake failure. It is to be noted that from the outset immediately after occurrence of accident and initial stages of investigation, the prosecution including TAZARA were aware that the accused line of defence was hinged on brake failure. However, among the prosecution witnesses who were paraded to testify no mechanical engineer appeared to explain on brake system or application and what amount to brake failure and consequential events. According to the first accused after occurrence of brake failure he attempted to apply full brake application in vain, as the gauge was reading zero. The facts that there was brake failure and that air gauge was reading zero was supported by PW2. PW10 stated that when they arrived at the scene, they saw state of brake blocks which are used to apply brakes were almost not used, as in case of brake failure, they expected to see attempt of clue to apply brakes, the locomotive has emergency brake and independent brake, they saw indications that there were no efforts to apply brakes. But on cross examination he said issues of brake are the domain of mechanical engineer. And in fact,

the opinion by PW10 is wanting, as it is in record that the train had stopped at various destinations, including at unauthorized station at Kimbwe 526 kilometer. According to PW17 whenever a train stop, it uses brake. Therefore, the general sweeping statement by PW10 that brake blocks were not used completely is highly suspect. PW17 also was of the view that there was no brake failure, on the explanation that if it was there, he could retrieve in a computer and reflect into his report. However, his story falls short, as that report was not tendered for appraisal by the Court. On cross examination, PW17 said his train fault report he downloaded is not attached to accident inquiry report exhibit P12, although initially he said it formed part and parcel of exhibit P12. It was the evidence of PW17 that if pipe brake reads zero, it means there is an emergency brake application. This version supports the story of the first accused, but as much PW17 made a caveat that he is an expert on computer system and electric engineer, still it cannot be taken as conclusive position. It is useful in so far as it assists the accused's defence. PW16 had raised an interesting argument that no indication that fuel was poured on the ground at the scene of accident and he concluded that all fuel in DE 3009 was stolen that is why locomotive DE 3009 lost direction and overturned. But this assumption is novel, because PW10 said after uplifting DE 3009 they recovered only 90 litres of fuel which remained in the tank, out of 3900 litres. According to PW10 from Makambako to the scene of accident the consumption of fuel is between 600 to 900 litres. It is to be noted that the capacity volume of illegal jerry cans found inside and under DE 3009 including at 516 kilometer is between 25 to 30 liters capacity. Now assuming the first accused cancelled those 100 liters on each locomotive for purpose of stealing, it means 4000 liters minus 900 liters (consumed by the locomotive) minus 90 litres (remained in the tank) remained a balance of 3,010 liters which are suspected to have been stolen from locomotive DE 3009 alone. It means it ought to be carried by 100 jerry cans! My undertaking is grounded on the premises that no evidence was tendered showing the rate of evaporation if any. There was no evidence which was tendered to establish if fuel in locomotive DE3010 remained an amount of 3,100 liters after consumption of 900 liters as suggested by PW10. Be as it may, there was evidence that a locomotive DE3010 was used to remove the eight jerry cans from the scene of accident to 516 kilometer, including one jerry which had contained fuel (as per report findings item 3.1(25)). The evidence of the chemist report exhibit PIO prepared by Emmanuel Naftani Gwae (PW16), establish that sample 'A' from locomotive DE3009 and sample 'B' from jerry can part of exhibit P14, resemble in terms of chemical and physical properties. Essentially I was prepared to hold the first accused liable for stealing, but in view of the findings above that the evidence on who and how the jerry cans part of exhibit P14 and P15 were found and collected, it creates doubt which invariably render unsafe to ground conviction on the evidence found to be suspect. Above all, there was no tangible evidence to prove the alleged sms purported to have been sent by the first accused to the control office Mbeya, while at 516 kilometer. Another aspect is on the information, where the accused persons were charged for less amount of fuel to wit 3,900 which were cancelled by the first accused. Meaning that those 100 liters which the first accused had unilaterally deducted were condoned by the republic. Regarding the evidence of cyber, being communication between the first and second accused persons in connection with the accident, Grace Hussein Mavuche (PW14) tendered a cyber report exhibit P6, CD exhibit P7 containing messages retrieved by a device called cellebrite mobile forensic from four mobile phone make

Huawei (two unit), Tecno and Bonitel exhibit P8. But during cross examination, PW14 said exhibit P7 has no hash value which is a digital signature generated automatically which guarantee authenticity as in case a document is altered a hash value change. Again, in her report, showed a message sent from +255763035506 on 10/10/2017 at 13.34 hours, was answered at 13.24 hours, which is very awkward and render her report suspect for issues of authenticity and reliability, as she conceded that it is misleading. More important, a report exhibit P6, according to PW14 said is not automatically saved as PDF rather is the discretion of the one who save it. In other words, PW14 failed to eliminate doubts of possible tempering in the process of retrieving, processing including storage. As such her report is unreliable. Another aspect is on competence of the first and second accused. The second accused was given a title of assistant driver on account that he failed exams. According to PW10 assistant driver is a job title. Well there is no dispute on that, but nowhere in the Train Working Regulation of Tanzania Zambia Railway Authority or its General Appendix provide that a person who fail an exam will be rewarded a job title of assistant driver. According to the second accused he commenced work in 2014 after attending driving training at Mpika TAZARA College. It is unknown as for how long he could work as an assistant driver, it was not known if it was permanent until his retirement or not. According to rule 2 of the Train Working Regulation of Tanzania Zambia Railway Authority, provide Anybody failing the technical examination, may be given another opportunity to pass an examination. Complete failures shall either be downgraded or laid off' Therefore, the only chance for the second accused was to re-sit his examination on the aspect of shunting which he failed on the first sitting/practical. And in case of failure he ought to have been disqualified/sacked or assigned other work. To be precisely, the second accused did not qualify to be an assistant driver. As for the first accused, PW15 stated that the first accused was indicted for forgery before subordinate court, as the first accused said Kagwa Luoga is not his name, he purchased certificates. As such an argument by PW10 that the first accused was a competent and licensed driver, is invalid. How can a person who failed eve to recite and pronounce properly the name of a school alleged he completed form six, be said to be competent? This is because during a trial within trial the first accused said Pilimiro, instead of Peramiho, which is a very famous school by the way. He could not recall a year he completed form six neither form four. He could not locate an exact vicinity or destination (street/suburb) where Peramiho is located in Songea. And it is a fallacy idea to imagine a person of this caliber to be an honest man. The conclusion by PW15 who said TAZARA employed a wrong person who is incompetent and was unfit to be a locomotive driver, is valid. Regarding evidence of caution statement for the second accused exhibit P3, Israel Amonisye Mwakalinga (PW11), when asked questions by the court, PW11 readily conceded that the handwriting in the contents and those used for inserting time, differs, as the ink on time and date is bold. And date on the supplementary sheet was altered, even a year was altered. Even the statement of the first accused exhibit P5, suffers the same anomaly. There is no endorsement as to why it was altered. This make the statements suspect and unreliable. It is true that this matter is based on circumstantial evidence as alluded by the learned Senior State Attorney. However, to ground conviction based on circumstantial evidence, it must be must watertight. As was established in the case of Inspector of Police, Tamil Nadu v. John David (2011), NSC 418, cited by the learned Senior State Attorney, I quote, 'the law is well settled that each and every incriminating circumstance must be dearly

established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and not other hypothesis against the guilt is possible' Herein there was circumstantial evidence that the third accused had assisted one Mendrad who sustained leg injury to obtain treatment without a PF3 at St. Francis Hospital which is a private facility at Mlimba. PW15 stated to had visited there including seeing the medical doctor who attended Mendrad and an entry into an outpatient register. But the said medical officer was not summoned and a register was not tendered. There was an evidence that villagers saw people who had carried empty jerry can boarded a locomotive, as stated by PW12 (Haji Amoni Mboneko). But the said villagers were not summoned. Even the Kimbwe Village Chairman and watchman of TAZARA at bridge number 116, who were alleged to have been interviewed by PW12, were not summoned. As such the evidence of PW4 that he was told by the first and second accused to had carried unauthorized people in the locomotive, feeble for want of corroboration. Also, PW15 said the polysack written Edi Msagampunga part of exhibit P15, pertain or belong to the third accused, but PW18 who is living at Mlimba, said he don't know if Edi Msagampunga is a nick name or alias for the third accused. In view of above, the chain of events was contorted, making the circumstantial evidence suspect. Therefore, an argument by the prosecuting officer/learned Senior State Attorney that the discrepancies are minor, cannot be upheld. That said, I nod with the argument of the learned defence Counsel that the prosecution has not proved their case (information) on the required standard. Therefore all offences of leading organized crime contrary to section 4(l)(d) of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002 as amended (first count); stealing contrary to sections 258 and 265 of the Penal Code Cap 16 R.E.- 2002 (second count); interfering with necessary services contrary to sections 3(d) of the National Security Act Cap 47 R.E. 2002 read together with Paragraph 12 of the First Schedule and sections 57(1) and 60(2) of Cap 200 R.E. 2002 (third count); occasioning loss to a specified authority contrary to Paragraph 10(1) of the First Schedule to, and sections 57(1) and 60(2) of Cap 200 R.E. 2002 (fourth count), are dismissed. All three accused persons are acquitted.

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