

TANZANIA / JUDGMENT

sofia hamis nambea another vs 2023 tzhc 19876 31 july 2023

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA AT
MTWARA CRIMINAL APPEAL NO 90 OF 2022 (Originating from Lindi District Court in Economic
Case No 3 of 2021 at Lindi) SOFIA. HAMIS NAMBEA..... 1st APPELLANT ALTABDU
ALI..... APPELLANT VERSUS THE REPUBLICRESPONDENT

JUDGMENT

26!: June .&3:2i July 2023 LA LTAl KA, .1 The appellants herein SOFIA HAMIS NAMBEA and ALI
ABDU ALI were arraigned hi the District Court of Lindi at Lindi charged with two counts:

1. Stealing c/s 257(1),(2)(a) and 265 of the Penal Code Cap 16 RE 2019. 2. Occasioning Loss to a Specified Authority contrary to Paragraph 10(1) of the First Schedule to and Section 57(1) and 60(2) both of the Economic and Organized Crime Control Act Cap 200 R.E. 2002. It was the prosecution's assertion that the first and second appellant (then accused) on diverse dates between the 9th day of October 2017 and Page 1 of 15 10 th October 2017 at Mnazi Mmoja area within the District of Lindi in Lindi Region being clerk and board member of Mnazi Mmoja AMCOS respectively, did steal 3993 kilograms of cashew nut valued at Tanzanian Shillings Fifteen Million Two Hundred and Forty Five and Two Hundred Seventy Four Thousand (TZS 15,245,274/=) only the property of MNAZI MMOJA AMCOS. On the second count, the prosecution alleged that the first and second appellants herein on diverse dates between 9th day of October 2017 and 10th day of October 2017 at Mnazi Mmoja area within the District of Lindi in Lindi Region being clerk and board member of Mnazi Mmoja AMCOS respectively, by willful act caused the said Mnazi Mmoja AMCOS to suffer a pecuniary loss of Tanzanian Shillings Fifteen Million Two hundred and Forty Five and Two Hundred Seventy Four Thousand (TZS 15,245f274). When the charges were read out and explained to the appellants (then accused) they pleaded not guilty. The trial court proceeded to conduct a full trial. Having been convinced that the prosecution case had been proved beyond reasonable doubt, the trial court convicted the appellants as charged. It proceeded to sentence them to a fine of 500,000 or 12 months in jail for count one, and 5 years in jail and a compensation of 7,622,635/= for count two. Dissatisfied with both conviction and sentence, the appellants have appealed to this court on four grounds as reproduced hereunder:

1. That the Honourable trial court erred in law by failing to see that the crimes alleged to have been committed by the Appellants were not proved to the required standards, that is, beyond reasonable doubt,
2. That the Honourable trial Court erred in law by failure to see that a chairman of the board for Mnazi Mmoja AMCOS and other seven (7) farmers alleged to have been paid were important and necessary witnesses in proving the alleged crimes for which the court was supposed to draw an inference adverse to the prosecution.
3. That the Honourable trial Court erred in law by admitting Exhibit P7 in contravention of the Evidence Act Cap 6 RE 2019.
4. That the Honourable trial Court erred in law by failure to see that Exhibit P2 and P3 as tendered by PW1 were illegally tendered and received in evidence. When the appeal was called on for hearing on the 26th of June 2023 the appellants appeared under custody while enjoying legal services of Mr. Hussein Mtembwa, learned Advocate. The respondent, on the other hand, was represented by Mr. Melchior Hurubano, learned State Attorney. Both learned counsel opted to make oral submissions as summarized hereunder. Taking up the podium, Mr. Mtembwa stated that he had chosen to start with the fourth, then third, second, and finally, the first grounds of appeal, in that order. Submitting in support of the fourth ground, Mr. Mtembwa clarified that the complaint was that the trial court erred in admitting exhibits P2 and P3, which were tendered by PW1 illegally as evidence. Mr. Mtembwa went through the documentary evidence and pointed out that the owner of the exhibits was Mnazimmoja AMCOS. He mentioned that the first appellant had objected to the admission of the evidence, but the court admitted them as exhibits P1 and P2, which were attached to the audited report labeled P1. Mr. Mtembwa raised the issue that there was neither oral nor documentary evidence to show how PW1 obtained the exhibits or how they came into his possession for tendering. He further explained that PW1, an officer from the Registrar of Cooperative Societies, tendered the Page 3 of 15 documents of Mnazimmoja AMCOS without indicating where he obtained them from, even though he was not involved with the office. Regarding exhibit P4 (Hati ya Kuchukutia Vife/ezo), which PW2 from the PCCB tendered, Mr. Mtembwa clarified that PW2 was not the person who originally tendered the exhibits P2 and P3. Instead, PW2 received them from a person called Salumu S. Mkalia for the first two exhibits, and for the last exhibit ending with 75, PW2 received it from one Richard Zengo, who was PW1. Mr. Mtembwa expressed doubts about the credibility of Salum Mkalia, who was never present in court, and questioned whether PCCB received the exhibits from PW1, who also did not disclose the source of the documents. He suggested that summoning Mkalia would be the best way to explain how he obtained the documents. PW3, the secretary at Mnazimmoja AMCOS, identified exhibits P2 (page 33) and P3 (page 34) of the proceeding, but Mr. Mtembwa maintained that the person who tendered the exhibits was not the appropriate individual. He asserted that these exhibits were incriminating, and their origins were unclear, making them susceptible to tampering. Mr. Mtembwa referred to the case of PAUL M. ADUKA V. REPUBLIC CRIM APPEAL NO 110 of 2007, cited in the case of Zainab d/o

Nasoro @Zena v. R. CAT, Arusha Crim Appeal No 348 of 2018. He highlighted the court's concern about the chain of custody, emphasizing the need for chronological documentation during the movement of exhibits from one person to another. Page 4«r i5 The learned Advocate acknowledged that the Court of Appeal Tanzania (CAT) had accepted oral evidence to establish the. chain of custody, citing the case of ft V. MUSA HATIB Crim. Appeal No 130 of 2021 CAT, Tanga. However, he noted that in the present case, there was neither documentary nor oral evidence establishing the. chain of custody. Mr. Mtembwa expressed suspicion that the documents might have been received during the investigation, but he referred to the case of MAGAMBO PAUL AND ANOTHER V. R. [1993] TLR 220, which stated that the District Court was not supposed to consider such documents in its judgment, In conclusion, Mr. Mtembwa emphasized the importance of Salum Mkalia as a witness who could have provided information on how the documents were obtained before being handed over to the PCCB. Moving to the third ground of appeal, Mr. Mtembwa mentioned that it was about the trial court's error in admitting exhibit P7, which he believed -contravened the Evidence Act No. 6 RE 2022. He stated that he had examined Exhibit P7 and noticed that the appellants had objected to it, claiming it was not an original document. He asserted that he could confirm that it was a carbon paper in pink color. According to Mr. Mtembwa, this indicated that such incriminating evidence was admitted as a photocopy. He referred to the famous case of LAURENCE SURUMBU TARA v. AG and 2 Others Civil Appeal No 56 of 2012, CAT Arusha, which was: commonly known as the "pink case." He explained that it involved election forms and was similar to the present case. In that case, the court had ruled that the appellant had not filed any notice to produce time original documents from the second respondent. As a result, Pane 5 of f5 there was no justification for the trial court to use the photocopy, which he argued did not comply with section 67 and 68 of the Evidence Act (TEA). Mr. Mtembwa disagreed with the learned trial magistrate's decision to accept the pink copies as evidence, and he believed that the trial court should have expunged the evidence. Mr. Mtembwa. stated that on the second ground of appeal, the trial court had erred in not recognizing the importance of summoning the chairman of the board of AMCOS and the seven farmers who were purported to have been paid the money, which he considered to be the crux of the matter. The learned Advocate mentioned that he was alive to the dictates of section 43 of the TEA, which indicated that no specific number of witnesses was required. Nevertheless, he believed that these witnesses were crucial to corroborate the evidence presented by PW1, PW2, PW3, and PW4, along with the eight exhibits tendered. Mr, Mtembwa cited the case of AZIZI ABDALLAH V. R. [1991] TL.R .71, where on page 72 of the judgment, the court had emphasized that the prosecution had a prime fade duty to call essential witnesses, and failure to do so could lead to a negative inference being drawn. Mr. Mtembwa then focused on the Chairman of the Mnazimmoja AMCOS board, stating that this witness should have proven that a total of TZS 15245274 had indeed been lost, as the society was the one that had incurred the ioss. He was aware that under section 68(1) of the Cooperative Societies Act of 2013, the management of cooperative societies is vested in the board, and the payment link was handled by the Page 6 of 15 board. Therefore, a representative from the board should have presented proof of payment, but currently, there

was no evidence of this matter. Regarding the seven farmers mentioned in the record, who were allegedly paid, Mr. Mtembwa asserted that they were supposed to appear in court to explain now they were paid and by whom. The learned counsel emphasized that the appellants had denied the allegations and testified that the seven farmers were paid the money of the buyers and not from any other sources. Mr. Mtembwa moved on to the first ground of appeal stating that the court had erred in failing to see that the offenses were not proved beyond reasonable doubt. He indicated that he was aware of section 3(2)(a) of the Evidence Act, which stated that in criminal cases, the burden of proof was beyond reasonable doubt. He also referenced the case of JOHN MAK'OLOBELA KULWA AND ANOTHER V. R. [2002] TLR 296, Which highlighted that a person is not guilty of a criminal offense simply because their defense is not believed. Instead, a person is found guilty and convicted based on the strength of the prosecution's case, which must prove the matter beyond reasonable doubt. Mr. Mtembwa asserted that they had raised doubts about the admission of exhibits P2, P3, P4, and P7, He noted that it was on record that P8 was the same as P3, and he had shaken the admission of those documents. He emphasized that the case rebed strongly on documentary evidence. Since they had raised doubts about the propriety of admitting Page 7 of 15 such evidence, he prayed that the court would expunge them. If the court did so, Mr. Mtembwa asserted, nothing else would be. left. He further pointed out that the board was not involved in the matter. He mentioned that on page 19, PW2 had stated that the receipts rendered contained the signature of the first appellant, and he claimed that the signature had been taken to the forensics bureau. However, no report from the forensic bureau was tendered. Mr. Mtembwa stressed that the main issue was theft and occasioning loss, and there was no evidence to prove that the money left Mnazi Mmoja's AMCOs account. Thus, he argued that the case was not proved beyond reasonable doubt. Finally, he stated that their petition of appeal prayed for the court to reverse the decision of the trial court dated 19 May 2022, set aside the sentence and conviction, and set the appellants free unless they were held in another lawful cause. Mr. Hurubano, the learned State Attorney for the respondent, stated that the respondent republic supported the conviction and sentence of the trial court. He then addressed the grounds of appeal in reverse order. On the first ground, he expressed the view that to prove the counts upon which the appellants were convicted, the prosecution needed to establish two main elements. Firstly, that the appellants took or converted 3993 kilograms of cashewnuts belonging to Mnazimmoja AMCOs, and secondly, that this act was done fraudulently or dishonestly without any claim of right. t'as-tV 8 of i 5 Mr. Hurubano asserted that the respondent was confident that these two elements were proven beyond reasonable doubt. He cited exhibit P1, the audited report, which showed that 3993 kilograms of cashewnuts were received by the appellants from seven farmers but were not taken to Mnazimmoja AMCOs. The receipts issued for these cashewnuts were tendered as exhibit P2 and were also admitted as exhibit P7. He noted that the names of the seven farmers did not appear in exhibit P3, which was similar to exhibit P8 (a list of farmers). According to the testimony of PW2, these names were omitted, and the cashewnuts from these farmers never reached the MnEizi.mmoja main warehouse. Mr. Hurubano referred to the testimony of PW3, who proved that the first appellant was

responsible for weighing all the cashewnuts brought and issuing receipts accordingly. PW3 also indicated that the second appellant was a board member of the AMCOs, and his functions were to inspect the cashewnuts brought to the AMCOs and ensure their transportation to the main warehouse. The learned State Attorney emphasized that the prosecution contended that the appellants received the cashewnuts, issued receipts, but never took the same to the main warehouse. He highlighted that the appellants did not dispute receiving the cashewnuts and issuing receipts, and they did not cross-examine PW2, implying their acceptance of his statement. Regarding the second count, Mr. Hurubano pointed out that the prosecution needed to prove two elements: (i) that the AMCOs: was a specified authority, which was defined under section 2 of the Economic and Organized Crimes Act RE 2019, and (ii) that the AMCOs suffered pecuniary Page 9 of 15 loss due to the actions of the appellants. He argued that these elements were proven by the witnesses and exhibits tendered/ including receipts and a list of farmers whose cashewnuts were taken to the AMCOs. Regarding the complaint about the chairman of the board or any other member not being summoned, Mr. Hurubano argued that this argument did not fit the facts of the case since exhibit P1 stated that the information was obtained from members of the board/ and the second appellant had testified that he was a board member. He further referred to PW3's testimony, recorded on page 36 of the proceeding, where he stated that the AMCOs chairman authorized the payment of seven farmers. This, according to Mr. Hurubano, indicated that the AMCOs had paid the farmers whose cashewnuts were not taken to the main warehouse. He emphasized that the cashews were received by the AMCOs, and the farmers expected to be paid accordingly. The appellants had presented a witness, DW2, among the seven farmers, who testified that after complaining, he was finally paid. This, in his view, proved that the seven farmers had been paid, resulting in loss to the AMCOs. Mr. Hurubano stated that the second ground of appeal was regarding the non-summoning of the members of the board or the chair. He mentioned that as previously mentioned, the witnesses brought to court had already proven the elements. According to him, the failure to summon the witnesses in question did not have an impact on the required proof. He expressed confidence that the witnesses had indeed proved the committed offence, referring to Section 43 of the TBA (supra) 10 of 15 Mr. Hurubano stated that co the 3rd ground, the court had erred in admitting exhibit P7. He conceded that the evidence was a copy and therefore inadmissible as the conditions for using secondary evidence were not met, However, he argued that an exception under section 67(l)(b) of the TEA applied, allowing for the use of secondary evidence when the existence, conditions, or contents of the original had been admitted in writing by the person against whom it is proved. He pointed out that during the preliminary hearing on page 5 of the proceeding, the 1st accused, who had tendered the exhibits, had admitted to. the existence, conditions, and contents of the secondary evidence. Thus, he believed that despite not being original, the documents were admissible due to the defendant's confession on their content, and he suggested dismissing the ground for lack of merit. On the fourth ground, which challenged the admissibility of exhibit P2 and P3, Mr. Hurubano objected to the assertion made by the learned counsel that only documentary evidence should be given weight in the case. He

argued that even if these exhibits were expunged from the proceeding, they would not undermine the case as the contents had been clearly expounded. Moreover, he stated that these exhibits were similar to exhibit P7 and P8 and could stand in place of the contested exhibits. Mr. Hurubano added that any irregularity in admitting P2 and P3, as per section 388 of the CPA Cap 20 & E 2022, would not vitiate the proceeding but might lead to a retrial. He emphasized that this explanation did not support the allegations made by the learned counsel. He also mentioned that the witness had been instructed by the RAS (Regional Page 11 of 15 Administrative Secretary). In conclusion, Mr. Hurubano expressed the opinion that the grounds and the appeal, in general, were devoid of merit and should be dismissed entirely. In rejoinder, Mr. Mtembwa stated that in general, he found the submission of the learned counsel to be supportive of their grounds of appeal. The learned counsel had argued in response to the 1st ground based on P1, P2, and P3. He mentioned that P2 is equivalent to P7, and P3 is equivalent to P8. The learned Advocate was of the view that P2, P7 (now also P7 and P8), had been weakened. If the court were to expunge them, only oral evidence would remain, which, in their opinion, cannot stand as everything was documented. Mr. Mtembwa agreed with the learned counsel that cashew nuts were received, and receipts were given, but the issue was whether the seven farmers were paid and by whom. Regarding the 2nd count, the learned counsel had no objection that AMCOs is a specified organization. However, Mr. Mtembwa averred, the controversy lay in how they suffered the loss. According to the learned Advocate, there was nothing to show that AMCOs made any payment. He disputed the use of the audited report as a basis for conviction, arguing that it was neither owned nor prepared by AMCOs. On the matter of witnesses, he insisted that the board was the main complainant and raised concerns about the absence of the complainant in court. He believed that a negative inference should be drawn and insisted that the seven farmers who were paid should have been called to testify. Page 12 of 15 Regarding the 3rd ground, Mr. Mtembwa noted that the learned State Attorney conceded that the document was a photocopy and thus should be expunged. He disagreed with the exceptions cited by the learned State Attorney, stating that there was a misinterpretation of the section, and emphasized that the accused person/appellant should have provided a written statement to acknowledge the content, which the tenderer failed to do. Concerning the 4th ground, Mr. Mtembwa highlighted that the learned State Attorney had agreed that exhibit P2 and P3 were erroneously admitted and should be expunged. He disputed the reliance on section 388 of the CPA as claimed by the learned State Attorney and prayed that the court grants the appeal. I have dispassionately considered rival submissions by the learned counsel for both parties and thoroughly examined the court records. Like Mr. Mtembwa, my analysis will also start with the fourth ground of appeal which I find that it touches the fabric of fair trial. I am alive to the legal position that it is upon the prosecution to choose which witness to produce and which evidence to tender." See the case of YOHANIS MS1GWA V. REPUBLIC [1990] TLR 148 (CAT). Nevertheless, this court has time and again emphasized the need to ensure that investigatory, and prosecutorial functions are separated. Tenets of fair trial require that an accused person knows the source of evidence that is being produced against him or her. Although it is not upon this court to prescribe how investigation and evidence

gathering should be done, it is not too late to emphasize that secrecy and fair trial rarely go together. Page 13 of 15 Mr, Mtembwa raised the issue that there was neither oral nor documentary evidence to show how PW1 an Officer from the Office of the Registrar of Cooperative Societies/ obtained the exhibits or how they came into his possession for tendering. If a Cooperative Society is a legal entity with its own board/ it is only fair to expect that in case of any loss or abuse of office/ the cooperative society in question will take the lead in producing evidence in court and offer a more credible version of the story. The Registrar should offer expert opinion if needed. In this case, as correctly observed by Mr. Mtembwa, PW1 tendered the documents of Mnazimmoja: AMCOS without indicating where he obtained them from, even though he was not involved with the office. It is also on record that the PCCB office and that of the Regional Administrative Secretary were involved in production of some documents. This is not against any law. However, if offences do not fall under the PCCB Act, modus operandi must change to ensure that the court is fully aware of the intricacies involved in the production and custodianship of a given document. The purpose is to ensure authenticity. I should also emphasize that the blanket statement "kufcababishiia hasara..." as used in day-to-day policy fora is, unfortunately not coterminous with the offence of "occasioning loss to a specified authority." As correctly argued by Mr. Hurubano, the offence is made up of two elements namely that a given entity is a specified authority and secondly that the act has occasioned loss. In the present matter, in my opinion, it is not enough to say since the seven farmers ended up being paid by Mnazi Mmoja AMCOS, that is tantamount to getting loss. Actual loss must be established. Page 14wf15 Premised on the above, I allow the appeal. I order that the appellants SOFIA HAMIS NAMBEA and ALI ABDU ALI be released from prison forthwith unless they are being withheld for any other lawful purpose. I also nullify the order lor payment of compensation. JUDGE 31.07.2023 Court Judgement delivered under my hand and the seal of this Court this 31st day of July 202.3 in the presence of Mr. Melchior Hurubano, learned State Attorney for the Respondent, Mr. Hussein Mtembwa, learned Advocate for Court The right to appeal to the Court of Appeal of Tanzania fully explained. 31.07.2023 Page 15 of 15

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