

TANZANIA / JUDGMENT

CRIMINAL APPEAL NOSULTAN ALI NASSORO NEWNEWNEW

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1 January 1983

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MTWARA SUB-REGISTRY AT
MTWARA CRIMINAL APPEAL CASE NO 62 OF 2023 (Originating from the District Court of Kiiwa
at Kiiwa Masoko in Criminal Case No 3 of 2022) SULTAN ALI NASSORO..... 1st
APPELLANT SILVERY MAXIMILLAN MAXMILLIAN 2nd APPELLANT VERSUS THE
REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: November 2023 r ■ Date of Judgment: November 2023 LALTAIKA, J. The appellants herein SULTAN ALI NASSORO and SILVERY MAXIMILLAN MAXMILLIAN referred to herein as the 1st and 2nd appellant respectively or simply appellants when referred to collectively, are protesting against the decision of the District Court of Kiiwa at Kiiwa Masoko in Criminal Case No 3 of 2022. Page 1 of 14 The appellants and another person Athumani Ahmad Sirriba were arraigned in the trial court for three counts. 1, ABUSE OF POSITION Contrary to Section 31 of the Prevention and Combating of Corruption Act, No. 11 of 2007 read together with Paragraph 21 of the First Schedule to, and Sections 57(1) and 60(2) both of the Economic and Organized Crime Control Act, [Cap 200 RE: 2019] 2. TAX EVASION Contrary to Section 84(1) of the Tax Administration Act [Cap 438 R.E. 2019] and 3. ABSTAINING FROM MAKING PROPER EVALUATION; Contrary to Section 7(1)(b) of the Customs and Management and Tariffs Act [Cap 403 R.E. 2019] After a full trial, the appellants were convicted and sentenced as follows 1. First count to pay a fine of TZS 250,000 in default 3 years in jail. On the 2nd count to pay a fine of 250,000 or serve three years in jail. For the third count, they were sentenced to conditional discharge of One year. They were also ordered to pay a fine of TZS 9269066.38 being financial loss to the Tanzania Revenue Authority (TRA). The account number was indicated. The appellants paid the fine instead of the jail term. When the appeal was called on for hearing, the appellants entered appearance while enjoying the legal services of Mr. Stephen Lekey, learned Page 2 of 14 Advocate. The respondent Republic, on the other hand, appeared through Mr. Melchior Hurubano, learned State Attorney. Mr. Lekey stated that he would begin with the 5th ground of the complaint, addressing the failure to summon a material witness. He emphasized that there is no specific number of witnesses needed to prove a case, and the prosecution is only required to bring material witnesses. If they fail to do so, the court is obligated to draw a negative inference.

The key question, according to Mr. Lekey, is whether there Was a material witness in the matter at hand. Regarding the imported cargo. Which arrived by a dhow owned by SALEHE SAIDI, Mr. Lekey high lighted the controversy over whether the dhow carried drums, gallons, or bottles of cooking oils. He pointed out the contradiction in the testimonies of PW1 (p.30), PW3 (p.39), exhibit PE6 (Radioactivity analysis certificate), and PW4 (p.50 to 56) during the proceedings. Mr. Lekey noted that there was no evidence to indicate that both PW3 and PW4, as well as the 1st and 2nd appellants, were together inspecting the dhow on the material day. He observed that appellants went to the dhow together, as per page 62 of the proceedings, raising the question of which group was there first. He argued that appellants should not be Page 3 of 14 blamed for what was seen only by their colleagues. Mr. Lekey pointed out the diverse packaging of the consignment and stressed the importance of summoning the captain of the dhow, SALEHE SHAHIDI, as a material witness. He argued that the failure to summon the captain should lead the trial court to draw an inference, and the current court is entitled to draw such a negative inference. Moving on to the 7th ground, Mr. Lekey focused bn the complaint centered on the failure to prove the prosecution case to the required standard. He reminded the court of the prosecution's duty to prove criminal allegations beyond reasonable doubt. Ae reiterated that there was no evidence that the four inspectors had inspected the dhow together at once. Mr. Lekey questioned whether the appellants could be blamed for what was seen by PW3 and PW4, considering the packaging of the edible oils. Referring to the case of Benedict Ajetum v. Republic [1983] TLR 190, Mr. Lekey highlighted a similar situation where items were not seen during verification, and the appellant admitted receiving the items he was charged and sentenced for. He emphasized the need for evidence showing that the goods were not used during the relevant period. In the current case, he noted that the appellants had charged 200 items but were accused of Page 4 of 14 failing to charge 300 items. He argued that the possibility of 300 items being present before or after the appellants' inspection was not eliminated. Mr. Lekey referred to exhibit DEI, a document showing the goods, which indicated that the dhow carried only 100 drums. He defended the appellants, stating that they did not go below what the transire provided, charging 200 drums of cooking oil. He mentioned that neither the appellants nor PW3 or PW4 were at the port during the dhow's docking and were i nfo rmed afte r it had docked. \ Mr. Lekey directed the court's attention to page 50 of the proceedings, specifically the evidence of PW4, who mentioned receiving a phone call about 100 gallons of 20 liters and being with PW3. He highlighted that DW1, at page 62, indicated that the appellants went to inspect the dhow but did not go there as a team. Each team recorded its own version, and PW3 and PW4 recorded two different things, creating material contradictions. Exhibit PE6, prepared by PW3, mentioned 500 bottles, while PW3 later provided that he saw 500 gallons. Exhibit PE8 and PE9, however, showed 500 drums. Mr. Lekey pointed out that during cross-examination, PW3 stated that a bottle is not the same as a gallon and not the same as a drum. He questioned the origin of the data, considering the contradiction with TRA Page 5 of 14 personnel charging 200 drums. He noted that PE6 was issued a day after the inspection on February 5, 2022, and criticized the explanation given by PW3 during re-examination (p49 of the proceedings), calling it an afterthought that denied the appellants the right to conduct cross-examination. ■; Referring to the case of PANTALEO TERESPHORY V. REPUBLIC Crim App. 515 of 2019 TANZUI (CAT) at p. 17, Mr. Lekey

argued that the same should be dismissed for denying the appellants the right to be heard. He highlighted another contradiction on page 50, where PW4 claimed to have seen 500 gallons of 20 liters, equal to 10,000 liters, but exhibits PE8 and PE9 showed only 15 in the quantity column. Mr. Lekey questioned whether these were tons or items and, assuming they were tons, how PW4 received 10 tons and charged 15 of them. He criticized the claim that the system allowed him to charge, stating that any civil servant true to his words could not see ten tons and charge a businessman 15 tons. He concluded that PW4 was not a trustworthy witness.

- On page 55 of the proceedings, when PW4 was being cross-examined, he stated that he was shown the transire (DEI), a document that an importer used to show the quantity and description of the goods imported. The transire indicated 100 drums (dr). Page 6 of 14 Mr. Lekey stated further that the contradictions were material and touched upon the basis of the offence with which the appellants were charged, specifically the number of items they charged. He pointed out that the terms "drums/" "gallon/" or "bottles" were not synonymous and contained different quantities. < Another issue raised in the appeal was that another count was occasioning loss to a specified authority, namely the TRA. Mr. Lekey noted that throughout the prosecution evidence, no single witness was brought from the TRA, indicating that TRA never stated in court that it suffered any loss. While PW2 was from TRA, his testimony focused on confirming that the appellants were staff members of TRA and did not mention any loss incurred by TRA. / W Referring to a precedent, Mr. Lekey mentioned the importance of the complainant voicing the loss in a case of occasioning loss. He argued that there was a variance between the charge and evidence, stating that the prosecution needed to prove what was contained in the charge sheet. He highlighted a contradiction between the charge Sheet and the evidence regarding the ownership of the items. Page 7 of 14 Mr. Lekey also addressed ground 6, where the complaint centered on considering plea bargaining as tantamount to a confession that could bind the appellants. He presented a case where a person named Athumani Ahmed Simba, who was charged with the appellants, entered into a plea agreement. The trial court considered the plea agreement as a confession that could be used against the appellants. Mr. Lekey argued that a plea agreement is a contract and cannot be considered a confession. He also questioned whether facts admitted in the plea agreement could incriminate the appellants, emphasizing that they were strangers to the agreement. On ground number 1, Mr. Lekey complained about the reliance on exhibits PE1 and PE2 in contravention of the Electronic Transactions Act
2015. He argued that while electronic evidence was allowed, the standard for admission and reliance must be met. He raised concerns about the lack of corroboration for these electronic documents and emphasized that the court should not have accorded them weight without proper evidence on their generation, storage, and transmission as required by the Electronic Transactions Act. Page 8 of 14 In conclusion, Mr. Lekey prayed for the appeal to be granted, and the appellants to be set free, asserting that their conviction spoke loudly of their employment status. Mr. Hurubano, responding to the above submission by his learned colleague also started with the 5th ground. He expressed a strong opinion that the mentioned witness was not a material witness. This assertion was based on the

sufficiency of evidence provided by PW1, PW4, and PW3, which, according to him, adequately proved the importation of 500 gallons of cooking oil by Abdallah Ahmad Simba. The evidence was said to be corroborated by Exhibit PE6; and other submitted documents. Mr. Hurubano argued that the issue of who arrived first was not material, emphasizing that the main concerns were the inspection of the consignment and the confession made by the importer, who admitted to importing the goods on February 4, 2022. Regarding the 7th ground, Mr. Hurubano disagreed with the appellant's counsel's assertion that the prosecution failed to prove the offense beyond a reasonable doubt. He maintained that the allegations were adequately proven based on the evidence presented. He distinguished the case cited by the appellant's counsel, Benedict (*supra*), stating that it was Page 9 of 14 an old case and did not consider the current laws on plea bargaining. He highlighted that Rule 4 of the Plea-Bargaining Rules allows collaboration between any person and the prosecution for bargaining. On the 4th ground, Mr. Hurubano addressed the alleged contradictions among PW3, PW4, Exhibit PE6, and PE8. He argued that the impugned judgment did not consider PE6, and PE8 was deemed irrelevant to support the charge. He disagreed with the assertion that PW4 contradicted himself, stating that the explanation given during re-examination clarified any doubts, and the Pantaleo (*supra*) case mentioned by the appellant's counsel did not align with the facts of the current case. Concerning the 6th ground, Mr. Hurubano contested the appellant's assertion that plea bargaining of the co-accused was wrongly considered a confession and incorrectly applied against the appellants. He cited the interpretation of plea bargaining as a contract and disagreed with the appellant's interpretation, stating that the confession of Mr. Simba was not the sole basis for conviction, but rather a combination of evidence. On the issue of occasioning loss, Mr. Hurubano concurred with the appellant's counsel that there was no witness from the TRA to testify on this matter. However, he argued that since the charge sheet indicated a loss of Page 10 of 14 9 million, and Mr. Simba had paid the amount, there was no actual loss, as confirmed on page 25 of the impugned judgment. On the first ground, Mr. Hurubano responded to the appellant's complaint against the reliance on exhibit PE1 and PE2, citing a contravention of the Electronic Transaction Act. He noted that the appellants did not object during the proceedings, and admission depended on the authenticity of the documents, with no legal basis for the court to disregard them. He concluded by asserting that the appeal lacked merit and should be dismissed. Mr. Lekey, in a brief rejoinder submission, mentioned that he would be concise on the first ground. He pointed out that Section 18(2) of the ETA indicates that admissibility and evidential weight should be determined. He noted that the learned State Attorney acknowledged that the witness did not provide any evidence to satisfy this section. Mr. Lekey argued that claiming the evidence was accompanied by a certificate is insufficient, especially since the certificate is not in the court records, and its purpose is not specified. % Regarding the seventh ground, Mr. Lekey highlighted the learned counsel's statement that the appellants were expected to inspect what they saw, namely 500 items. He questioned whether it could be asserted with certainty that 500 items, whether gallons or drums, were present when the Page 11 .of 14 appellants inspected and valued the consignment. He emphasized that the inspection occurred at

different times, by two different groups, and resulted in conflicting reports. Additionally, the transire indicated 100 drums, while appellants charged 200 drums. Mr. Lekey noted discrepancies in the reported quantities, such as 500 bottles and an allegation of 15 tons. He argued that the situation would have been different if the inspection had ,taken place all at once. In conclusion, he reiterated their previous submission and prayed ir1' for the appeal to be allowed. I have dispassionately considered the grounds of appeal and the rival submissions. Courts of law do not concern themselves with non- contentious matters because their primary function is to resolve disputes and administer justice between parties who have conflicting interests or claims. The judicial process is inherently adversarial, meaning that it is designed to adjudicate issueswhere there is a genuine dispute that needs resolution. The grounds of appeal largely dwell on theoretical issues and inconsistencies that were either not material to the outcome of the case or were not contested at trial. For example, the argument about the failure to summon a material witness, such as the captain of the dhow, does not sufficiently challenge the sufficiency of the evidence presented by the Page 12 of 14 prosecution. The court's role is to adjudicate disputes over material facts and legal principles that affect the outcome of the case, not to entertain speculative or hypothetical concerns. This is a misplaced appeal. It is beyond my call of duty to decide on abstract issues that do not have a bearing on the justice system. It is hereby dismissed. It issoendei^d. V XX \ o q 'n. √ N / / ' " ■A "1- ' Stole E.I. LALTAIKA JUDGE 29.11.2023 This judgment is delivered under my hand and the seal of this court this 29th day of June 2023 in the presence of Mr. Hurubano, State Attorney for the respondent and the appellants. E.I. LALTAIKA JUDGE 29.11.2023 Page 13 of 14 Court The right to appeal to the Court of Appeal of Tanzania is fully explained. Page 14 of 14

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