

TANZANIA / JUDGMENT

Kisena Judgement

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IN THE HIGH COURT OF TANZANIA CORRUPTION AND ECONOMIC CRIMES DIVISION AT PAR
ES SALAAM ECONOMIC CASE NO. 09 OF 2022 THE REPUBLIC VERSUS

1. ROBERT SIMON KISENA
2. CHARLES SELEMAN NEWE
3. TUMAINI DEUSDEDIT KULWA @ TUMAINI KULWA
4. JUMA RAJABU FURAJI

JUDGMENT

2CP June & 13th September, 2024 KAM AN A, J: Mr. Robert Simon Kisena (the 1st accused), Mr. Charles Seleman Newe (the 2nd accused), Mr. Tumaini Deusdedit Kulwa @Tumaini Kulwa (the 3rd accused) and Mr. Juma Rajabu Furaji (the 4th accused) were arraigned before this Court to answer information containing thirty-three counts. The counts were of leading the organized crime, forgery, uttering false documents, money laundering and occasioning loss to a specified authority. Given the complexity of this case in terms of the number of counts, I think it logical to recount the facts that led to this case. To improve transport within Dar es Salaam, the Government introduced i the Bus Rapid Transit system (BRT) managed by the Dar es Salaam Rapid Transit Agency (DART). The Agency was responsible for the construction and management of the BRT infrastructure. After the completion of phase I of the system, the Agency entered into an agreement with UDA Rapid Transit Limited (UDART) whereby the latter was appointed to be the interim service provider on BRT infrastructure. Under the said agreement commonly known as the Interim Service Provider Agreement (ISP), UDART was required to provide and operate buses and other facilities for the smooth running of the BRT system. It is worth noting that UDART is a company owned by Shirika la Usafiri Dar es Salaam (UDA) for ninety-nine percent and Simon Group Limited (SGL) for one percent. Further, SGL owns UDA by the majority and the minority shareholder is the Treasury Registrar (TR). Reverting to the Interim Service Agreement, UDART found itself with no financial muscles to run the project to the expectations of the Agency. In that case, UDA as the parent company resolved to seek a loan from the NMB Bank to finance the project. On 4th September, 2015, the first accused acting as the Executive Chairman of UDA wrote a loan application letter to NMB 2 which was received on the same day. The amount sought was Tshs. 9,538,000,000/=. The letter cited the procurement of the Intelligent Transportation

System (ITS) as the purpose for which the loan was sought. The letter was admitted as Exhibit PE14 after being tendered by Mr. Richard Makungwa (PW13), the then Chief Whole Banking Officer of the NMB Bank. When the NMB Bank was processing the loan application, on 14th September, 2015, it received a letter from the second accused. In the said letter, the second accused, acting as the Group Finance Officer of UDA, informed the bank that the previous application was made in the oblivion of other financial needs of the applicant. In that case, the subsequent letter applied for Tshs.2,200,000,000/- as an additional loan. The purpose of the additional loan was to finance the purchase of Near Field Cards (NFCs) to be used by commuters to access the services offered by UDART. The letter was admitted as Exhibit PE15 after being tendered without objection by PW13. Unlike the first loan application which was supported by an agreement for the supply and service between UDART and Kapsch CarrierCom Belgium NV (KCC), a company based in Leuvensesteenweg 540 b3, B-1930 Zaventem, Belgium and a letter 3 from UDART to KCC, the supplement to the loan application attached revised financial projections that reflected the purpose of the additional loan. On 1st October, 2015, the NMB Bank issued the loan through the Offer Letter titled Offer for a Bridge Loan Facility. The letter was admitted without objection as Exhibit PE8 after being tendered by PW6 Mr. Evarist Mpogole, the Legal Officer of the NMB Bank. According to the Offer Letter, Tshs. 11,738,000,000/- was issued to UDA as a loan. One of the cardinal conditions for such a loan as per the Offer Letter was that the loan should be used for the purpose for which the loan was sought and granted and related costs. Further, it was agreed by the parties that NMB Bank would be responsible for disbursing the loaned sum to the suppliers upon receiving the instructions from UDA and upon receiving tax invoices from the suppliers through UDA. Having briefly recapitulated the background on the case, I think it prudent to commence with the second count of forgery as it lays the foundation for other offences allegedly committed by the accused. But before I do that, it is worth noting that during the trial the Republic was represented by Mr. Zacharia Ndaskoi and Ms. Cecilia Mkonongo, 4 learned Principal State Attorneys assisted by Mr. Patrick Mwita, Mr. Timotheo Mmari, Ms. Gloria Mwenda, Mr. Fadhili Mwandoloma and Ms. Lucy Kyusa, learned Senior State Attorneys, Mr. Moses Mafuru, Ms. Blandina Mnung'a and Mr. Nickson Shayo, learned State Attorneys. The first to third accused were represented by Mr. Nduruma Majembe, Mr. Deusdedit Luteja, Ms. Dorine Karugila and Mr. Habib Kassim, learned Counsel. Mr. Bryson Shayo, Mr. Jeremiah Mtobesya and Me Omary Kirwanda, both learned Counsel appeared for the fourth accused. Suffice it to note that the Republic fielded 23 witnesses and 39 exhibits. On the 2nd count, the first and second accused were charged with an offence of forgery contrary to sections 333, 335(a) and 337 of the Penal Code, Cap. 16 [RE.2002]. Particulars have it that the two accused on diverse dates between 1st June, 2015 and 30th April, 2016 within Ilala, Dar es Salaam, with intent to defraud made a false document titled Intelligent Transport System (ITS) Management Agreement between UDART and Maxcom Africa Ltd (Maxcom) dated 20th June, 2015. The false document as per the particulars was intended to show that UDART has contracted Maxcom to procure and 5 distribute the initial batch of the NFC cards for consideration of Tshs.2.2 billion which was not true. The two accused denied the charge. Before I analyze the evidence adduced by the prosecution and defence, I feel it obligatory to highlight what constitutes a forgery. According to section 333 of the Penal Code, forgery entails the making of a false document with

the intent to defraud or deceive. The section reads:

333. Forgery is the making of a false document with intent to defraud or to deceive.' From the above-quoted section, it is certain that for an offence of forgery to be proved, there must be a false document that was made to defraud or deceive. That being the case, it must be proved that the false document in the eyes of section 333 was made by a person in the following circumstances as per section 335 of the Penal Code which states the following:

335. Any person makes a false document who—

- (a) makes a document which is false or which he has reason to believe is untrue; 6
- (b) alters a document without authority in such a manner that if the alteration had been authorised it would have altered the effect of the document; (c) introduces into a document without authority whilst it is being drawn up, matter which if it had been authorised would have altered the effect of the document;
- (d) signs a document- (i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing; (ii) in the name of any fictitious person alleged to exist whether the fictitious person is or is not alleged to be of the same name as the person signing; (iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person; (iv) in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be.' Reading sections 333 and 335 of the Penal Code entails that for the offence of forgery to be proved to the required standard, the prosecution is under the obligation to prove that there is a false document that was made by an accused person in one or more of circumstances stated in section 335 with an intent to defraud or deceive. In a bid to prove that there was a forged document (Intelligent Transport System (ITS) Management Agreement between UDART and Maxcom Africa Ltd (Maxcom) dated 20th June, 2015), the prosecution fielded Mr. Ahmed Salum Lusasi (PW18) who is the Maxcom's Director 8 of Business Development. In his evidence in chief, the witness testified that on 20th June, 2015, he and the fourth accused, on behalf of Maxcom, signed an agreement with UDART whose signatories were the first accused and Mr. Patrick Mtani. According to PW18, the agreement was for the management of the Intelligent Transport System (ITS). The witness recognized the said agreement which was admitted as Exh.PE27-A2 (hereinafter to be referred to as Agreement A2) after being tendered by F.5587 Det. Cpl. Hamis Nankaha (PW17). The witness further evidenced that the said agreement was of 15 pages. He maintained that in the said agreement, Maxcom was not under any obligation to supply anything to UDART other than providing consultancy services in respect of the ITS. Led by Mr. Mwita, learned Senior State Attorney, PW18 testified that though Exh.PE27 A-2 (the agreement he and the fourth accused signed) and Exhibit 27 A-1 (alleged to be forged by the 1st and 2nd accused, hereinafter to be referred to as Agreement A1) are the same from page 1 to page 11, the two agreements sharply differ in their first schedules. The witness

evidenced that in Agreement A2, its first schedule contains 13 paragraphs while in Agreement A1, the first 9 schedule contains 14 paragraphs whereby the 14th paragraph states one of Maxcom's obligations is to procure and distribute NFC Cards. PW18 further testified that the two agreements differ in the sense that Agreement A2 has two paragraphs in the second schedule while the agreement that is alleged to be a forged one (Agreement A1) has three paragraphs in the second schedule. The witness stated that the third paragraph in the second schedule to Agreement A1 states Maxcom would be paid Tshs.2.2 billion for the initial batch of the NFC Cards. The witness went on to differentiate the two exhibits by testifying that Agreement A2 has two schedules and 15 pages while Agreement A1 has three schedules and 16 pages. When cross-examined by Mr. Majembe, learned Counsel for the 1st, 2nd and 3rd accused, PW18 testified that apart from signing Agreement A2, he and the fourth accused signed Agreement A1 and that Agreement A1 bears his and the fourth accused's signature. When cross-examined by Mr. Shayo, learned Counsel for the fourth accused, the witness changed his story. He evidenced that the initials and signatures alleged to be of the fourth accused that are reflected on pages 14, 15 and 16 of the Agreement A1 are not his. He went on to testify that he was accustomed to the fourth accused's handwriting as he was his colleague and had seen his initials and signature in the course of their business. The witness added that, at some point, Maxcom paid DZ Card for 400,000 NFC Cards after being instructed by UDART. During re-examination, PW18 testified that he signed Agreement A2 and Agreement A1- as both contained his signature. The witness added that the initials on pages 14, 15 and 16 in Agreement A1 are not of the fourth accused and he did not witness the initialing of Agreement A1. The witness stated that he saw pages 14, 15 and 16 of Agreement A1 for the first time in Court. PW17 Det. Cpl Hamis Nankaha, the handwriting expert, testified that he was the one who examined the disputed documents brought to the Forensic Bureau by the Prevention and Combating of Corruption Bureau (PCCB). He mentioned the documents as two agreements entered on 20th June, 2015 between Maxcom and UDART (Agreement A2 and Agreement A1) and the Memorandum of Understanding between UDART and DZ Card Africa signed on 16th November, 2015. The witness added that, for the purpose of examination, he also examined undisputed documents brought by the PCCB. He mentioned the documents as sample signatures of the 1st accused, 2nd accused, 4th accused, Mr. Patrick Kissa Mtani and PW18 and documents that were signed by them in the normal course of business. The disputed documents and undisputed ones, the Examination Report and the letter that submitted the Report were collectively admitted as Exh.27. According to this witness, after his examination, he concluded that on both pages 14, 15 and 16 of Agreement A1 (alleged to be forged), the 1st and 4th accused put their initials. Likewise, the witness stated that he found that in Agreement A2, the 1st and 4th accused put their initials. Mr. John Joseph (PW23), the investigator of the case from PCCB, testified that during the investigation, they interrogated the 1st accused and Mr. Mtani from LIDART who confirmed to know Agreement A1 (alleged to be forged). He further testified that when they interrogated PW18 and the 4th accused, both from Maxcom, they denied knowing Agreement A1. The witness stated further that PW18 and the 4th accused supplied them with Agreement A2 which they alleged to be the

agreement that was entered by UDART and Maxcom. He averred that PW18 and the 4th accused stated that Maxcom had never purchased, supplied or distributed NFC Cards and 12 that it had no agreement with UDA or UDART for purchasing and supplying NFC Cards. Being in that situation, PW23 testified that he instructed his subordinate to submit the two agreements with other undisputed documents signed by the four persons to the Police Forensic Bureau for examination. The witness testified that according to the Examination Report, the two agreements were found to be signed by the 1st accused, 4th accused and Mr. Mtani. According to him, Mr. Mtani was still at large during the trial of this case. In defence, the 1st accused (DW1) testified that on 20th June, 2015, he, in the capacity of the Executive Chairman of UDART and Patrick Mtani, UDART's Company Secretary signed Agreement A2. He evidenced that on behalf of UDART, PW18 and the fourth accused signed the said Agreement. DW1 testified further that shortly after signing Agreement A2, it came to their knowledge that the said agreement left out the important aspect of NFC Cards. In that case, Agreement A1 was signed by those who signed Agreement A2 and the latter Agreement was discarded by both parties. 13 DW1 evidenced that Agreement A1 which is alleged to have been forged was implemented by UDART and Maxcom. He amplified that UDA disbursed Tshs.2.2 billion to Maxcom which in turn supplied one million NFC cards. He testified that apart from supplying the NFC Cards, Maxcom under Agreement A1 kept, activated and sold the NFC cards to commuters. The witness testified that there was no agreement between UDART and DZ Card for the supply of NFC cards. He added that what was in place was the Memorandum of Understanding which was set to come to an end after the lapse of seven days from the date of signing unless the parties agree to give effect to the contents of the Memorandum by signing a contract. DW1 evidenced that in the discharge of its obligation under Agreement A1, Maxcom instructed ICB Bank to pay DZ Thailand for the NFC cards. He added that, unlike Agreement A1, the Memorandum of Understanding between UDART and DZ Card Africa was unimplementable as it did not contain specifications so far as the NFC cards were concerned. He evidenced further that Agreement A1 was the one that was implemented by the parties as it provided for insurance and indemnity so far as NFC cards are concerned. 14 The second accused Charles Selemani Newe testified as DW4. So far as the second count is concerned, the witness testified that he did not participate in making and signing Agreement A1. However, the witness testified that the said agreement was the one that was used by Maxcom in supplying the NFC Cards and that the said Agreement was not forged. At this juncture, I wish to determine whether the prosecution has succeeded in proving the second count beyond a reasonable doubt so far as the second accused is concerned. I hasten to state that so far as the second accused is concerned, none of the prosecution's witnesses evidenced the involvement of the second accused so far as the alleged forgery is concerned. To be precise, there was no scintilla of evidence that in any way pointed the finger at the second accused in relation to any of the circumstances stated under section 335 of the CPA. Surprisingly enough, while the prosecution charged the second accused with the offence under the second count with which it did not adduce any evidence against him, it opted not to charge the fourth accused with the offence under the second count despite adducing evidence against him. 15 According to PW23, the

investigator, the fourth accused signed Agreement A1. Further, PW17, the handwriting expert, testified that both Agreement A2 and Agreement A1 contain signatures and initials of the fourth accused. I have no reason to fault such expert opinion. It is worth noting that on 17th October, 2023, Mr. Mwita, learned Senior State Attorney sought, among other things, to amend the second count to add the fourth accused. However, for reasons known to the prosecution, Mr. Mwita withdrew his prayer to amend the second count for the said purpose. I understand that there is prosecutorial discretion under which the prosecution enjoys the liberty to choose who to prosecute and for which offence. However, it is my considered opinion that such discretion must not be used in the circumstances that constitute double standards in the administration of justice. I say so while mindful of the observation of the Court of Appeal in the case of *Haika Chesam Mgao v. Republic*, Criminal Appeal No. 37 of 2021-CAT (Unreported). In the said case, the appellant was arrested in the company of one Anthony Philemon after being found with elephant tusks. However, the prosecution did not charge Anthony Philemon and instead charged only the appellant. This was observed by the Court of Appeal as double standards that amounted to rationing of justice since none of the prosecution's witnesses testified on why Anthony Philemon was not charged. Though the circumstances of the cited case differ from the instant case, the reasoning is valid. Since PW23 who investigated this case and PW17, the handwriting expert, testified that the fourth accused appended his signature and initial on Agreement A2 and A1, it was incumbent for the prosecution to lead evidence on why the fourth accused was not charged in the second count. In the absence of such an explanation, it is clear that by failing to charge the fourth accused for the offence under the second count, the prosecution traded on the double standards. This makes me draw an adverse inference against the prosecution for trading on the double standards. So far as the first accused is concerned, I hasten to state that the evidence of PW17 is not relevant. I take that position as the first accused did not deny to have signed both Agreement A2 and Agreement A1. What is in dispute is whether Agreement A1 was forged or otherwise so far as the contents are concerned. 17 In this regard, I wish to reiterate the cardinal principle that each witness is entitled to credence and to be believed by the trial court unless there are cogent reasons for the court to consider him otherwise. See: *Goodluck Kyando v. Republic* [2006] TLR 363. Guided by that position, I evaluated the evidence adduced by PW18 who is one of the directors of Maxcom. In his evidence in-chief, the witness was very eloquent in differentiating Agreement A2 and Agreement A1 which is alleged to be forged. The witness testified that he and the fourth accused signed only Agreement A2. When cross-examined by Mr. Majembe, learned Counsel for the first, second and third accused, PW18 admitted that he and the fourth accused signed Agreement A2 and Agreement A1. He added that the two agreements contain their signatures and initials. However, when he was cross-examined by Mr. Shayo, learned Counsel for the fourth accused, PW18 testified that he and the fourth accused signed only Agreement A2. He amplified that the initials that are on pages 14, 15 and 16 of Agreement A1 are not of the fourth accused. In re-examination, PW18 testified that he signed Agreement A2 and Agreement A1 as both contained his signature. The witness 18 added that the initials on pages 14, 15 and 16 in Agreement A1 are not of the fourth accused. From this evidence, it

is clear as crystal that PW18 contradicted himself substantially. Trite law is that when the evidence adduced by the witness is contradictory, the trial court is constrained to address the contradiction to ascertain whether such contradiction goes to the root of the case or otherwise. In the case of *Mohamed Said Matula v Republic* [1995] TLR 3, the Court of Appeal provided the following guidance as follows: 'Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the Court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter.' Guided by that principle, it is my findings that the contradictions manifested by PW18 are not minor. This is because, in the second count, the central issue is whether Agreement A1 was forged or otherwise. In this regard, PW18 had contradicting stories as shown hereinabove which left this Court with no option other than to disregard his evidence as the contradictions go to the root of the case. As I hinted hereinabove, DW1 did not deny having signed Agreement A1 which is alleged by the prosecution to have been forged. Further, according to PW17 who examined Agreements A1 and A2, both agreements contained signatures of DW1 and DW6 (the fourth accused). As I said earlier, I have no reason to fault PW17's opinion. Likewise, PW23, the investigator of this case, testified that DW6 also appended his signature and initials on both Agreement A1 and A2. However, DW6 categorically denied having signed Agreement A1. The witness stated that Maxcom, the company he worked with, did not at any time enter into the agreement with UDART so far as the purchasing of NFC Cards is concerned. I do not succumb to that allegation for the reasons to be reflected in the course of this

Judgment.

Having taken that position, I asked myself whether the prosecution advanced any evidence that Agreement A1 was false and was made with intent to defraud. So far as falsity of the Agreement A1 is concerned, the prosecution fielded Mr. Elia Jeremia Mbwambo 20 (PW9) who at one point served as UDA's and UDART's Chief Finance Officer. In his evidence-in-chief, PW9 testified that a total of Tshs. 11,738,000,000/= was loaned to UDA for the supply and installation of the ITS System by KCC. He added that part of the loaned sum was paid to KCC for the supply of NFC Cards. He added that the loaned sum to the tune of Tshs. 2.2 billion was used to pay Maxcom for the supply of NFC Cards. He amplified that during his time in the two companies, he did not see any agreement between either of the two companies and Maxcom for the supply of NFC Cards. Mr. John Xaviery Nguya (PW10) who at the time of testifying was the Chief Executive Officer of UDA and UDART testified in examination in chief that he was shown by PCCB's officers some documents that effected some payments to Maxcom by UDA. During cross-examination by Mr. Majembe, PW10 testified that he believed Tshs. 1.1 billion that was paid to Maxcom was paid for the work intended. The witness further stated that he had not seen any ITS Agreement. Testifying on the CAG's report, PW10 stated that according to the report, the TTS Agreement was between UDART and KCC. 21 When cross-examined by Mr. Mtobesya, PW10 testified that he does not know if UDA had any agreement with DZ Card. He added that he does not know whether there

was any payment that was made to DZ Card. He added that what he knows is that UDART owes Maxcom around Tshs.3 billion which arose from the three agreements relating to fare collection, mobile network operators and maintenance of ITS. In re-examination by Mr. Mwita, PW10 testified that Tshs.1.1 billion was paid to Maxcom as fifty percent advance payment in respect of one million NFC Cards. PW10 added that the cards were supplied by DZ Card. The witness recounted that DZ Card supplied 200,000 NFC cards in two phases as part of the implementation of the agreement between UDA and DZ Card. Eng. Ronald Buberwa Lwakatare (PW12) who was the Chief Executive of DART Agency testified to have asked Maxcom to provide a report of the sum that was credited to its account by UDA. The request was through the letter dated 25th October, 2017 which was admitted as Exh.PE12. According to PW12, Maxcom submitted to DART Agency a letter dated 3rd November, 2017 which was admitted as Exh.PE13. Explaining the contents of the said letter, PW12 testified that DZ Card was contracted by UDART to supply one million NFC cards. He added that as per the letter, Maxcom, in respect of the NFC cards, received Tshs.2.2 billion from UDART. He expounded further that according to the letter, the said sum except Tshs.356,668,680/- was credited to DZ Card's account following his instructions. PW12 stated that Tshs.356,668,680/- was credited to DZ Card's account for the purchase of 100,000 NFC cards and the rest was credited to DW1's account. PW18 testified that Maxcom was instructed by UDART to pay DZ Card for 400,000 NFC cards. PW23, the investigator of this case, testified that upon questioning DW6 and PW18, both denied knowing the contents of Agreement A1. PW23 evidenced further that the duo told him that Maxcom had not at any time entered into an agreement with UDART or UDA for the supply of NFC cards. He added that according to the investigation, the sum of Tshs.2.2 billion that was credited to Maxcom's account was not used for purchasing NFC cards. He asserted that the said sum was credited by Maxcom to DW1's account. 23 PW23 evidenced that though he wrote a statement of Mr. Alexander Bonde Affredi from DZ Card, he does not remember if Affredi told him that DZ Card Thailand received payments from Maxcom. The witness added that he does not remember the exact amount DZ Card Thailand was paid by Maxcom though he remembered that Affredi told him that DZ Card Thailand supplied 100,000 cards to Maxcom. In his defence, DW1 testified that Agreement A1 was signed by him and Patrick Kissa Mtani on behalf of UDART. He further testified that the said agreement was signed by DW6 and PW18 on behalf of Maxcom. DW1 evidenced that after they signed Agreement A2, shortly thereafter, it came to their understanding that Agreement A2 left out the purchase of NFC cards by Maxcom which was fundamental in the ITS system. He evidenced that following such shortcomings, he and Mtani met with DW6 and PW18 to sign an amended agreement which is Agreement A1. DW1 testified further that after signing Agreement A1, Agreement A2 was discarded. According to DW1, Maxcom supplied one million NFC cards to UDART as per Agreement A1. Apart from that, DW1 testified that Maxcom was the one that sold the said cards to the commuters. 24 He evidenced that his account was credited by Maxcom with money which was a loan he sought from the latter to facilitate UDART during the trial runs. To substantiate his evidence, DW1 tendered a letter he wrote to DW6 in his capacity as the Managing Director of Maxcom asking for the loan. The letter was admitted as Exh.DE36. Though he was not charged with the second count, DW6 (the fourth accused) testified that Maxcom was not contracted by UDART to supply the latter with the NFC cards. It was his testimony that Maxcom was contracted

under Agreement A2 as a technical consultant in matters relating to the procurement and installation of the ITS system. He evidenced further that in the discharge of its duties under Agreement A2, Maxcom facilitated the procurement of DZ Card by UDART whereby DZ Card was contracted to supply the NFC cards. DW6 testified that Maxcom received Tshs.2.2 billion from UDA. He added that after receiving such an amount, DW1 through the letter written by him as the Executive Chairman of UDA instructed him to transfer the said amount to his personal account at ICB Bank. The witness evidenced that Maxcom did not issue any loan to DW1 and the transfer of money that was made to DW1's account was made in the exercise of Maxcom's functions as the payment company. I have given thorough thought to the evidence adduced by the prosecution and the defence. In this regard, I asked myself whether DW1 in signing Agreement A1 had such a mandate. From the prosecution's evidence, no witness testified that DW1 at the time of signing Agreement A1 which is alleged to be a forgery had no mandate to sign an agreement on behalf of UDA or UDART. Given that, it is my finding that DW1 had such a mandate and was among the persons who signed Agreement A1. As I pointed out above, though DW6 was not charged with the second count, I have no reason to doubt the evidence of PW17, the handwriting expert, that DW6 (the fourth accused) did sign Agreement A1. Having taken that position, I asked myself whether the prosecution has successfully proved that the contents of Agreement A1 were false. In this regard, the prosecution relied on the Memorandum of Understanding between UDART and DZ Card Africa which was admitted as Exh.27A3 after being tendered by PW17. According to Exh.27A3, UDART, through the second accused, entered into such MoU with DZ Card Africa in which it was agreed that DZ Card Thailand would supply UDART with one million NFC cards. The said MoU was subjected to a contract to be entered by the parties within seven working days from the date of the signing of the MoU. So far as the MoU is concerned, it is my considered opinion that the same did not create any binding agreement between UDART and DZ Card Africa. As it is manifested in the MoU that a contract would be signed between the parties to the MoU within seven working days from the date of signing the MoU, the absence of the contemplated contract left much to be desired. While the prosecution wanted this Court to believe that it was DZ Card that was contracted to supply the NFC cards through the MoU, Mr. Mbwambo (PW9) testified that KCC was paid some amount from the loaned sum to supply the NFC cards. The said witness further testified that Tshs.2.2 billion was also paid to Maxcom for the supply of NFC cards. PW9 stated that during his time in UDA and UDART, he did not see any agreement between either UDA or UDART and Maxcom. After examining the evidence adduced by PW9, the same suggests that it was KCC that was contracted to supply the NFC cards and was paid for that and not DZ Card. If that is the case, I wonder why the prosecution failed to tender an agreement between UDA or UDART and KCC which evidenced that KCC was contracted to supply the NFC Cards and was paid for it. Likewise, If it is true that KCC was contracted for that task as stated by PW9, it was incumbent for the prosecution to field a witness from KCC who was material to testify on that. Further, if the assertion that KCC was paid by UDART for NFC cards is true, the paying slips would be necessary to prove that UDART used funds other than those paid to Maxcom to pay KCC for NFC cards. The established principle is that when the prosecution fails to field a material witness without supplying the reasons, the court is constrained to draw an adverse inference that the prosecution knew that the witness would testify against it. In this, I am fortified by the position of

the Court of Appeal in the case of Baya Lusana v. Republic, Criminal Appeal No. 593 of 2017-CAT (Unreported) where it was remarked: Failure to call material witness entitles this court to draw an inference adverse to the prosecution...' 28 Since PW9 evidenced that there was a contract between UDART and KCC in which the latter supplied NFC cards and was paid and considering that the prosecution did not tender the said agreement, proof of payment or field a witness from KCC to testify on that, I draw an inference adverse to the prosecution that there was no such contract and the payment was not made to KCC in respect of NFC cards. I further draw an adverse inference against the prosecution that it knew that fielding a witness from KCC to testify on what was stated by PW9 would be detrimental to their case. Further, his evidence that Maxcom was paid Tshs.2.2 billion to supply NFC cards supports DWI's case. However, his assertion that he did not see any agreement between either UDA or UDART and Maxcom is baseless as PW9 did not testify to have been the custodian of the agreements entered by UDA or UDART. Mr. Nguya who testified as PW10 stated to know nothing about the agreement entered by UDART and Maxcom. The witness further stated that Tshs.1.1 billion that was paid to Maxcom was paid for the purpose that was intended which was to purchase NFC Cards. PW10 evidenced that though Maxcom was paid, the NFC cards were supplied by DZ Card. 29 From this evidence, there is no doubt that NFC cards were purchased as the witness at the time of giving his evidence was the Chief Executive of UDA and UDART, hence better placed to know whether the cards were purchased or not. Further, his evidence suggests that though Maxcom was paid to supply the cards, it was DZ Card that supplied the cards. Again, I asked myself if it was true that the cards were supplied by DZ Card to UDART, why the prosecution did not adduce any evidence in terms of a contemplated contract under the MoU between the two companies to that effect? Why the prosecution did not bring any evidence to substantiate that some funds other than those paid to Maxcom were used to purchase NFC cards from DZ Card? This brought me to the evidence adduced by PW23, the investigator. In his evidence, he testified that he interrogated Mr. Affredi from DZ Card Africa. According to PW23, Mr. Affredi told him that DZ Card Thailand supplied NFC Cards to Maxcom. If what was testified by PW23 is true, this Court is placed to understand the reasons for the prosecution not to field Mr. Affredi who was listed as a prosecution witness. Mr. Affredi was material to testify about who really purchased NFC cards from DZ Card Thailand 30 between Maxcom and UDART. Failure to field him makes this Court draw an adverse inference against the prosecution that if Mr. Affredi would be fielded, he would testify against its interest. I take that position on the reason that since the prosecution's case is built on the allegation that it was DZ Card Thailand that supplied NFC Cards to UDART through a Memorandum of Understanding and not Maxcom, Mr. Affredi from DZ Card would be very resourceful to testify on that. The prosecution, for the reasons best known to it, opted not to field him and did not provide any explanation for that. Eng. Lwakatare testified mainly on how the sum credited to Maxcom's account was used. His evidence was supported by Exh.PE13 which is a letter from Maxcom to DART Agency. The letter was responding to the letter written by PW12 which asked for proof of payment to supplier and service providers of ITS/AFCs. According to the said letter, a sum of Tshs.2.2 billion was credited to Maxcom's account for the purchase of NFC Cards. Out of such a sum, Maxcom alleged that Tshs.356,668,680/- was transferred to DZ Card for the purchase of NFC Cards. The letter states that upon 31 instructions of UDART, the remaining sum was transferred

to the DWI's account. I have gone through the said letter and its annexures which are photocopies, hence worth no weight. The said letter does not state how such instructions from UDART were relayed to Maxcom. However, during his evidence, DW6 sought to tender a photocopy of the letter purported to have been written by UDART instructing Maxcom to transfer the said sum to DWI's account. In justifying to tender the photocopy of the purported letter, DW6 stated that the original copy was taken by the PCCB. The said photocopy was not admitted by this Court. I have decided to bring into the picture the said photocopy for a reason that, if it is true that the original copy of the letter was taken by the PCCB, indeed the same would be tendered by the prosecution. I understand that the prosecution has the liberty to choose which kind of evidence to adduce. However, it is my considered view that the instructions alleged to be issued by UDART that the sum credited to Maxcom's account be transferred to DWI's account are vital and exclusive for the prosecution to nail DW1. 32 I take that position while mindful of DWI's evidence that he sought the loan in his personal capacity from Maxcom. The purpose of the loan was, according to DW1, to facilitate UDART during the trial runs. This was denied by DW6 who supported what is contained in Exh.PE13. It was his evidence that when Maxcom made the payment to DWI's account and DZ Card, it did so as the payment company. However, DW6 did not tender any evidence that shows that the said transfers of money from Maxcom's account to DWI's account and DZ Card were done by it as the payment company. That being the case, it is my considered view that in the absence of proof that Maxcom was instructed by UDART to transfer money to DWI's account and in the absence of the proof that it did so as the payment company, I am constrained to accord no weight to the evidence adduced by PW12 and including Exh.PE13 so far as the sum that was credited to DWI's account. I further give no weight to DW6's assertion that Maxcom was instructed by UDART to transfer the money to DWI's account as the payment company. Generally, it should be noted that none of the prosecution's witnesses testified that NFC cards were not purchased. The prosecution's witnesses testified that the cards were purchased and 33 used. DW1, DW2, DW3, DW4 and DW6 also testified before the Court that NFC Cards were purchased, sold to commuters and used. Further, from the prosecution's evidence, there is no proof that there was some money other than Tshs.2.2 billion that was credited to Maxcom's account that was used by UDART or UDA to purchase NFC cards. Likewise, there is no proof from the prosecution that it was DZ Card that was contracted by UDART or UDA to supply NFC Cards. Having taken that position, it is my finding that the prosecution has failed to prove the falsity of Agreement A1 beyond a reasonable doubt. To sum up, it is my finding that the prosecution has failed to prove the second count beyond a reasonable doubt. Concerning the 3rd count, it was the prosecution's case that on 12th November, 2015 Mr. Charles Selemani Newe (the second accused and DW4) while in Dar es Salaam knowingly and fraudulently uttered a false document, namely Intelligent Transport System (ITS) Management Agreement between UDART and Maxcom dated 20th June, 2015 to NMB. It was alleged by the prosecution that the agreement was purported to show that UDART has contracted 34 Maxcom to supply it NFC cards worth Tshs.2.2 billion, a fact which Mr. Newe knew to be untruth. In determining this count, I hasten to state that the prosecution failed to prove the count beyond a reasonable doubt. To prove the offence, the prosecution was under the duty to prove the offence of forgery under the second count. Since the prosecution failed to prove the second count beyond a reasonable count, it goes without saying

that the uttered document was not false. It is worth noting that proof of uttering a false document flows naturally upon proving the forgery. See: Stanley Murithi Mwaura v. Republic, Criminal Appeal No. 144 of 2019-CAT (Unreported). On the 4th count which is forgery, the accused is Mr. Newe. According to the particulars of the offence, on 9th November, 2015, Mr. Newe while in Dar es Salaam with intent to defraud made a false document, namely DART Project Implementation Progress-NFC Cards Procurement dated 9th November, 2015. It was alleged that the said document was purported to show that UDART has contracted Maxcom to procure, manage and sell NFC cards worth Tshs.2.2 billion, a fact which Mr. Newe knew to be false. 35 In proving the offence, the prosecution fielded Ms. Furaha Kobelo (PW19), the Senior Relationship Manager at NMB Bank. In her evidence, she stated that on 10th November, 2015, her bank received the letter from UDA dated 9th November, 2015. According to her, UDA, through Mr. Newe who was the Group's Chief Financial Officer, introduced Maxcom as the one that would be responsible for procurement, management and sale of NFC cards. Ms. Kobelo tendered the letter that was received by the Bank which was admitted as Exh.PE28. According to Ms. Kobelo, it was her understanding that as per the letter, Maxcom was to be paid for procuring NFC Cards. She added that to have supporting documents for such payment, he asked Mr. Newe to submit them. Ms. Kobelo added that Mr. Newe submitted the agreement between Maxcom and UDART dated 20th June, 2015 through an email dated 12th November, 2015 as a supporting document. Both email and agreement were admitted as Exh.PE30. It should be noted at this point that the agreement was a scanned copy of Agreement A1. In his defence, Mr. Newe (DW4) did not dispute the fact that he wrote Exh.PE28. He asserted that at the time when he was writing the 36 said document, he was mandated by the Board of Directors of UDA through its resolution which was admitted as Exh.DE2. According to the resolution, Mr. Newe was authorized to be a signatory on any correspondence relating to financial issues under the ISP Agreement. However, in his evidence, Mr. Newe testified that the Exh.PE28 was not false as claimed by the prosecution as Maxcom was contracted under Agreement A1 to procure, manage and sell NFC Cards. He evidenced that according to the evidence adduced by the prosecution's and defence's witnesses, Maxcom was the one which procured, managed and sold NFC Cards. In determining this count, it is inescapable to determine whether Maxcom was contracted by UDART to procure, manage and sell NFC cards. However, such determination has already been made when determining the second count. Since the prosecution failed to prove that Agreement A1 was forged, it is apposite to find that the prosecution has failed to prove the fourth count beyond a reasonable doubt for the reasons stated when determining the second count. On the 5th count which was of uttering false document, it was alleged by the prosecution that on 10th November, 2015 Mr. Newe, while in Dar es Salaam, knowingly and fraudulently uttered a false 37 document, namely DART Project Implementation Progress-NFC Cards Procurement dated 9th November, 2015 to NMB Bank. According to the Information, the document purported to show that Maxcom was contracted by UDART to procure, manage and sell NFC cards, a fact which Mr. Newe knew to be false. Again, in proving the offence, the star witness was Furaha Kobelo who testified to have received the letter from Mr. Newe. This was not disputed by Mr. Newe who testified that the letter was not false and that Maxcom was contracted by UDART to procure, manage and sell NFC Cards. Since I have held in the fourth count that the said document was not false, I find the uttering of the document offends

no law as the same was not false. Given that, the prosecution has failed to prove the fifth count beyond a reasonable doubt. Coming to the 6th count which is forgery, it was alleged by the prosecution that on 11th November, 2015 Mr. Newe, while in Dar es Salaam, with an intent to defraud made a document, namely Dart Project Implementation Progress-ITS Installation and NFC Card Procurement. According to the particulars of the offence, the purported document was made to show that Maxcom was contracted 38 by UDART to procure NFC cards worthy of Tshs.2.2 billion and to perform pre-installation work worthy of Tshs. 1,285,200,000/-, a fact which Mr. Newe knew to be false. In proving the offence, the prosecution relied on the evidence of Ms. Kobelo (PW19). In her evidence, she stated that on 12th November, 2015 she received the letter titled Dart Project Implementation Progress-ITS Installation and NFC Card Procurement dated 11th November, 2015. She named Mr. Newe, the Group Chief Financial Officer as the author of the letter in question. According to PW19, UDA, through the said letter, requested to utilize the loaned sum. She explained that according to the letter Tshs.2.2 billion and Tshs. 1,285,200,000/- were requested to be expended for procurement of NFC cards and pre-installation works respectively. PW19 testified that since the letter did not state to whom such payment should be made, she asked UDA to provide her with supporting documents. Following her requests, Mr. Newe submitted the Agreement between UDART and Maxcom which was admitted as Exh.PE30. The witness evidenced that upon submission of Exh.PE30 which is a scanned copy of Exh.27A1 (Agreement A1) and an original 39 copy of Agreement A1, the payment was effected to Maxcom's account. This evidence was echoed by PW23 who investigated the case. In his defence, Mr. Newe testified that he wrote Exh.PE29 with full authority granted to him by the Board of Directors of UDA as per Exh.DE2. Concerning the payment of Tshs. 1,285,200,000/-, the witness testified that the same was made as per the agreement between UDART and KCC dated 19th October, 2015. He explained further that the said amount was paid to Maxcom following KCC's instructions that Maxcom should be paid such amount for pre- installation works to be performed by Maxcom on behalf of KCC. In this regard, the witness relied on an invoice issued by KCC to Maxcom which was admitted as Exh.DE34 after being tendered by DW1. The prosecution did not object admissibility of the invoice. So far as the payment of Tshs.2.2 billion, Mr. Newe evidenced that the same was made under an agreement between Maxcom and UDART which was Agreement A1. He rested his case by testifying that the two payments were made in the execution of Agreement A1 and the Agreement between UDART and KCC. His evidence was supported by DW1. 40 In his defence, though he was not charged with the offence under the sixth count, Mr. Furaji (DW6), as I hinted hereinabove, testified that Maxcom had no agreement with UDART for the procurement of NFC cards. Mr. Furaji testified further that under the agreement between UDART and KCC, Maxcom was a subcontractor responsible for the installation of ITS and AFC systems including supplying equipment such as computers and servers. He evidenced that in the discharge of those duties, Maxcom was paid directly by KCC. Concerning Exh.DE34 which was alleged by Mr. Newe and DW1 to have been submitted by KCC to UDART to pay Maxcom, Mr. Furaji testified that he was not aware of the invoice and that it had never been submitted to Maxcom. In determining this count, I am of the view that it is indisputable that Mr. Newe wrote the said letter alleged to have been forged. It is further not disputable that at the time of writing the said letter, Mr. Newe had the authority of the Board of Directors of UDA as evidenced by Exh. DE2. That being the case,

I had to examine from the evidence if the said letter was false as alleged by the prosecution. From the 41 prosecution's evidence, nothing suggests that there were no pre- installation works that were required to be performed by KCC or by Maxcom on behalf of KCC. Further, it is indisputable that there was a business relationship between Maxcom and KCC. This is evidenced by the letter written by KCC to UDART in which Maxcom was referred to by KCC as his business partner in Tanzania. The letter was admitted as Exh.DE33 after being tendered by DW1. Likewise, in his evidence, Mr. Furaji testified that Maxcom was subcontracted by KCC to discharge some duties in the Dart project on behalf of KCC. All this, in my opinion, proves the existence of a business relationship between the three companies. In his defence, Mr. Furaji while admitting that Maxcom was subcontracted by KCC to discharge some duties under the latter's agreement with UDART, he testified that Maxcom was paid directly by KCC. However, Mr. Furaji did not tender any documentary proof to that effect. Further, his allegation that the invoice (Exh.DE34) was not availed to Maxcom does not erode the fact that KCC instructed UDART to pay Tshs. 1,285,200,000/- as expenses for pre-installation works which according to the invoice was about Euro 519,275.90. 42 It should be noted at this point that at no time DW1 or DW4 was cross-examined by the prosecution concerning Exh.DE34. Trite law is that failure to cross-examine a certain fact amounts to an admission by the adverse party that the fact contains nothing but the truth. In this, I am inspired by the Court of Appeal in the case of Shadrack Balinago v. Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and Attorney General, Civil Appeal No. 223 of 2017-CAT (Unreported) where it was stated: Ms rightly observed by the learned trial judge in her judgment the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross-examine the first respondent amounted to acceptance of the truthfulness of the appellant's account.' Since the prosecution did not cross-examine on Exh.DE34, I am constrained to hold that it founds truth in it. In other words, the prosecution was satisfied that KCC instructed UDART to pay Maxcom the said sum for pre-installation works. 43 In the same vein, the prosecution while alleging that Maxcom had no agreement with UDART warranting the payment of Tshs. 1,285,200,000/-, was oblivion of the defence case that the said amount was paid to Maxcom in compliance with KCC's instructions. In that case, it was incumbent on the part of the prosecution to lead evidence that UDART owes KCC such an amount paid to Maxcom. In the absence of such evidence from KCC, this Court finds the count unproven to the required standard. Concerning the request to pay Tshs.2.2 billion, the reasons supplied when determining the second count suffices. Coming to the 7th count of uttering a false document, it was the prosecution's case that on 12th November, 2015 Mr. Newe while in Dar es Salaam knowingly and fraudulently uttered a false document, namely Dart Project Implementation Progress-ITS Installation and NFC Card Procurement to NMB Bank. It was alleged that the purported document was made to show that UDART had contracted Maxcom to procure NFC cards and to perform pre-installation works worthy of Tshs.2.2 billion and Tshs. 1,285,200,000/- respectively, a fact which Mr. Newe knew to be false. 44 Without much ado, since it is my holding that the 6th count was not proved to the hilt, uttering the said document to the NMB did not offend any law as the document was not proved to the required standard to be false. Given that, the prosecution failed to prove the 7th count beyond a reasonable doubt. On the 8th

count of forgery, the prosecution alleged that on 15th December, 2015 Mr. Newe, while in Dar es Salaam, made a false document, namely Dart Project Implementation Progress-ITS Loan-Requests for Draw Down dated 15th December 2015. According to the particulars of the offence, the purported document was made to show that UDART had contracted Maxcom for backup power installation consumables for consideration of Tshs.425 million, a fact which Mr. Newe knew to be false. In proving the offence, the prosecution fielded Mr. Nguya (PW10). In his evidence, the witness testified to have been shown by the PCCB officers a transfer form in respect of Tshs.425 million from the UDA/Dart Project account to Maxcom's account. He testified that he was asked to recognize the form but he could not be able to do that as the said transaction was done before he joined UDA and UDART. 45 PW10 testified that he was given the CAG's report and after perusing it, it came to his knowledge that the payments that were made to Maxcom from the UDA/DART Project account were invalid as they were supposed to be paid to KCC which was contracted by UDART to supply ITS system. The witness testified that he managed to recognize DWI's and DW4's signatures before the Court as he had worked with them, hence familiar with their signatures. When cross-examined by Mr. Majembe, learned Counsel for the 1st, 2nd and 3rd accused, Mr. Nguya testified that Tshs.425 million was paid to Maxcom for electrical consumables and installation of ITS. He added that the said money was used for the works intended. During the cross-examination by Mr. Shayo, learned Counsel for the 4th accused, PW10 testified that he had not seen an agreement between UDART and Maxcom relating to electrical consumables. When re-examined by Mr. Mmari, learned Senior State Attorney, PW10 testified that Tshs.425 million was paid to Maxcom for electrical consumables though the work was done by KCC. The witness added that up to the time when he was testifying UDART owes KCC a lot of money in respect of such installation, operation, software and hardware of the ITS System. 46 Eng. Lwakatare (PW12) testified that upon inquiring from Maxcom about the money that was credited to its account from the UDA/Dart Project account, Maxcom submitted a letter that was admitted as Exh.PE13. According to the witness, Maxcom informed him that Tshs.425 million that was credited to its account for electrical consumables was transferred to DWI's account on the instructions issued by UDART. When cross-examined by Mr. Luteja, learned Counsel for the 1st, 2nd and 3rd accused, PW12 testified that when DART handed over BRT infrastructure to UDART, there was no electrical equipment that could support the ITS system. He asserted that what was in place was an electrical system that could operate only lights. He added that when the BRT system was handed over to UDART, there was no communication system to support the ITS system. PW12 testified that DART Agency did not procure electrical and communication equipment that was installed at the BRT infrastructure. Eng. Lwakatare told this Court that it was UDART that paid for all infrastructures that were installed in BRT infrastructure. Ms. Kobelo (PW19) testified that on 16th December, 2015 she received a letter from UDA titled Dart Project Implementation 47 Progress-ITS Loan-Request for Draw Down dated 15th December,

2015. The said letter was admitted as Exh.PE31. According to the witness, through the said letter, UDA instructed NMB Bank to pay Maxcom Tshs.425 million for backup power installation consumables. Ms. Kobelo testified that on 4th January, 2015, the said amount was credited to Maxcom's account for electrical consumables. When cross-examined by Mr. Shayo,

learned Counsel for the 4th accused, PW19 testified that she did not see an agreement between Maxcom and UDART for electrical consumables. He added that the payment was processed and paid without supporting documents. PW23, the investigator, testified that from his investigation, he came to the knowledge that Mr. Newe wrote the letter titled Dart Project Implementation Progress-ITS Loan-Request for Draw Down dated 15th December, 2015. According to the witness, through the said letter, UDA instructed the NMB to pay Maxcom Tshs.425 million. He averred that from the investigation, it was found that Maxcom had no agreement that warranted the payment of such a sum. In his defence, DW4 testified that he was the one who wrote the letter which was admitted as Exh.PE31. He asserted that at the time of writing the letter in question, he was mandated by the Boards of Directors of UDA and UDART as per Exh.DE2 and DE3. The witness testified that the payment of Tshs.425 million to Maxcom for purchasing electrical and communication consumables was valid as it was made per the agreement between UDART and Maxcom dated 20/06/2015. He added that the payment was valid as it arose from the agreement between UDART and KCC dated 19/10/2015. DW4 explained that according to the agreement between KCC and UDART, the latter was under the obligation to adapt all points on which ITS and AFC systems would be installed. He evidenced that the AFC system needed equipment that would enable the commuter to pay fares on a self-service basis. He testified that the points on which the systems would be installed needed electrical power and internet communication. DW4 testified that due to the urgency to commence commercial operations, daily meetings were held in December, 2015 to meet the deadline set by the Government that the operations should start on 10th January, 2016. He evidenced that on 15th December, 2015, Maxcom met with UDART whereby the former informed the latter 49 about the equipment to be bought before the closure of the business for end of year holiday. DW4 testified that after the said meeting, he wrote a letter to NMB (Exh.PE31) to request the payment of Tshs.425 million to Maxcom so that it could purchase the needed equipment. The witness testified that up to 31st December, 2015 up to 31/12/2015, UDART was yet to pay suppliers of fiber optic cables, microwave link consumables, electrical cables, and other equipment that were needed to connect BRT infrastructures with National Optic Fibre Cable and upgrade the electrical system from single phase to three phase. DW4 asserted that due to the delay on the part of NMB Bank, Maxcom wrote the letter dated 21st December, 2015 to remind UDART of the urgency of purchasing the needed equipment. The said letter was admitted as Exh.DE31 after being tendered by DW1. According to DW4, through Exh.DE31, Maxcom asked to be paid Tshs.425 million for electrical and communication consumables. The witness stated that under Agreement A1, Maxcom had the duty relating to the installation of electrical equipment and communication networks. Testifying on the 8th count, DW1 testified that according to exhibit DE 31, Maxcom Africa, through the Agreement dated 20th 50 June, 2015 (A1), requested to be paid Tshs.425 million for ITS installation expenses specifically battery enclosures for 35 units for a total of 324 batteries, one additional electricity line for each station and cabling consumables for internet and communication facilities for the ticket office machine. DW1 testified that Exh.PE31 was written by UDART following the meeting

held on 15th December, 2015 between Maxcom and UDART in which Maxcom requested orally to be paid Tshs.425 million to purchase the electrical and communication equipment necessary for supporting ITS and AFC systems. The witness testified that following the delay in paying Maxcom, Exh.DE31 was written by Maxcom to give effect to its oral request to be paid Tshs.425 million. Given that, the witness evidenced that the Exh.PE31 was not false as alleged by the prosecution. When cross-examined by Mr. Mtobesya, DW1 testified that due to the delay by NMB Bank to pay Maxcom and the urgency of the project, he advanced his personal money to the tune of Tshs.425 million to Maxcom on the understanding that the works should continue and upon being paid by NMB Bank, Maxcom should refund the said sum. 51 Testifying on the 8th count, DW6 evidenced that on 18th December, 2015 he was phoned by DW1 who asked him to go to his office at Kamata Building in Dar es Salaam. He stated that while there, he was told by DW1 that on 15th December, 2015 there was a high-level meeting chaired by the Prime Minister concerning the commencement of the DART project operations. He stated that DW1 told him that the Prime Minister was disappointed to learn from DART Agency that the project would not be able to commence on 10th January, 2016 due to delays in the installation of the ITS and AFC system. The witness testified that he told DW1 that the installation of the systems depended on the pre-installation activities that were UDART's duties. DW6 added that DW1 asked him to take over the duty as his staff was slow. According to the witness, on 21st December, 2015 he wrote a letter to UDART when Maxcom informed the latter of the activities which were to be performed to meet the deadline of 10th January,

2016. He asserted that following the said letter, DW1 asked him to come to his office and discuss the matter with Mr. David Mgwasa, UDART's Director. 52 DW6 stated that he discussed the matter with Mr. Mgwasa whereby he told him that DW1 had asked him to take over the pre-installation works using Maxcom's money on the understanding that it would be repaid later. The witness told this Court that he told Mr. Mgwasa that Maxcom had no such money to finance pre-installation works. The witness testified that Mr. Mgwasa asked him to raise an invoice. He stated that he told Mr. Mgwasa that he could not raise an invoice as there was no contract between Maxcom and UDART for that assignment. He added that he told Mr. Mgwasa that Maxcom was unable to raise an invoice since it was not aware of the pre-installation works needed. DW6 evidenced that Mr. Mgwasa told him that he knows the pre-installation works and they cost Tshs.425 million. He added that he gave Mr. Mgwasa two conditions: One, UDART should procure goods and services needed for pre-installation works and Maxcom would supervise the pre-installation works which was the duty of UDART. Two, if UDART would not be able to purchase the goods and services, it should pay Maxcom an imprest of Tshs.425 million. 53 Following the two conditions, DW6 stated that Mr. Mgwasa asked him to write the letter to UDART so that the said letter could be used to brief DW1. The witness testified that he wrote the said letter which was before the Court as Exh.DE31. The witness testified that on 5th January, 2016 DW1 informed him that Tshs.425 million was credited to Maxcom's account. He asserted that DW1 told him to credit the said amount in his account as he used his personal money to accomplish pre-installation works.

DW6 evidenced that he phoned his employee at the site who confirmed to him that the pre-installation works were completed and Maxcom was continuing with the installation. After such confirmation, DW6 stated that he transferred the said amount to DWI's account. From the evidence adduced above, none of the prosecution's witnesses testified that Mr. Newe at the time of writing Exh.PE31 was not mandated to do that. However, Mr. Newe proved to the satisfaction of this Court through Exh.DE and DE 3 that he was mandated by the Boards of Directors of UDA and UDART to make correspondences of the nature that was reflected in Exh.PE31. As to whether the document was false, it is my considered opinion that the prosecution has failed to prove the allegation beyond 54 a reasonable doubt. Mr. Nguya (PW10) when examined in chief by Mr. Mwita, learned Senior State Attorney testified to know nothing about the transaction that involved Tshs.425 million. The said witness evidenced that he knew about the transactions after perusing the CAG's Report that termed the transactions as invalid as the payment was supposed to be made to KCC which had the contract to install ITS and still UDART owes KCC for such services. When cross-examined by Mr. Majembe, learned Counsel for the 1st, 2nd and 3rd accused, PW10 evidenced that Tshs.425 million was paid to Maxcom and the needed works were done. Cross-examined by Mr. Shayo, learned Counsel for the 4th accused, PW10 testified that he had never seen a contract between Maxcom and UDART for pre-installation works. When re-examined, PW10 testified that the pre-installation works were done by KCC though UDART paid Maxcom. From this evidence, it is clear that pre-installation works relating to electrical and communication consumables were done. It is further clear that Tshs.425 million was paid to Maxcom for such works. However, according to PW10, the pre-installation works were done by KCC and not Maxcom. 55 That being the case and considering that the witness testified that UDART owes KCC for pre-installation works, I asked myself whether the prosecution through PW10 proved to the hilt that it was not Maxcom but KCC that was contracted to perform the works and that UDART owes KCC for such services. From such evidence, there is no hint that KCC was contracted for pre-installation works relating to electrical and communication consumables as the witness did not tender any contract to that effect. Further, the witness did not tender any document from KCC that would convince this Court that UDART owes KCC for pre-installation works related to electrical and communication consumables. Concerning the evidence of Eng. Lwakatare (PW12), I found the witness supporting the defence case. This is because, in his evidence, he testified that when BRT infrastructures were handed over to UDART by DART Agency, there were no electrical and communication consumables that would support the ITS and AFC systems. PW12 further testified that it was UDART that paid for the electrical and communication consumables that were installed to support the ITS and AFC systems. 56 From the evidence of PW12 who was the Chief Executive of DART Agency, pre-installation works relating to electrical and communication consumables were paid for by UDART. In his evidence, the witness did not testify that there was money that was paid by UDART other than Tshs.425 million that was credited to Maxcom's account. It is my view that if there was such an amount other than Tshs.425 million credited to Maxcom's account that was used for such works, the witness would have testified on that. PW12's evidence matches to a large extent

with what was testified by PW10. Despite such fact, a question remains who performed the pre-installation works relating to electrical and communication consumables since there was no evidence that KCC was the one which performed the works as evidenced by PW10. Were electrical and communication consumables installed in the BRT infrastructure divine interventions? Both PW10, PW19 and PW23 testified not to have seen the agreement between UDART and Maxcom for the pre-installation works related to electrical and communication consumables. Leave alone PW10 who stated that when the transactions were made, he was not working with UDA and UDART. In her evidence, PW19 testified that 57 the payment of Tshs.425 million was approved in the absence of supporting documents including the agreement. That indeed offended the Offer Letter which required invoices and other documents to be presented to the Bank before authorizing payments. However, it is my view that omission on the part of the Bank to observe the terms and conditions of the Offer Letter does not render the letter requesting the payment to be a forgery. Likewise, the inability of PW23 to locate or interpret the existing agreement between UDART and Maxcom so far as electrical and communication consumables do not render the letter requesting the payment in question a forgery. Since the prosecution's witnesses failed to satisfy my Court that there was no agreement between Maxcom and UDART concerning electrical and communication consumables, I thought it prudent to go through Exh.DE31 (the letter written by Maxcom to UDART dated 21st December, 2015). The authenticity of the letter was not questioned by the prosecution and DW6 who wrote the same. In the first paragraph, DW6 wrote the following: 'We are writing to inform you that we are finding it extremely difficult to continue with the installation of the 58 ITS solution for lack of funds, as you understand we are approaching the festival season where most businesses will be dosed, thus we only have tomorrow to ensure that we have purchased all necessary consumables and equipments (sic) for this project.' Deducing from the quoted passage, it is my view that Maxcom was responsible for the installation of ITS solution which required necessary consumables and equipment for it to be installed. Further, the passage contradicts DW6's evidence that Maxcom did not deal with the pre-installation works relating to electrical and communication consumables necessary for ITS installation contrary to what was evidenced by DW1. In the second paragraph, DW6 wrote the following: 'Please, we urgently require you to purchase or provide us with the funds for the following:

- Battery enclosures for 35 units for a total of 324 batteries
 - One additional electricity line for each station to enhance reliability of power supply 59
 - Cabling consumables for internet and communication facilities for the TOM, gates, etc.'
- From the passage, it is clear that at the time of writing the letter in question, DW6 was aware of the electrical and communication consumables because as per Agreement A1 which I have held not to be false, the duties of Maxcom include those relating to mains power and backup power equipment (Raw Power); clean power installation equipment; local servers, network equipment and front office equipment. In the third paragraph, DW6 wrote the

following: 'The above item are within the consumables that you are required to provide in accordance to the contract between you and us and you and KCC and hence we urgently request you to either supply us with the above consumables or alternatively you pay us an imprest which we estimate to be not less than Tshs.425 million, we will provide you the receipts once the items are purchased. Make the payment directly to the below Banking account: 60 Maxcom Africa Limited International Commercial Bank (Tanzania) Limited Account No. 1160166505 Branch Code:0001 Swift Code: BKMYTZTZ.' As opposed to what was testified by the prosecution's witnesses, Exh.DE31 tendered by DW1 states clearly that as per the understanding of Maxcom, there was an agreement between it and UDART so far as the electrical and communication consumables are concerned. Further, Exh. DE31 contradicts DW6 who testified that Maxcom had no agreement with UDART concerning electrical and communication consumables. If DW6 testified the truth that Maxcom and UDART had no agreement relating to electrical and communication consumables which supports prosecution's case, why the same witness wrote in Exh.DE31 that Maxcom had the contract with UDART on the same issue? This makes me to find that DW6 was economic of truth when he testified on that issue. Trite law is that the defence is under the duty not to prove its innocence but to raise doubts on the prosecution's case. This was well stated in the case of Bathromeo Vicent v. Director of Public 61 Prosecutions, Criminal Appeal No. 521 of 2019-CAT (Unreported) where it was stated as follows: 'It is well settled that in criminal trials, the duty of the accused is to raise doubts on the prosecution case. In the circumstances of this case, we are convinced that the defence case put holes in the prosecution case against the appellant.' Since none of the prosecution's evidence proved to the required standard that Maxcom was not contracted by UDART for backup power installation consumables and considering that the defence has raised doubt on that aspect, it is my holding that the prosecution failed to prove the offence to the required standard. On the 9th count, it was alleged by the prosecution that on 16th December, 2015, Mr. Newe uttered the false document mentioned in the 8th count to NMB Bank purporting to show that Maxcom was contracted by UDART for backup power installation consumables, a fact which he knew to be false. As the principles dictate, since the prosecution has failed to prove the 8th count related to forgery, uttering the same document does not offend any law. It is my holding 62 that the prosecution has failed to prove the count to the required standard. Coming to the 10th count, the prosecution had it that on 24th March, 2024 within Dar es Salaam, Mr. Newe, with intent to defraud, made a document namely, Dart Project Implementation Progress-Request to Utilize our ITS Loan Facility. According to the particulars of the offence, the purported document aimed at showing that Longway Engineering Ltd was contracted by UDART to manufacture cabinets for backup power and ITS equipment for consideration of Tshs.594,925,000/-, a fact which Mr. Newe knew to be false. In proving the offence, Ms. Kobelo (PW19) testified that on 24th March, 2016 while discharging her duties at NMB Bank, she received the letter titled Dart Project Implementation Progress- Request to Utilize our ITS Loan Facility. According to her, the letter was authored by Mr. Newe in the capacity of the Group Chief Finance Officer. The witness tendered the letter which was admitted as Exh.PE32. PW19 evidenced that as per the letter, the author requested payments to three

suppliers including Longway Engineering Ltd which was to be paid Tshs.594,925,000/- for manufacturing cabinets for backup power and ITS equipment, civil works necessary for 63 installation of ITS, electrical and data cables installation in the BRT infrastructure. She added that the letter attached a pro forma invoice as a supporting document. She evidenced further that the payment of Tshs.594,925,000/- was made to Longway Engineering Company Ltd as per the request made through Exh.PE32. Mr. Mbwambo (PW9) testified that as per the records, he saw that Tshs.594,925,000/- was paid to Longway Engineering from the UDA/Dart Project account. Mr. Nguya (PW10) testified that Tshs.594,925,000 was paid to Longway Engineering Ltd from the UDA/DART Project Account at NMB Bank. When cross-examined by Mr. Majembe, PW10 stated that Tshs.594,925,000/- that was credited to Longway Engineering Ltd was used for the purpose intended. In re-examination, PW10 testified that Tshs.594,925,000/- was for manufacturing cabinets for backup power and its equipment and civil works for installation. He added that the cabinets were installed by Rex Energy and not Longway Engineering Ltd which was paid. Mr. David Oturo Nyatara (PW11) testified that on 12th September, 2018, while working at the Business Registration and Licensing Agency, he received a letter from the PCCB requesting information as to the existence of Longway Engineering Ltd, its 64 shareholders and directors and shareholding structure. The witness stated that he made the search and found the MEMARTS, Certificate of Incorporation and Forms No. 14 (a) and 14(b) and Certificate of Change of Name. He evidenced that through the file, he found that the Directors were Chen Shi with 500 shares and Tao (500 shares). He evidenced further that according to the Certificate of Incorporation, the company was registered on 05/07/2011. He testified that the company's name was changed on 01/08/2014 from Longway Engineering Co. Ltd to Simon Construction and Engineering Ltd. MEMARTS in respect of Longway Engineering Company Limited, Certificate of Incorporation of Longway Engineering Company Ltd and Certificate of Change of Name from Longway Engineering Company Limited to Simon Construction and Engineering Company Ltd were admitted as Exh.PE 11. When cross-examined by Mr. Nduruma, the witness testified that when the application for change of name was submitted, BRELA was using a manual system that required the client to physically come to the Agency's offices to inquire about the application or to take the certificate for change of name. He added that before the Court there was no evidence that the certificate for change of name was taken by Longway Engineering Ltd. PW23, the investigator, testified that in his investigation, he discovered that there were companies that were paid for supplying nothing to UDA. He mentioned Longway Engineering Ltd as a company that was paid Tshs.594,925,000/- for supplying nothing. He asserted that the payments were effected by NMB Bank upon the request through the letter which was authored by Mr. Newe (Exh.PE32). The witness amplified that as per his investigation, Longway Engineering Ltd had no agreement with UDA and did not discharge any duty to UDA. He evidenced that the work that was mentioned which was manufacturing cabinets for backup power and ITS equipment was done by another company called Synergyict. The witness added that Tshs.594,925,000/- that was paid to Longway Engineering Ltd was paid to a non-existing company. He explained that Longway Engineering Ltd ceased to exist in 2014 when it changed its name to Simon Engineering and Construction Company

Limited as exhibited by Exh.PE11. 66 In his evidence, Mr. Newe testified that there is a total misconception on the part of the prosecution to allege that Exh.PE32 purported to show that UDA contracted Longway Engineering. He evidenced that the truth was that UDA only applied for a loan on behalf of UDART. He amplified that Exh.PE32 though written under the UDA's letterhead, the requested payment was for UDART's activities. He stated that he wrote Exh.PE32 after being mandated by the Boards of Directors of UDA and UDART as per Exh.DE2 and DE3. DW4 testified that Tshs.594,925,000/- was paid to Longway Engineering Ltd to give effect to the agreement between UDART and KCC which required the UDART to adapt all points on which ITS and AFC system would be installed. He testified that adaptation works included civil works for inserting cables for fiber optics and upgrading the electricity system from single phase to three phase and for connecting BRT stations with National Fibre Optic Cable. He added that all the said works were done by Longway Engineering Ltd through the agreement between UDART and that company which was admitted as Exh. DE4. Mr. Newe testified that in all 28 BRT stations, the power backup system that required batteries to function was installed. He amplified 67 that for safe keeping of the batteries, hard wooden cabinets were needed in all BRT infrastructures. The cabinets, according to Mr. Newe, were manufactured by Longway Engineering Ltd as per Exh.DE4. The witness continued to testify that in each BRT station and terminal, TOMs were kept on tables. He stated that the tables on which TOMs were kept were manufactured by Longway Engineering Ltd as per Exh.DE4. Mr. Newe evidenced further that in each BRT station and terminal, there were ticket offices that were manned by cashiers and other attendants. He stated that the cashiers and attendants needed chairs which were manufactured by Longway Engineering Ltd as per Exh.DE4. He added that the payment made to Longway Engineering Ltd was related to TTS as per the Letter of Offer (Exh.PE8). His evidence was supported by the evidence of DW1 who tendered the agreement between UDART and Longway Engineering Ltd which was admitted as Exh.DE4. From the evidence adduced by the prosecution's witnesses, I found that none of them testified that Mr. Newe had no authority to write the letter in question. This signifies that Mr. Newe had the 68 authority to request the said payment to be made to Longway Engineering Ltd as he proved the same through board resolutions of UDA and UDART (Exh.DE2 and Exh.DE3). As to the falsity of the letter, it is not in dispute that the said letter requested payment of Tshs.594,925,000/- to Longway Engineering Ltd for cabinets for backup power and ITS equipment, civil works necessary for installation of ITS, electrical and data cables installation at the BRT infrastructure. This is mainly evidenced by PW19 who received the said letter while discharging her duties at NMB Bank. The assertion was not denied by DW4 and DW1. It is further not in dispute that Longway Engineering Ltd was paid Tshs.594,925,000/- for the works stated in Exh.PE32. This was evidenced by PW9, PW10, PW19 and PW23. This was also the case of DW4 supported by DW1. Likewise, it is not disputable that the works stated in Exh.PE32 was done. This was evidenced by PW10 and PW23. DW4 did not dispute such evidence. What is in dispute is whether Longway Engineering Ltd was contracted by UDA to discharge the functions stated in Exh. PE32. According to PW10, even though Longway Engineering Ltd was paid 69 for the works stated

in Exh.PE32, the said works were done by Rex Energy Ltd. However, PW10 who at the time of testifying was the Chief Executive of UDA and UDART did not bring to the attention of this Court an agreement between UDA or UDART and Rex Energy Ltd for the said works. Likewise, PW10 did not testify how Rex Energy Ltd was paid for the works stated in Exh.PE32. Further, the witness did not state from which account, Rex Energy was paid. This makes me find the evidence so wanting. So far as PW23's evidence is concerned, I treat it as lame evidence. In his evidence, the witness stated that UDA had no agreement with Longway Engineering Ltd for the works stated in Exh.PE32. This was not disputed by DW4 who stated that it was UDART and not UDA that had the agreement with Longway Engineering Ltd to do the works stated in Exh.PE32. In this, I hasten to agree with DW4 that there was a misconception on the part of the prosecution to allege that UDA had the agreement with Longway Engineering only for a reason that Exh.PE32 was written under UDA's letterhead. Had the prosecution been diligent, it would have noted that the borrower was UDA and it was UDA that was mandated to apply for utilization of the borrowed sum. He further stated that the said works were done by Synergyict. This piece of evidence confirms that the works stated in Exh.PE32 were done. However, by stating that the works were done by Synergyict, PW23 insinuated that Longway Engineering Ltd was not supposed to be paid. Like PW10, PW23 did not tender any agreement between UDA or UDART and Synergyict for the works stated in Exh.PE32. Further, PW23 did not state how Synergyict was paid and from whose coffers. All in all, there is a material contradiction between PW10, the Chief Executive of UDA and UDART and PW23, the investigator of this case so far as who performed the works stated in Exh.PE32. In my opinion, such discrepancy goes to the root of the case as the central issue in the 11th count is who performed the works stated in Exh.PE32. Given that, the evidence of PW10 and PW23 regarding who discharged the duties stated in Exh.PE32 is given no weight. This brought me to the evidence adduced by DW4 and DW1 which in my opinion is watertight and puts holes in the prosecution's evidence. In his testimony, DW1 tendered Exh.DE4 which is an agreement between Longway Engineering Ltd and UDART dated 20th November, 2015. Under the said agreement, Longway Engineering Ltd was required to carry out civil works for the installation of fibre optic cable from the National Fibre Optic Cable to BRT infrastructures; civil works required for the installation of additional electricity line required for upgrading electricity to Three Phase to BRT infrastructures and other works stated in Exh.PE32. In the same vein, Exh.DE4 is sufficient to explain human errors so far as the proforma invoice issued by Longway Engineering Ltd is concerned. This is because though it was previously addressed to Simon Group Ltd, its contents reflect Exh.DE4 which is an agreement between UDART and Longway Engineering Ltd. It is worth noting that the prosecution did not object to the admissibility of Exh.DE4. Further, it did not cross-examine the involvement of Longway Engineering Ltd in the said Agreement. This, in my view, indicated the acceptance of the facts stated in Exh.DE4. In his evidence, PW23 testified that at the time when Exh.PE32 was written, Longway Engineering Ltd had already ceased to exist since 2014. In this, he relied on Exh.PEI 1 which is the Certificate for Change of Name. I brush off the evidence as immaterial. It has never been a position of the law that a company ceases to exist upon

changing its name. Further, in his evidence, PW23 stated that the works mentioned in Exh.PE32 were not part of the works contemplated in the Letter of Offer (Exh. PE8). Again, I brush off the evidence as per clause 3.1, UDA was mandated to utilize the borrowed sum for purchasing ITS and NFC cards and related costs. In my view, the works stated in Exh.PE32 are related to ITS and there is no way the ITS could operate smoothly without the works stated. Having taken that position, it is my holding that the prosecution has failed to prove the case to the hilt. On the 11th count, it was the prosecution's case that on 24th March, 2016 Mr. Newe, while in Dar es Salaam, knowingly and fraudulently uttered the false document mentioned in the 10th count to NMB Bank purporting to show that Longway Engineering Ltd was contracted by UDA to manufacture cabinets for backup power and ITS equipment for consideration of Tshs.594,925,000/-, a fact Mr. Newe knew to be false. Without much ado, since the 10th count was not proven to the required standard, the 11th count suffers the same consequences. 73 At this point, I wish to generally state that the counts of forgery were not proved to the hilt. The prosecution's witnesses concentrated on proving the counts by referring to the transactions that were made between the UDA/DART Project account, Maxcom's account and DWI's account and transactions related to fixed accounts opened by DW1. The transactions, however suspicious as the prosecution's witnesses wanted this Court to believe are unable to prove the offence of forgery. The established principle is that suspicious however grave cannot ground conviction. See: Shabani Mpunzu@ Elisha. Mpunzu v. Republic, Criminal Appeal No. 12 of 2002-CAT (Unreported) and Benedict Ajetu v. Republic [1983] TLR 190. In the same vein, I am aware of the principle that when an accused person gives evidence against his co-accused, the Court should warn itself of the danger to convict thereon. In this case, DW6 when adducing his evidence testified against DW1, DW4 and DW5. In essence, he categorically denied that Maxcom signed Agreement A1 with UDART and hence, all transactions made therefrom were a forgery including the agreement itself. 74 Warned by the danger of convicting on the evidence of DW6, I hesitated to convict the accused charged with the offences of forgery relating to transactions made to Maxcom for the following reasons: One, there was no corroborative evidence that Maxcom did not enter into the said Agreement with UDART. This is due to the fact that CpI. Nankaha (PW17) testified before me that upon examination of Agreement A1, he found that DW6 signed the said Agreement. Likewise, PW23 who investigated the case testified the said fact. As I said earlier, I have no reason to fault the said evidence. Two, DW1 testified that the sum that was credited to his account by Maxcom was a personal loan and refund of the sum advanced to Maxcom for electrical and communication consumables. So far as the loan is concerned, DW1 tendered Exh.DE31. Though DW6 denied that Maxcom advanced a loan to DW1, I found that wanting as his explanation that the sum was credited to DWI's account in exercise of Maxcom's functions as the payment company was not supported by any concrete evidence. It is not occurred in my mind, for a payment company to transact more than Tshs.3 billion without any paper trail. Further, his assertion that Maxcom was 75 instructed by UDART to credit the money to DWI's account is devoid of merits for the reasons I have already stated. Three, in his evidence, DW6 stated that there was a feud between Maxcom and UDART following the latter's intention to terminate the three agreements they had. He

evidenced that from the three agreements, UDART owes Maxcom more than Tshs.3.5 billion. This assertion was echoed by Mr. Nguya (PW10) who testified that UDART owes Maxcom more than Tshs.3 billion. He added that the debt accrued from the three agreements relating to fare collection, mobile network operators and ITS management. In my view, so far as the debt is concerned, DW6 testified while he had an interest to serve to the detriment of his co-accused. All in all, this is not a civil court with jurisdiction to determine the commercial dispute between Maxcom and UDART so far as Tshs.3.5 billion which DW6 alleged that UDART owes Maxcom. The companies are wise enough to refer the dispute to the Court with competent jurisdiction. I now determine the 33rd count in which the four accused are alleged to have caused a pecuniary loss to a specified authority. The prosecution alleged that on diverse dates between 1st June, 2015 and 76 30th April, 2016, within Dar es Salaam, 1st, 2nd and 3rd accused being directors of UDA and the 4th accused being the director of Maxcom willfully caused UDA to suffer a pecuniary loss of Tshs.4,505, 125,000/-. In determining the offence, it was incumbent on the prosecution to prove the following: One, the accused persons at the commission of the alleged offence were directors of the stated companies; Two, the said accused willfully caused the pecuniary loss of Tshs.4,505,125,000/-; and Three, the loss was caused to UDA which is, in this case, is alleged to be a specified authority. These conditions must be cumulatively proved. On whether the accused were directors of the said companies as alleged in the Information, I hasten to state that none of the prosecution's witnesses testified that at any time in question Mr. Tumaini Deusdedit Kulwa @Tumaini Kulwa, the 3rd accused, served in the capacity of the director of UDA. Further, the 3rd defendant at no time during the trial self-proclaims himself as the director of UDA. Without citing any authority, it is an established principle for the prosecution to prove what is alleged in the charge sheet. Since there is no proof that the 3rd defendant was the director of UDA, it is my 77 holding that the prosecution failed to prove the 33rd count against the 3rd accused beyond a reasonable doubt. As far as the rest of the accused are concerned, it is indisputable that DW1 and DW4 served on UDA's Board of Directors as members. Further, DW6 was the director of Maxcom. Given that, the allegations that DW1 and DW4 were directors of UDA were proved beyond a reasonable doubt by the prosecution. Likewise, the same- was proved so far as the directorship of DW6 in Maxcom. On whether the trio willfully occasioned the pecuniary loss of Tshs.4,505,125,000/-, Mr. Mbwambo (PW9) who happened to be the Chief Finance Officer of UDA and UDART testified that he does not remember to have come across any loss caused to UDA concerning the funds issued under the ITS Loan Agreement between UDA and NMB Bank. Mr. Nguya (PW10) who at the time of testifying was the Chief Executive of UDA and UDART testified that according to the statutory audit conducted by Matsab, an audit firm, there was no loss registered from the transactions relating to the ITS loan agreement. Testifying on that, PW23, the investigator, stated that up to the time of filing this case, he discovered that UDA had suffered a loss of Tshs.4,505,125,000/-. PW23 evidenced that the amount was reached 78 after discovering that Tshs.2,200,000,000/=, Tshs. 1,285,200,000/= and Tshs.425,000,000/= that were transferred for the purchase of NFC Cards, pre-installation works and electrical consumables were not used for that purpose. He evidenced further that the sum of Tshs.594,925,000/= that was paid to

Longway Engineering Ltd also was not used for the intended purpose. From the evidence of PW9 and PW10 who at one point worked in the high echelon of UDA and UDART, UDA suffered no pecuniary loss. However, from PW23's investigation, UDA suffered a pecuniary loss. In this, it is my considered opinion that UDA suffered no pecuniary loss as alleged by the prosecution and evidenced by PW23. I take the position for the following reasons. One, Tshs.2.2 billion that was transferred to Maxcom's account, as I stated when determining the 2nd count, was used for purchasing NFC Cards as intended. This is because there were no prosecution witnesses who testified that the said NFC cards were not purchased. Those who testified agreed that the NFC cards were purchased, sold and used by commuters. 79 Further, none of the prosecution witnesses testified that there was money other than Tshs2.2 billion that was used by UDA to pay for those NFC Cards. Mr. Makungwa who testified as PW13 testified that one million cards were purchased. Further, it was his testimony that during his time at NMB Bank, there was no claim for payments from the supplier so far as NFC cards were concerned. This was also the evidence of DW1 and DW4. PW23 testified that he was told by Mr. Affredi that DZ Card supplied NFC cards to Maxcom. Given that, it was necessary for PW23 to not only field Mr. Affredi as a witness but also tender any claim for such payment from DZ Card. Short of that, PW23's evidence is devoid of merits. Two, concerning Tshs. 1,285,200,000/=-, without much ado, my reasoning when determining the 6th count suffices. Likewise, for Tshs.425 million and Tshs.594,935,000/- my reasoning when determining 8th and 10th counts suffices. Since I have found that there was no forgery so far as the payments are concerned, it goes without saying that there was no pecuniary loss caused by the accused to UDA. Hence, the 33rd count stands unproven by the prosecution beyond a reasonable doubt. 80 It should be noted that in the course of this trial, both prosecution on one hand and DW1 and DW2 on the other battled on the issue of ownership of UDA with the view to establishing who is the majority shareholder. In my view, that battle was fought in the wrong arena. The civil court provides a conducive stadium for the battle. Having stated that, I now turn to determine another set of counts which are premised on the allegations of money laundering in which both accused were not spared. Those are counts 12th to 32nd. In those counts, the prosecution alleged that the accused contravened the provisions of sections 12(b) and 13(1) (a) of the Anti-Money Laundering Act, 2006. In this, I hasten to state that according to section 12(b) of the Anti-Money Laundering Act, a person commits an offence if he conceals, disguises the illicit origin of the property or assists any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions while he knows or ought to know or ought to have known that such property is the proceeds of such offence. According to the said section, the offence can be committed by way of converting, transferring, transporting or transmitting property. Section 13(l)(a) is a penal provision. 81 While I am aware that money laundering is a stand-alone offence, for that offence to stand, there must be a predicate offence that has been committed and known to the persons accused of money laundering as a matter of fact or by common sense. Further, the said predicate offence must yield proceeds in whatever form which persons accused of money laundering conceal or disguise the illicit origin of the proceeds by way of conversion, transfer, transmitting or transporting the ill-acquired

proceeds. In this case, the prosecution was under the duty to prove the offence of forgery that is termed in the 12th to 32nd counts as a predicate offence to the offences of money laundering. Since the prosecution failed considerably to prove the offence of forgery, the 12th to 32nd counts stand unproven by the prosecution to the required standard. Turning to the 1st count of leading organized crime, the prosecution alleged that on diverse dates between 1st June, 2015 and 30th December, 2016, the four accused while in Dar es Salaam intentionally organized a criminal racket. It was alleged that through the racket, the accused fraudulently obtained Tshs.4,505,125,000/-, from UDA/Dart Project Account maintained at NMB Bank. 82 In proving the offence which was premised under paragraph 4(l)(a) of the First Schedule to the Economic and Organized Control Act, Cap. 200, the prosecution was under the obligation to prove that the said accused intentionally or willfully organizes, manages, directs, supervises or finances a criminal racket. I have gone through the evidence adduced by the prosecution's evidence and found that none of its witnesses testified how the alleged criminal racket was organized, managed, directed, supervised or financed by the accused. There was no evidence that at any time in point, the four accused met or communicated with the view to organize, manage, direct, supervise or finance a criminal racket. Further, in the absence of proof that the alleged offences were committed, the first count of leading organized crime cannot stand. I hold that the prosecution failed to prove the first count beyond a reasonable doubt. In the upshot, the prosecution has failed to prove the 33 counts against the accused. Robert Simon Kisena, Charles Selemani Newe, Tumaini Deusdedit Kulwa @ Tumaini Kulwa and Juma Rajabu Furaji are hereby acquitted of the charges. I further order their immediate release unless they are held for other lawful cause. 83 Right To Appeal Explained. Order accordingly. DATED at DAR ES SALAAM this 13th day of September, 2024. \ KSKAMANA J! JUDGE // f// 84

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