

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: JUMA, C.J., MUGASHA, J.A. And LILA, J.A.)

CRIMINAL APPEAL NO. 35 OF 2016

AZIMIO MACHIBYA MATONGE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Tabora)**

(Mruma, J.)

dated the 1st day of February, 2016

in

Criminal Case No. 145 of 2013

JUDGMENT OF THE COURT

9th & 15th February, 2018

JUMA, C.J.:

The appellant, AZIMIO MACHIBYA MATONGE is still determined to challenge his conviction by the Senior District Magistrate, Maswa District Court of the counts of: (i)-Conspiracy to commit an offence known as "diversion" (c/s. 32 of the Prevention and Combating of Corruption Act No. 11 of 2007 [the PCCA]); (ii) Diversion (c/s. 29 of the PCCA); and

(iii) Occasioning loss to a specified authority (c/s. 284A of the Penal Code, Cap. 16). The appellant is similarly seeking to overturn his conviction in fourth and fifth counts, both relating to giving false documents with intent to mislead his principal (c/s. 22 of the PCCA). Following his conviction on all those counts, he was sentenced to serve three years in prison or to pay a fine of Tshs. 8,500,000/= . His first appeal was dismissed by the High Court at Tabora (Mruma, J.). Being further aggrieved by the dismissal of his first appeal, the appellant lodged this second appeal based on five grounds of appeal.

His **first** ground of appeal contends misapprehension of evidence which he would like this Court to look into. In the **second** ground of appeal he complains about the error arising from the way the first appellate Judge lumped together the charge of conspiracy with other offences that were levelled against the appellant. This, he contends, occasioned injustice to him.

In the **third** ground of appeal, the appellant gives four reasons why he thinks the offence against him was not proved to the required standard of proof beyond reasonable doubt. The first reason contends

that the offence of giving of documents in order to mislead the principal (c/s. 22 PCCA), and the offence of using these documents with intent to mislead (c/s. 22 PCCA) were full of contradictions. The second reason faults the way the first appellate Judge relied on the evidence of PW1. The appellant questioned why this witness was allowed to tender exhibits which he was not the author of. Thirdly, he contends that the offence of diversion (c/s 29 of the PCCA) was not proved to the required standard. Fourthly, he faults the way calculation which PW1 made was used to base his conviction for occasioning loss to specified authority (c/s 284A Penal Code).

In the **fourth** ground of appeal he faults the first appellate judge for upholding the trial court's judgment cumulatively without analyzing the evidence that was on record. In the **final** ground of appeal, he faults the learned first appellate judge for using documents which were not exhibited as evidence.

The background leading up to this second appeal was precipitated by complaints by the villagers of Malampaka against the conduct of a water project. These complaints somehow caught the attention of the

Prevention and Combating of Corruption Bureau (PCCB) Maswa office on 14/7/2009. Cosmas Severia Batanita (PW1) who was then an Investigator of the PCCB office, was put in charge of the investigations. He began by collecting files and documents associated with the project at the Maswa District Council (the Council). He also conducted interviews of employees of that Council.

From his investigations, PW1 was able to trace the genesis of the water project. For quite some time, he found, the village of Malampaka which falls within the Council was facing acute shortage of water. The main obstacle was how to take water from a nearby well at Bukigi village, along two kilometres of water pipes right up to Malampaka. The Council secured funds and assigned WEDECO Co Ltd the task of digging up channels to lay down the water pipes. The Council invited tenders to supply water pipes to convey water from a renovated water tank at Bukigi village. Bidders were given several tender conditions, required them to be registered companies with Tax Identification Number (TIN), and also to be registered for purposes of the Value Added Tax. Bidders were supposed to possess capital of not less than Tshs. 20,000,000/=.

Jackson Mathias Mashimba (who was charged as 4th accused person) chaired the Tender Board which received bids from the Kilalo General Merchandise of Ushirombo (**KGM**), ALFO-Investment of Shinyanga and High Builders of Kilimanjaro. The appellant was the Director of KGM which emerged the winner of the tender to supply the water pipes.

In his evidence, PW1 testified that despite winning the tender award, the appellant's company did not meet the salient conditions for the award of the tender. Firstly, because the **KGM** did not present its Tax Identification Number and VAT Certificates. Secondly, because the company's stated capital of Tshs. 3,000,000/= was far less than the minimum amount of Tshs. 20,000,000/= which was required from the bidders.

PW1 also highlighted on the culpable roles which those who were charged together with the appellant—Sogoyo Samson Simbira (1st accused), Sophia Alexander Nangale (2nd accused), Azimio Machibya Matonge (3rd accused), Jackson Mathias Mashimba (4th accused) and Omary Khalid Yahaya (5th accused) played to commit the offences. PW1

highlighted the way the appellant (as the Director of the KGM) sent a Delivery Note to the Council to signify that he had delivered a total of 334 PVC pipes and poly pipes in compliance with the tender agreement. PW1 also found that JACKSON (4th accused) had instructed SOPHIA (2nd accused) to make entries in the store ledger to signify that the consignment of water pipes had been duly received and stored.

PW1 testified against the 5th accused, who by then was a technician employed by the Council. According to PW1, the 5th accused issued a voucher to the KGM to prove that the Council had received the water pipes. PW1 also maintained that the way the KGM sent an invoice to the Council to demand payment of Tshs. 56,333,000/= for water pipes that were not delivered is evidence that the accused persons committed the offences they were charged with. He further asserted how the Council was deceived into believing that the water pipes had been received, leading to the Council to pay Tshs. 56,333,000/= into the appellant's personal bank account. PW1 maintained that although all the documents show that the appellant's company had delivered the

water pipes to the Council, not a single water pipe was actually supplied.

When put to his defence the appellant gave sworn evidence and he did not call any witness to testify in his defence. He explained that he was not an employee of the Council but of the Bukombe District Council. He insisted that he won the tender to supply water pipes after reading the advertisements in the newspapers inviting bids. He applied because his company was qualified and met all the conditions. He insisted that documentary evidence on record proves that he delivered the water pipes to the Council and had complied with his obligations under the tender agreement. He denied he had any role in the diversion of any property belonging to the Council.

When the appeal came up for hearing before us on 9th February 2018, the appellant was unrepresented, while the respondent Republic was represented by the learned Senior State Attorney, Mr. Juma Masanja. The appellant expounded on his grounds of appeal by placing reliance on the written statement of arguments which he had filed earlier on 23/06/2017.

At the very outset the appellant reiterated his stand that he was not an employee of the Council, and he had never been an employee of the Council. He urged us to discard what he described as hearsay evidence of PW1, who was the only witness who had implicated him. Explaining why he thinks the entire evidence of the investigation officer of the PCCB (PW1) and the exhibits he tendered should be expunged, the appellant submitted that the duty of PW1 was to investigate and to identify potential witnesses to testify in court. It was these witnesses, he submitted, who should have tendered the exhibits. The appellant was adamant that it was not up to PW1, to be both the sole investigator of the case and then to act as the main prosecution witness, and to also tender the exhibits whose custodians were not called in to exhibit them in court.

The appellant urged us to discard all the exhibits which PW1 had seized from custody of the officers of the Council without complying with section 8 (3) of the PCCA. This provision, he explained, required PW1 to issue a receipt acknowledging the seizure of documents and files from possession or control of the officers of the Council. He urged

us to place doubt in the probity of exhibits P1, P2, P3, P4, P5, P6, P7, P8 and P9 which PW1 tendered without strict compliance with the law requiring him to show Certificate of Seizure of those documents before they can be admitted as evidence in court. To cement his argument with regard to the documents which PW1 exhibited without Certificates of Seizure, the appellant referred us to Section 38 of the Criminal Procedure Act, Cap 20 (CPA) which, like section 8 of the PCCA, underscores the duty to show legal chain of custody from custodians of documents within the Council, how PW1 obtained these documents, right up to their exhibition as evidence. In urging us to accord no weight in the evidence of PW1, the appellant referred us to the decision of the Court in **MASHAKA PASTORY PAULO MAHENGI @ UHURU AND 5 OTHERS V. R**, CRIMINAL APPEAL NO. 49 OF 2015 (unreported).

The appellant next submitted that the evidence of PW1 is without any weight because the internal and external auditors did not report any loss or non-delivery of water pipes. On this, the appellant referred us to the evidence of Ms Elizabeth Simon Kitundu (PW10), who was the

District Executive Director of the Council and the evidence of Robert Ndomele (PW8) who was the Council Treasurer. He asserted that both PW8 and PW10 testified that there was no such loss as claimed by PW1, and that the Council had had four years of clean audit reports. The appellant added that the purported loss, for which he was convicted, was PW1's imagination which should not have been accepted by the two courts below.

Submitting on the second ground of appeal over the way he was charged with conspiracy to divert, a charge he did not understand, he pointed out that he was neither an employee of the Council, nor was he in any position to influence how the tender board of the council arrived at its decision to award him the tender. He referred us to a letter appearing on page 209 of the record of appeal where the Council Executive Director formally informed the appellant that his bid to supply water pipes had been accepted after some corrections and modifications. As a result, he submitted, it was not correct for the first appellate Judge to accept the claim by PW1 that the **KGM** was not qualified to supply the water pipes.

In urging us to allow his appeal, the appellant submitted that all the evidence shows that the water pipes he delivered were received, checked and verified before he was paid. And having been paid for the water pipes he had actually delivered, he submitted, he does not understand why he could still be charged and convicted of diversion of those same pipes.

The respondent Republic, through Mr. Masanja the learned Senior State Attorney had initially resisted the appeal. But he later relented and came round to concede that the evidence on record did not support the conviction of the appellant. He noted how the first appellate court failed to show how the evidence on record proved the distinct ingredients of the offences facing the appellant. He submitted further that the evidence of PW1, which was relied on to convict the appellant was not fully supported by the evidence of two senior officers of the Council, that is, the executive director of the council (PW10) and that of the council treasurer (PW8). Mr. Masanja submitted that the failure to produce the Auditors' Reports to prove the alleged loss, created doubt in prosecution case which entirely relied on the evidence of PW1.

The learned Senior State Attorney could not but agree with the appellant that it is not clear how PW1 obtained the documentary evidence from the Council, which he tendered as exhibits and which formed the basis of his oral evidence. He surmised that since PW1 was for the purposes of his investigations equivalent to a police officer of or above the rank of Assistant Superintendent of Police referred us to section 8 (2) (b) of the PCCA, he should have complied with the procedure of seizing documents for exhibits from the Council as is provided for under section 38 of the CPA. He submitted that the evidence and exhibits which PW1 tendered are of doubtful integrity and should be disregarded. What this means, he added, there is no evidence to support the conviction.

Mr. Masanja concluded his submissions by asserting that without the evidence that proves that the appellant was in any way involved in diversion, the offences of diversion and conspiracy to divert cannot stand alone.

This Court, when sitting to hear second appeals like the present one, is ordinarily concerned with issues of law unless there are mis-

directions or misapprehension of evidence which have occasioned injustice to the appellants. We reiterated this stand in **WANKURU MWITA V. R.**, Criminal Appeal No. 219 of 2012 (unreported):

*"The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that there are perceived, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of evidence; misdirections or non-directions on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice (See, **Amratlal Danodar Maltaser and Another T/A Zanzibar Hotel** (1980) T.L.R. 31; **Mohamed Musero V. R.** (1993) T.L.R. 290; **Salum Mhando V. R.** (1993) T.L.R. 170; **Cosmas Karatasi V. R.**, Criminal Appeal No. 119 of 2004 (CAT, unreported)."*

With due respect to the learned Senior State Attorney and the appellant who urged us to discard the evidence of PW1, we think, failure of the first appellate court to evaluate the chain of custody regarding how this PW1 had obtained the documents from the Council and according the evidence full weight is a misapprehension of evidence which occasioned injustice to the appellant. Section 8 (3) of the PCCA and section 38 of the CPA require investigators who impound documents for evidential purposes to issue Certificates of Seizure. Section 8 (3) of the PCCA states:

8 (3) - Where any property is seized in pursuance of the powers conferred in paragraph (b) of subsection (1), the Director General or a person authorized by him seizing the property shall issue a receipt acknowledging seizure of that property, bearing the signature of the owner or occupier of the premises of his near relative or other person for the time being in possession or control of the premises and the signatures of witnesses to the search.

The decision of the Court in **PAULO MADUKA AND OTHERS VS R.**, Criminal Appeal No. 110 of 2007 (unreported) underscores the importance of showing proper chain of custody of exhibits:

'... chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime... '"

We also agree with Mr. Masanja that the probity of the evidence of PW1 is further weakened by the evidence of the two senior officers of the Council— PW10 and PW8 who saw nothing wrong with the way the appellant won the tender to supply water pipes, and actually delivered those water pipes.

It is also very difficult to countenance PW1's assertion that the appellant's company, the **KGM**, was not qualified to supply the water pipes. As the Executive Director of the Council, PW10 recalled her full involvement in the tendering process. After the signing the tender agreement, the **KGM** which was the successful bidder, purchased and

delivered the water pipes to the Council. In so far as PW10 was concerned, the delivery of the water pipes was made in accordance with the terms of the tender, which she described as being in accordance with the legal process. Paraphrased, PW10 confirms that after the signing of the tender agreement, the successful bidder purchased the water pipes, and then placed his demands for payments on the strength of delivery note (exhibit P2). This delivery note showed the quantity and specifications of water pipes which the appellant actually delivered. The supplier also sent an invoice (exhibit P4) to demand a total Tshs. 56,333,000/=. It seems from the evidence of PW10, that before payment, she instructed the Water Engineer of the Council (Mr. Mabelana) to inspect whether the water pipes complied with the tender specifications. The engineer approved the water pipes.

It is also apparent that the Council carried out its own investigations following the complaints from Malampaka villagers. PW8, who was the Council Treasurer, led a team that was tasked to investigate these complaints. After talking to the villagers, the team compiled and presented its report to the Council on 19/03/2012. The

team's findings show that the water pipes which were laid down to convey water to Malampaka had a number of shortcomings. For example, the water pipes under the ground were different from those specified in tender documents. It is up to the Council to implement the contents of PW8's report, which may include a special audit which may lead to a better grounded prosecution or the taking of internal disciplinary action against its officers who were responsible for the loss.

However, for purposes of this appeal, the appellant is right to insist that because he was not an employee of the Council, he was not privy to internal procedures which led to the appointment of his company to supply the water pipes which he delivered in compliance with tender agreement.

Having failed to evaluate the evidence of PW1 in relation to the evidence of PW10 and PW8 who saw nothing wrong with the way the appellant's **KGM** won the bid to supply water pipes, we saw no evidential basis for the first appellate Judge to reopen the issue whether the appellant's company was qualified to present its bid before the Council Tender Board. The first appellate Judge stated that:

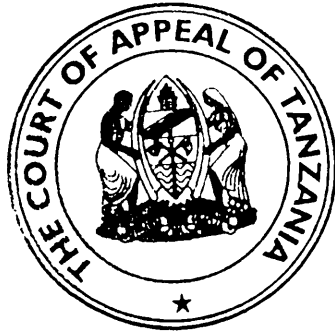
"...It is undisputed evidence of PW1 that Kilalo General Merchandise is not a registered limited liability company but according to Exhibit P1 it was an enterprise registered under Business Names (Registration Ordinance Cap. 213). Secondly, it was also undisputed evidence of PW1 that the appellant's company deals with supply of stationery and it had no licence to deal with supply of water pipes. That notwithstanding it was this company which consequently emerged the winner and was awarded the tender. From this piece of evidence it is clear that the appellant's company didn't qualify even to apply because it didn't meet the tender requirements [Emphasis added].

In the upshot of what we have said, we are satisfied that there is justification for us to interfere with the findings of the trial District Court of Maswa District (Criminal Case No. 26/2011) and that of the High Court at Tabora (DC Criminal Appeal No. 145 of 2013).

We allow this appeal, quash the appellant's conviction and set aside the sentence to serve three years in prison or to pay the fine of Tshs. 8,500,000/= imposed on him. The appellant shall be released

forthwith if he is in custody, unless otherwise lawfully held. In case he paid the fine, he should be refunded immediately.

DATED at **TABORA** this 12th day of February, 2018.



I. H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

A handwritten signature in black ink, appearing to read "A. H. Msumi".

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL