IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KWARIKO, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 120 OF 2019

1. **RAYMOND ADOLF LOUIS**
2. **KHALID YUSUPH HASSAN** ..... **APPELLANTS**
3. **BENSON VITALIS MALEMBO**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es Salaam)

(Korosso, J.)

dated the 25th day of March, 2019

in

Economic Crime Case No. 1 of 2017

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JUDGMENT OF THE COURT

25th May, 2021 & 27th January, 2022

NDIKA, J.A.:

Raymond Adolf Louis, Khalid Yusuph Hassan and Benson Vitalis Malembo ("the first, second and third respondents" respectively), along with four other persons namely, Haruni Lyson Mpande, Khamis Ally Omar, David Faustine Chimomo and Safina Kassim Rupia, stood trial before the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es Salaam for various offences arising from allegedly illegal removal of 329 containers from an inland container depot in Dar es Salaam. At the close of the prosecution case, the said David Faustine Chimomo and Safina Kassim Rupia, who were

the sixth and seventh accused respectively, were found to have no case to answer and were, accordingly, acquitted.

The trial then proceeded with the remaining accused, ending up with acquittal of the said Haruni Lyson Mpande and Khamis Ally Omar, the third and fourth accused respectively. Conversely, there was no escape for the first and second appellants who were convicted of forgery on Counts 2 to 106 and, accordingly, each of them was sentenced to three years' imprisonment on each count. Furthermore, the duo along with the third appellant were convicted on Count 107 of occasioning loss to a specified authority. For this count, the trial court imposed two years' imprisonment on each of the three appellants and ordered further that the sentences against the first and second appellants be served concurrently. Besides, pursuant to paragraph 10 (4) of the First Schedule to the Economic and Organised Crime Control Act, Cap. 200 RE 2002 (now RE 2019) ("the EOCCA"), the trial court ordered the appellants to pay jointly and equally to the Tanzania Revenue Authority ("the TRA"), the country's tax and customs authority, a sum of money amounting to half the loss of TZS. 12,618,970,229.00 they occasioned to the latter on account of their wilful acts. It is also worthwhile to remark that the first appellant was acquitted of money laundering laid as Count 108. Given the circumstances, the trial court refrained from making any finding, as against

the appellants, in respect of Count 110, citing the offence of aiding tax evasion, drawn up in the alternative to Count 107, against the appellants and the rest of the accused persons.

Resenting the outcome of the trial, the appellants, through a consortium of four learned advocates, namely, Messrs. Kung'he N. Wabeya, Mashaka K. Ngole, Amin Mshana and Daimu Halfani, instituted the present appeal premised upon four grounds of complaint as follows:

1. *That the learned trial Judge erred in law and in fact in holding that the prosecution case was proved beyond reasonable doubt.*
2. *That the learned trial Judge erred in law and in fact in holding that the forgery in counts no. 2 to 106 was proved against the first and second appellants herein.*
3. *That the learned trial Judge erred in law and in fact in holding that Tanzania Revenue Authority (TRA) being specified authority has suffered loss alleged to have been occasioned by the acts and or omissions of the first, second and third appellants herein.*
4. *That the learned trial Judge erred in law and in fact in ordering the appellants to pay compensation to the specified authority (TRA) amounting to Tanzania Shillings Two Billion each upon completion of their terms of imprisonment.*

When the appeal came up before us for hearing on 25th May, 2021, Messrs. Halfani, Ngole and Wabeya, appeared for the appellants, who were also present. The respondent, on the other hand, had the services of Mr. Zachariah Ndaskoi, learned Principal State Attorney, assisted by Messrs. Christopher Msigwa and Nassoro Katuga, learned Senior State Attorneys.

Before the hearing began earnestly, the third appellant sought and obtained leave of the Court for withdrawal of his appeal as he no longer intended to pursue it. Accordingly, we marked his appeal withdrawn in terms of Rule 77 (4) of the Tanzania Court of Appeal Rules, 2009.

Before dealing with the substance of the appeal, we find it instructive to provide, at the forefront, facts of the case that appear not to be seriously disputed by the parties.

The setting in this case is an inland container depot known as Azam Inland Container Depot (henceforth "AZAM-ICD" or "AICD" or simply "the depot"). Linked to the Dar es Salaam Port ("the port"), AZAM-ICD was established and operated upon a licence as a unit by Said Salim Bakhresa & Company Ltd, a private company based in Dar es Salaam. As an "inland depot" or simply "dry port", AZAM-ICD had a common user facility along with appropriate infrastructure and storage facilities so as to operate as a centre for transshipment of mostly sea-bound containers to and from inland

destinations. Certainly, the use of dry ports is usually expected to decongest seaports and speed up the flow of cargo between ships and inland transportation systems. Thus, AZAM-ICD would regularly receive containers from the port pending customs clearance.

Insofar as this appeal is concerned, a total of 329 containers, which had been received at the port, were, at the request of either XL Clearing and Forwarding Ltd. ("XLCL Ltd.") or JAS Express Freight Limited ("JAS Ltd."), discharged from the port and subsequently delivered at AZAM-ICD for storage pending clearance. Both XLCL Ltd. and JAS Ltd. as well as another company christened as Regional Cargo Services Ltd. ("RCS Ltd.") were sister companies whose majority shareholder was said to be a certain Abdulkadir Kassim Abdi. At the material time, that is between 11th July and 28th October, 2015 when the said containers were allegedly released fraudulently from AZAM-ICD, the first and second appellants worked, respectively, as AZAM-ICD's Operations and Security Manager and Port Operations Manager under the supervision of Ashraf Yusuf Khan (PW1), the General Manager. Another key official at AZAM-ICD was Kessy Juma Mkambala (PW2), the Delivery Manager. It was in the evidence that PW2 was absent from work between June and November, 2015 during which the first appellant acted as the Delivery Manager.

On the evidence on record, especially as adduced by PW1 and PW2 as well as the first and second appellants, the clearance and eventual release of cargo from AZAM-ICD had to follow Standard Operating Procedures agreed upon by the stakeholders notably the TRA Customs and Excise Department and the Tanzania Ports Authority ("TPA"). Without going into the procedure in detail, it suffices to note that the clearance process was tripartite in that it sought to ensure that taxes or charges due to the TRA, the TPA and AZAM-ICD, were duly paid before any cargo or container was ultimately released.

To initiate the clearance process, an importer's clearing and forwarding agent ("CFA") would lodge onto the TRA's Tanzania Customs Integrated System ("TANCIS") a full set of clearance documents. Briefly, the TANCIS is an integrated electronic system for monitoring and management of imports. If the customs entry declaration by the CFA was successfully done, the TANCIS would generate an assessment notice (called Tanzania Single Administrative Document or simply "TANSAD") with a unique reference number. Once payment of the assessed taxes was done by the importer or the CFA in favour of the TRA and upon completion of customs verifications, where applicable, TANSAD would be issued thereby enabling a "Customs Release Order" ("CRO") to be printed out from the TANCIS. As far as AZAM-ICD operations were concerned, a CRO printout had to be signed and issued

by the Customs Officer in Charge stationed at AZAM-ICD, who, during the material time, was Eliachi Heriel Mrema (PW5). In PW5's absence, PW10 Rehema Kassim Siguda, Assistant Customs Officer at AZAM-ICD, would deputize. It is noteworthy that a CRO is essentially proof that all applicable customs duties or taxes for a particular imported cargo have been fully paid.

The CRO would then be lodged by the CFA at AZAM-ICD along with a delivery order issued by the shipping line and proof from the TPA of payment of port charges. The said proof of payment of port charges was referred to in the proceedings as "D&DO". These three documents would be received by the Delivery Manager at AZAM-ICD where a file would then be opened and the relevant information posted onto AZAM-ICD's comprehensive and integrated container depot management system known as "Capella". The Delivery Manager would himself verify the authenticity of the documents or delegate the process to his subordinates especially where he was out of office. For example, in validating a CRO on file, the Delivery Manager at AZAM-ICD or any other manager, as the case may be, could access the TANCIS to confirm its authenticity. After verification, a tax invoice is issued by AZAM-ICD for its costs and charges mainly covering container storage, customs verification (where applicable), removal expenses and shore handling cost. Once AZAM-ICD's charges are paid by the CFA, a "loading

order" would be processed and issued to the CFA by the Delivery Manager's subordinates. A loading order shows the name of the driver and details of the vehicle entering AZAM-ICD to collect the cargo or container as described therein. Meanwhile, a "gate out pass" would be prepared describing the cargo or container intended to be removed as initiated on the Capella system by the Delivery Manager.

It should be stressed that AZAM-ICD's three managers (that is, the Delivery Manager, the Operations and Security Manager and the Port Operations Manager) had access to the TANCIS and Capella systems for them to verify the documents on file before processing the removal of the cargo leading up to the signing of the gate out pass. It is also significant to note that they could also verify whether the CFA appointed by the importer to undertake the clearance process was duly licensed to operate or not.

After the gate out pass is issued, the designated truck would be allowed to enter AZAM-ICD and load the cargo or container concerned. Before the truck was allowed to leave the depot, a Customs Preventive Officer stationed at the checkpoint at the depot would look at the CRO and the gate out pass to verify them on the TANCIS and then determine if they tallied with the cargo or container(s) on the truck sought to be removed. If

satisfied, the Officer would then flag off the truck. So much for matters not seriously in dispute.

We now turn to contested matters. It was the prosecution case that on diverse dates between 11th July and 28th October, 2015 a total of 329 containers of cargo that had been transferred at the request of either XLCL Ltd. or JAS Ltd. from the port to AZAM-ICD for storage were illegally cleared and removed from AZAM-ICD upon 105 forged CROs purporting to show that they were issued by the Customs and Excise Department, TRA, Dar es Salaam resulting in evasion of payment of chargeable import taxes. As indicated earlier, the alleged forgery of the said CROs constituted Counts 2 to 106 against the first and second appellants contrary to sections 333, 335 (a) and (d) (i) and 337 of the Penal Code, Cap. 16 RE 2002 (now RE 2019) ("the Code").

It was further contended by the prosecution that in a bid to hide the alleged forgeries, the said Haruni Lyson Mpande, a Business Analyst/Web Developer at the TRA, on diverse dates between 11th July and 28th October, 2015, intentionally and unlawfully deleted from the TANCIS database certain computer data constituting manifest information regarding the aforesaid 329 containers destined to AZAM-ICD. The charge was framed as Count 1 under section 7 (1) (b) of the Cybercrimes Act, 2015.

The prosecution posited further that the appellants and their four co-accused, on diverse dates between 11th July and 28th October, 2015, intentionally facilitated the removal of 329 containers from AZAM-ICD without payment of import taxes amounting to TZS. 12,618,970,229.00. This allegation was presented as Count 107 against all seven accused persons, accusing them of occasioning loss to a specified authority contrary to paragraph 10 (1) and (4) of the First Schedule to and sections 57 (1) and 60 (2) of the EOCCA. It was alleged in Count 110, in the alternative to Count 107, as against the appellants and the rest of the accused persons that, on diverse dates between 11th July and 28th October, 2015, they aided tax evasion contrary to section 80 of the Tax Administration Act, 2015 resulting in non-payment of import taxes amounting to TZS. 12,618,970,229.00 for the imported cargo in the said 329 containers.

For the record, it would be worthy to recall that the prosecution had also charged the first appellant with money laundering under Count 108 contrary to sections 12 (a) and 13 (a) of the Anti-Money Laundering Act, No. 12 of 2006. The accusation was that on diverse dates between 11th July and 12th November, 2015 the first appellant received in his bank account at CRBD Bank, Lumumba Branch the sum of TZS. 686,868,000.00 knowing that the said amount of money was proceeds of a predicate offence, namely, tax

evasion. The said Khamis Ally Omar faced a similar charge of money laundering drawn up as Count 109 in respect of a transaction involving the sum of TZS. 25,000,000.00 paid into his bank account knowing that the said amount of money constituted proceeds of tax evasion, a predicate offence.

The tale on how the alleged illegal removal of the 329 containers from AZAM-ICD was uncovered began with the testimony of PW1 Ashraf Yusuf Khan, the depot's General Manager. He adduced that on 13th November, 2015, he initially learnt that eight containers were unaccounted for at the depot. After liaising with PW2 Kessy Juma Mkambala (the Delivery Manager), the first appellant and PW5 Eliachi Heriel Mrema (the Customs Officer in Charge stationed at AZAM-ICD) on the matter, investigations were conducted. It was subsequently established that 105 files containing full sets of documents relating to 329 containers were missing but there was an indication that they had been sent to the first appellant for custody. According to PW1, the first appellant, upon being pressed on the matter, directed the search party to Segerea in Dar es Salaam where most of all the 105 files were ultimately retrieved. Salum Idd Omary (PW4), AZAM-ICD's Data Entry Clerk, confirmed to the trial court that the first appellant admitted having possession of the files and that it was at his direction that the files

were retrieved at Segerea from two persons, whom he named as Chris and Raphael. All the 105 files were tendered in evidence collectively as Exhibit P1.

Subsequently, PW1 examined the recovered files and noted an apparent procedural mishap: that all the gate out passes in the files had one signature only appended by the first appellant instead of two. According to him, while a gate out pass had to be signed by the Delivery Manager, it also had to be countersigned by the Operations and Security Manager, who, as indicated earlier, was the first appellant at the material time. In the absence of either of the two, the Port Operations Manager, who, at the material time was the second appellant, could sign. Other officials who could fill in the role, where necessary, were AZAM-ICD's General Manager and the Financial Controller. On being queried on the absence of countersignature, the first appellant admitted having signed the passes singly.

PW2, who as the Delivery Manager should have been at the helm of the clearance process at AZAM-ICD, was not at the depot between June and November, 2015. When shown the gate out passes, he confirmed that they bore the first appellant's signature with which he was familiar. He was emphatic, however, that none of the disputed CROs contain the second appellant's signature.

There was also damning evidence from PW3 Hamida Seif Ally, the depot's Data Entry Supervisor, that the first appellant, being her supervisor, directed her to omit from her daily reports on movement of containers in and out of the depot any reference to RCS Ltd. She complied with the directive even though she admitted that it was a clear dereliction of duty.

The prosecution case also tended to show that the said CROs (annexed to Exhibit P5 as A1 to A105) were not printed out of the TANCIS nor were they signed and issued by PW5 Eliachi Heriel Mrema or her second-in-command, PW10 Rehema Kassim Siguda. According to PW5, she could only print out and issue a CRO from the TANCIS upon being satisfied that all the required documents including proof of payment of import duties and container inspection report, where applicable, are in order. She would, then, sign and rubber stamp the CRO before endorsing on it *"Azam ICD/TPA Proceed."* The CRO would then be recorded in a register for CROs and sent to AZAM-ICD by dispatch. Both PW5 and PW10 denied to have ever issued or signed the disputed CROs, all of which purportedly indicated that they were issued at the instance of RCS Ltd. as a duly appointed CFA. Moreover, none of the entries in the register (Exhibit P2) for the material period revealed a CRO issued to RCS Ltd.

We wish to interpose here to remark that based on the evidence adduced by PW28 Tiagi Masamaki, the then Commissioner for Customs and Excise Duty, RCS Ltd. had its licence as a CFA revoked vide letter dated 21st October, 2013 (Exhibit P20). The said company, therefore, could not lawfully operate as a CFA anywhere in the country. This fact was acknowledged by PW16 Godfrey Anton Masilamba who previously worked for the said company and its two affiliates (JAS Ltd. and XLCL Ltd.)

There was also evidence from PW11 Ghati Joseph Nyagonde, Senior Customs Officer at AZAM-ICD who, like PW10, was responsible for physical verification of cargo prior to the issuance of CROs. She too denied to have ever conducted any verification of cargo or containers involving RCS Ltd. as a CFA during the period in issue. Besides, two TRA Preventive Officers/Assistants stationed at the checkpoint at AZAM-ICD – Assistant Customs Officer Raya Ramadhani Ibrahim (PW6) and Preventive Assistant Zulfa Mohamed Marila (PW8) – also testified that they did not handle any removal of cargo from the depot initiated by or in favour of RCS Ltd. during the material period. To substantiate her evidence, PW6 tendered in evidence two registers of cargo gate out passes (Exhibit P3 (a) and (b)), none of which revealed any gate out pass issued in the name of RCS Ltd. as an agent in respect of cargo or container removed during the period in issue.

Assistant Superintendent Police Chrisantus Kitandula (PW7), a gazetted handwriting expert from the Forensic Bureau, Police Headquarters, Dar es Salaam testified that he examined and analysed the handwritings on the disputed CROs against the writing specimens from various officials including PW5 and the two appellants which had been collected separately by three police officers but dispatched to the Forensic Bureau by PW14 Police Officer E.4261 Detective Sergeant Chuchi. As per his report dated 7th March, 2016 annexed with the disputed CROs and specimen signatures (Exhibit P5), PW7 found the signature on the disputed CROs differing from that of PW5 and that the words *"AICD/TPA Proceed"* appearing on the disputed CROs matched with the second appellant's handwriting. In addition, he opined that the signature on the CROs matched the first appellant's handwriting. This evidence dovetailed with PW1 and PW2's testimonies who claimed being acquainted with the first and second appellants' handwritings having worked with them for a sufficiently long duration. On being shown the disputed CROs and gate out passes, they attributed the handwritings thereon to the two appellants.

PW9 Kalunde Suleiman Kisesa, the then Senior Business Analyst at the TRA Headquarters, told the trial court that, at the instruction by the police investigators, she examined the disputed 105 CROs as against the TANCIS

system and tendered in evidence her detailed report dated 10th February, 2016 (Forged Customs Release Orders Analysis Report – Exhibit P6). She found that the said CROs did not tally with the system and therefore they were bogus. She based her findings, in a nutshell, on the following: one, that 92 of the disputed CROs indicated that they originated from "DAR COSTOMS SERVICE CENTRE" instead of "DAR CUSTOMS SERVICE CENTRE". Two, all the disputed CROs had "2015 ..." as the manifest number instead of "15 ..." to reflect the year in which the manifest was registered. The said "2015 ..." could not be reflected or accommodated in the TANCIS. Three, some of the disputed CROs used TANSAD numbers of previous CROs that had previously been used to clear cargo at one of the twelve customs controlled areas, namely, Namanga, Kabanga, Rusumo, Tunduma, Mutukula, Tanga Port, the Julius Nyerere International Airport at Dar es Salaam ("JNIA"), Kasumulo, Horohoro, Tarakea, Holili and Mwanza Airport. A TANSAD number is unique and, therefore, it could not be used more than once. Four, all the disputed CROs mentioned "RCS Ltd." as the duly appointed CFA but this was a phony company as it ceased to operate since 21st October, 2013 following revocation of its licence.

PW9's testimony was supported by the testimonies of Customs Officers from the aforementioned twelve customs controlled areas: PW13 Ayubu

Anael Mbowe (JNIA), PW18 Samwel Ebenezer (Mutukula), PW19 Aden Mwakalobo (Holili), PW20 Edward John Iwato (Horohoro), PW21 Ally Said Liana (Rusumo), PW22 Samson Wilson Mwakikuti (Tanga Port), PW23 Kalolo Alphonce Mbeya (Tarakea), PW24 Zacharia Jumaa (Kasumulo), PW25 Mohamed Joma Shamte (Kabanga), PW26 Aminiel Lewis Malisa (Namanga), PW27 Benjamin Charles Mallya (Tunduma) and PW30 Farence Mniko (Dar es Salaam Port). These witnesses took turns to compare the information on the disputed CROs with a series of previously used TANSAD forms and CROs from their respective areas printed out from the TANCIS (that is, Exhibits P8 to P19 as well as Exhibits P22 to P26). Their evidence was essentially in common that the disputed CROs had TANSAD numbers which had been used at their controlled customs centres for exports or transit cargo by CFAs other than RCS Ltd.

The prosecution also produced Liberatus Charles Mzobola (PW12), the then TRA's Manager, the Computer Forensic Unit, who conducted a thorough investigation on the TRA and AZAM-ICD computer systems to find information on the 329 containers. In his report (Forensic Report on TANCIS System Fraud – Exhibit P7), he established that 329 containers disappeared while under customs control at AZAM-ICD and that the said containers exited between July and November, 2015. He adduced further that in order to

conceal the fraud, manifest information in the TANCIS system was deleted to eliminate traces of the existence of the containers after they had exited the depot. To facilitate the release of the containers, forged CROs in the name of RCS Ltd., a phony company, were used even though the operators at AZAM-ICD had access to the TANCIS to verify the authenticity of every CRO and other documents submitted to them by the CFA. It was surmised that the operators deliberately ignored the verification procedure. In addition, based on the analysis of information retrieved from AZAM-ICD's Capella system, PW12 confirmed that 329 containers cleared at the behest of RCS Ltd. were removed from the depot without payment of import taxes amounting to TZS. 12,618,970,229.00 between July and November, 2015.

In his defence as laid down in cross-examination of prosecution witnesses and through his testimony, the first appellant claimed that AZAM-ICD was not involved in the payment of customs duties and that operators of the depot only received CROs from the TRA Customs Officer in Charge at the depot. They acted on such documents upon verifying them through the TANCIS system. He denied having hidden any files or signing the allegedly forged CROs. He also refuted having caused any loss to any specified authority. In cross-examination, he conceded having had access to the TANCIS system to verify the authenticity of the CROs submitted to the depot.

However, he was insistent that there was no proof of illegal removal of 329 containers from the depot as alleged.

On the part of the second appellant, his defence also consisted of a general denial of the prosecution case. He averred that as the Port Operations Manager, he was responsible for handling the transfer of containers from the port to AZAM-ICD and that he had no role in removal of cargo from the depot. Thus, he denied having dealt with any of the disputed CROs at any point. On being cross-examined, he also refuted having had access to the TANCIS or ever acting on behalf of an absent manager at the depot.

In her judgment, the learned trial Judge found the charge of forgery on Counts 2 to 106 proven against the first and second appellants beyond all reasonable doubt. Briefly, she held, on the totality of the evidence on record, that the disputed CROs were false. She was impressed by the handwriting expert's evidence as well as the testimonies of PW1 and PW2 affirming that the signature on all disputed CROs purporting to authorize the processing of the documents matched the first appellant's handwriting thereby rejecting his defence of general denial. As regards the second appellant, the trial court accepted the handwriting expert's opinion attributing to him the endorsement *"AICD/TPA Proceed"* on all the CROs for the illegal process of clearance to

progress. His general denial was considered but rejected. The court was also satisfied that the disputed CROs were deployed with intent to defraud or deceive thereby facilitating illegal clearance and removal of 329 containers from AZAM-ICD without payment of import taxes. That the two appellants knew or ought to have known the falsity of the CROs; and that they acted consciously and intentionally to facilitate the illegal removal of the containers.

Coming to Count 107 alleging occasioning loss to a specified authority, the learned trial Judge, mainly relying on the unassailed Forensic Report on TANCIS System Fraud (Exhibit P7) tendered by PW12, found it established that the TRA suffered loss in the sum of TZS. 12,618,970,229.00 due to illegal removal of 329 containers from AZAM-ICD without payment of import taxes. She attributed the loss particularly to wilful acts of the duo by signing and endorsing on the forged CROs so as to facilitate the illegal removal of the containers.

In his argument in support of the appeal, Mr. Halfani canvassed the first three grounds of appeal conjointly and then rounded off with the fourth ground. Insofar as the first three grounds of appeal were concerned, he raised a myriad of contentions whose thrust was that the charged offences of forgery and occasioning loss to a specified authority were not proven to the required threshold against the first and second appellants. We find it

convenient, at first, to deal with the contentions regarding Counts 2 to 106 alleging forgery and then proceed to determine the tenability of the other offence (Count 107).

Ahead of examining and determining the merits of the appellants' contentions on Counts 2 to 106, we think it is necessary to set out the provisions of sections 333, 335 (a) and (d) (i) and 337 of the Code under which the said counts were laid:

> *"**333**. Forgery is the making of a false document with intent to defraud or to deceive."*
>
> *"**335**. Any person makes a false document who -*
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> *(a) makes a document which is false or which he has reason to believe is untrue;*
>
> *(b) [Omitted]*
>
> *(c) [Omitted]*
>
> *(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) [Omitted*
>
> *(iii) [Omitted]*
>
> *(iv) [Omitted]"*

> *"**337.** Any person who forges any document is guilty of an offence, and liabie, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for seven years."*

While section 333 above defines forgery as "the making of a false document with intent to defraud or to deceive," section 335 specifies the four main ways in which a person may be held to have made a false document, two of which are relevant to this case. In the first place under section 335 (a), a person makes a false document when he makes a document which is false or which he has reason to believe is untrue. The document is, therefore, made purporting to be what in fact it is not. It would be helpful to cite, with approval, the case of **Deogratius v. Republic** [1971] HCD n.155, wherein the High Court (Bramble, J.) referred to a passage in Kenny's Outlines of Criminal Law, 5th Edition, at page 354 thus:

> *"A writing is not a forgery when it merely contains statements which are false, but only when it falsely purports to be itself that which it is not. The simplest and most effective phrase by which to express this rule is to state that for the purposes of the law of forgery **the writing must tell a lie about itself.**"*
> [Emphasis added]

See also **Joseph Mapema v. Republic** [1986] TLR 148, a decision of the High Court (Msumi, J. as he then was); and **Stanley Murithi Mwaura v. Republic**, Criminal Appeal No. 144 of 2019 (unreported).

In the second way under section 335 (d) (i), a person can be held to have made a false document if he signs the said document in the name of any person without his authority, whether such name is or is not the same as that of the person signing. Finally, section 337 provides for general punishment for forgery applicable only where no other punishment for the offence is provided for.

In view of the above legal standpoint, three main issues arise for determination in the instant case: one, whether the disputed 105 CROs were false; two, whether the appellants made or signed the said documents; and three, whether the documents were made with intent to defraud or deceive.

Starting off with the question whether the disputed 105 CROs were false, we note that Mr. Halfani did not specifically address this issue in his lengthy submissions. Conversely, Mr. Msigwa sturdily contended, in effect, that the documents were proven to be forged as they did not originate from the TRA TANCIS system. That, they were not signed by PW5 or her deputy (PW10), and that they were not reflected in the CROs registers (Exhibit P2). And that the said position was reinforced by PW9's forensic findings as per

the Forged Customs Release Orders Analysis Report (Exhibit P6) and the testimonies of the twelve Customs Officers from the twelve customs controlled centres across the country.

On our own evaluation of the evidence on record, we endorse Mr. Msigwa's submission, as we hold that the finding that the disputed CROs were false was soundly based on overwhelming evidence as we shall demonstrate. First and foremost, the trial court believed the evidence of PW5 (the Customs Officer in Charge at AZAM-ICD) and her assistant (PW10) that none of them signed and issued any of the disputed CROs purporting to bear PW5's signature. As did the trial court, we find no basis to disbelieve these two witnesses, even without factoring in the handwriting expert's opinion at this point. Secondly, we find no reason for not giving credence to the unassailed testimonies of the aforesaid two witnesses supported by the CROs Registers (Exhibit P2) that none of the disputed CROs was ever recorded to have been issued by the TRA Office at the depot during the material period. Nor was there any CRO issued at the material time in the name of RCS Ltd., an undisputed bogus company that ceased to exist and operate since October 2013. Thirdly, the investigation, analysis and findings by PW9 Kalunde Suleiman Kisesa, the then Senior Business Analyst at the TRA Headquarters, as presented in the Forged Customs Release Orders Analysis

Report dated 10th February, 2016 (Exhibit P6) established further the details of the falsity of the disputed 105 CROs. Having gone through her 138-page report, we accept her findings, which were largely unchallenged in cross-examination, that the CROs did not tally with the TANCIS system. The discrepancies on the disputed CROs that she referred to in detail are so apparent on the face of the CROs that they affirm the falsity of the said documents. Without repeating the details, the discrepancies concerned the inaccuracy of the name of the customs controlled centre from which the CRO supposedly originated, use of incorrect manifest number and re-use of previous TANSAD number that had been used for export of goods or clearance of transit cargo at one of the twelve customs controlled areas. Fourthly, we are also conscious that PW9's forensic findings tallied with the evidence of the Customs Officers from twelve customs controlled areas: PW13, PW18, PW19, PW20, PW21, PW22, PW23, PW24, PW25, PW26, PW27 and PW30. Their evidence, which was based on comparison of the information on the disputed CROs and a series of previously used TANSAD forms and CROs from their respective areas printed out from the TANCIS (Exhibits P8 to P19 as well as Exhibits P22 to P26), was categorical that the disputed CROs were bogus. This finding was partly but soundly grounded upon the fact that the disputed CROs had unwittingly re-used previous

TANSAD numbers which had been used at their controlled customs centres for exports or transit goods by CFAs other than RCS Ltd. It was in evidence that a TANSAD number was unique and that it could not be re-used.

On the basis of the foregoing, it is our firm view that the disputed documents were false in that they purported to be CROs issued from the TANCIS by the relevant authority at the instance of RCS Ltd. as the CFA, which was not true. Each of the documents, therefore, purported to be what in fact it was not.

We now turn to the crux of the matter, which is apparently a hotly contested question whether the appellants made or signed the disputed CROs.

On the issue at hand, Mr. Halfani attacked PW5's testimony, at page 235 of the record of appeal, by which she denied having signed any of the disputed CROs. He contended that the said denial did not matter much as PW5, at page 240 of the record, did not go as far as denying if her deputy (PW10) signed the CROs in her stead especially on the occasions, acknowledged at page 242 of the record of appeal, that she was out of office.

Then, Mr. Halfani assailed the handwriting expert's evidence on three fronts: one, that the expert's opinion, founded on comparison of the second appellant's specimen handwriting as against PW5's specimen handwriting, did not rule out the possibility that PW10 was the one who signed or endorsed the disputed CROs. Two, that the expert's finding that the rubber stamp embossed on each of the disputed CROs was similar to that of the TRA suggested that the CROs were processed by authorized TRA officials at the depot. Three, that the handwriting expert's (PW7's) evidence was discrepant and unreliable. He elaborated that while the expert adduced, as shown at page 287 of the record of appeal, that he received the specimens in a sealed envelope on 16th February, 2016 and started his analysis on the same day using an advanced imaging device for document examination known as Video Spectral Comparator (VSC) 6000, some of the photographic enlargements produced using the said device from some of the examined documents, as shown at pages 3,702, 3,708, 3,709, 3,731 and 3,732 of the record of appeal, were dated 7th February, 2016, well before the expert had received the specimens. Referring us to page 288 of the record of appeal revealing the expert's assertion that he did not recall receiving the specimens prior to 16th February, 2016, Mr. Halfani urged us to hold his entire evidence materially discrepant and unreliable as the examination and analysis that was

done prior to 16th February, 2016 must have been done by a person other than PW7, who was obviously not called as a prosecution witness. As regards the second appellant, the learned counsel specifically submitted that while PW7's opined that the disputed CROs contained the second appellant's handwriting, PW2 was categorical, as shown at page 209 of the record of appeal, that the second appellant did not sign anywhere on any of the disputed CROs.

Furthermore, Mr. Halfani took pains to review the procedure and movement of cargo from the port to AZAM-ICD until their clearance and removal from the depot. Referring to the evidence of PW2 (AZAM-ICD's Delivery Manager), he postulated that PW2 received all documents (including the shipping line delivery order, D&DO from the port and CROs supposedly issued by the TRA), which were then verified and accepted before other procedures proceeded under PW2's subordinates (PW3 and PW4). He added that PW4, at page 223 of the record of appeal, confirmed that the containers complained of were all received at the depot and that all the depot's fees and government taxes were duly paid as reflected in the depot's Capella system. Ultimately, he urged us to find that the prosecution failed to establish who forged the CROs.

Mr. Msigwa strongly disagreed with his learned friend. Addressing us on the liability of the first appellant, his essential submission was that apart from the handwriting expert's opinion and the evidence adduced by both PW1 and PW2 attributing the signature on all the disputed CROs to the first appellant there was also cogent circumstantial evidence against the said appellant. The first strand of the said circumstantial evidence was the claim by both PW1 and PW2 that the first appellant breached the dual control procedure requiring any gate out pass to be countersigned by an authorized official at the depot after it is signed by another authorized official as all gate out passes that he signed were not countersigned. Secondly, it was posited that the first appellant hid the files (Exhibit P1) containing information on the containers so as to hide the truth. Thirdly, that the first appellant instructed PW3 to avoid recording in her daily reports any containers sought to be cleared by RCS Ltd. Fourthly, that according to PW1, as reflected at page 186 of the record of appeal, the first appellant acknowledged having authorized the release of the disputed containers from the depot.

As for the reliability of the handwriting expert's opinion, Mr. Msigwa brushed aside the alleged discrepancy in dates between the dates shown on some photographic enlargements made from the VSC 6000 comparator and the date PW7 (the expert) received the sealed envelope containing the

handwriting specimens. He submitted that the error complained of was not fatal to the basis of the findings in view of the fact that the police investigator who submitted the samples to the Forensic Bureau for examination (PW14 Detective Sergeant Chuchi) clarified that he took different specimens three times, not once on 16th February, 2016. He added that apart from the handwriting expert's opinion, PW1 and PW2's evidence, which was based on their familiarity with the first appellant's handwriting, was reliable in terms of section 49 (1) and (2) of the Evidence Act, Cap. 6 RE 2002 (now RE 2019) ("the Evidence Act") as elaborated in **Joseph Mapema** (*supra*). On that basis, he urged us to sustain the trial court's finding upon PW7's evidence that the first appellant signed the disputed CROs for the clearance process to advance.

Mr. Msigwa's position as against the second appellant was equally damning. Citing PW7's evidence, he urged us to sustain the trial court's finding that the second appellant usurped the role of PW5 and endorsed all the CROs with words *"AICD/TPA Proceed"* so that the illegal clearance process could proceed.

Mr. Msigwa finally submitted that although it was true that a wealth of manifest information was deleted from the TANCIS system so as to hide the truth about the illegal removal of the containers from AZAM-ICD, PW9's

forensic report confirmed the alleged removal based upon various sources apart from the depot's Capella system. He urged us to take into account the information in the 105 retrieved files (Exhibit P1) as explained by PW1, PW2 and PW3 as well as PW33 Inspector John Ernest Mwakalenda who handled the retrieved files and ultimately took them to the Forensic Bureau. It was his contention that although the said Chris and Raphael who ceded the files at Segerea were not called to testify so as to assure on the movement of the files, the omission was not fatal. He supported his argument by referring to pages 23 and 24 of our typed decision in **Chacha Jeremiah Murimi & Three Others v. Republic**, Criminal Appeal 551 of 2015 (unreported) for the proposition that not every exhibit has to be proved by paper trail.

Rejoining, Mr. Halfani argued that it was PW7, not PW14, who was supposed to explain the discrepancy in the dates and maintained that PW7's report was shaky, hence unreliable. He also criticized the prosecution for failing to explain how the retrieved files were handled after they were handed over by the said Chris and Raphael who were not called to testify at the trial. As to the necessity of a countersignature on the gate out passes, the learned counsel forcefully contended that it was only PW1 who testified to that procedure while PW2 and PW4 did not allude to it as they suggested that one of the managers' signature was sufficient. Finally, he referred us to

Exhibit D.2 (a police statement attributed to PW2), at page 4,631 of the record of appeal, indicating that PW2 too had instructed the deletion from reports of any reference to RCS Ltd. as a CFA that had cargo cleared at its behest. On that basis, he censured PW2, arguing that PW2 had an interest to serve and that he ought to have been charged in the case as well.

To begin with, we find Mr. Halfani's criticism of PW5's testimony totally flawed. It is on record that both PW5 and PW10 denied having signed and issued the disputed CROs. First and foremost, we think that PW5 could not logically have testified as to whether it was PW10 who actually signed the disputed CROs in her stead when she was out of office. Secondly, we find it inexplicable that PW10, who had authority to fill in PW5's role in the latter's absence, could sign the CROs purporting to be PW5 instead of signing and issuing them in her acting capacity. We are satisfied, on the evidence on record, that neither PW5 nor PW10 signed and issued the disputed CROs.

We now turn to the cogency and reliability of the handwriting expert (PW7's) evidence as well as his report (Exhibit P5). We have considered Mr. Halfani's criticism and carefully examined the relevant parts of the record of appeal. At first, we acknowledge that there is a modicum of truth in Mr. Halfani's criticism. It is on record that while PW7 stated in cross-examination that his examination of the documents handed over to him commenced on

16th February, 2016 and that it was completed on 7th March 2016 when he issued his report, the photographic enlargements referred to by the learned counsel bore dates before 16th February, 2016. PW7 frantically maintained that his report was reliable denying that the photographic enlargements were done prior to 16th February, 2016 but that the dates were automatically emblazoned on the enlargements. This explanation, in our view, does not clear the apparent contradiction in PW7's evidence.

Nevertheless, we agree with Mr. Msigwa that the discrepancy complained of was sufficiently explained by PW14 Detective Sergeant Chuchi. That PW14 took the samples to the Forensic Bureau in three batches after they were collected because the suspects were arrested at different times. The samples had been collected separately and on different days by PW14, PW15 WP.3254 Detective Station Sergeant Judith and PW33 Inspector Mwakalenda. Thus, while PW14 handed over the first batch on 3rd February, 2016, he submitted the second one on 9th February, 2016 and the last one on 16th February, 2016. On handing over the last lot, the Bureau's rubber stamp dated 16th February, 2016 was affixed on the cover letter from the Zonal Police Commander, Dar es Salaam (referenced as DSM/CID/C.5/4/Vol.94/239 of 2nd February, 2016 by which the disputed documents and samples were submitted for examination and analysis –

Exhibit P4) to formally acknowledge receipt. On that basis, although 16th February, 2016 was formally the date on which the documents and samples were received, the Bureau had by then received two batches of the documents that it must have started processing. We find it reasonably inferable that PW7 mixed up the dates and assumed that 16th February, 2016 was the date on which the disputed documents and specimens were presented as a single sealed envelope under a cover letter (Exhibit P4).

Even if it were assumed for the sake of argument that PW14's testimony was insufficient to explain away the incongruity at issue, it is pertinent that contradictions by any particular witness or among witnesses cannot be avoided in any particular case: see, for example, **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 (unreported). In **Evarist Kachembeho & Others v. Republic** [1978] LRT n.70 the High Court observed, rightly so, that:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story."*

This Court observed, in the same vein, in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported) that due to the frailty of human

memory and if the contradictions or discrepancies in issue are on details, the court may overlook such contradictions or discrepancies.

Guided by the above authorities, we would go along with Mr. Msigwa in his submission that the contradiction or discrepancy as to when the examination and analysis commenced was a minute detail in view of the bulkiness of the material presented to the Bureau for examination. As a matter of fact, the photographic enlargements complained of are a tiny fraction of all the enlargements (that is, five out of forty-nine enlargements) running from pages 3,702 to 3,750 of the record of appeal. It seems that the variation likely arose due to lapse of memory since PW7 testified about two years after he had examined the documents. As we held in **Masanja Mazambi v. Republic** [1991] TLR 200, such a minor variation is, if anything, a healthy sign that the witness had not rehearsed the evidence before testifying. We are, therefore, satisfied that the discrepancy complained of is, by any yardstick, so trifling that it does not efface the quality and cogency of the handwriting expert opinion.

We equally find no merit in the criticism that PW7 did not rule out the possibility that PW10 was the one who signed or endorsed the CROs. It is clear to us that the expert's opinion on the matter had to be considered along with other evidence on record. In our view, his evidence attributing the

signature on the CROs to the first appellant and matching the endorsement *"AICD/TPA Proceed"* on the said documents with the second appellant's handwriting sufficiently incriminated the two appellants in view of the totality of the circumstances in this case. Furthermore, we would repeat our earlier observation that it is inexplicable that PW10, who had authority to sign and issue CROs whenever PW5 was absent, could go on signing and issuing the documents purporting to be PW5 instead of signing and issuing them in her acting capacity.

The complaint that PW7's finding that the rubber stamp embossed on each of the disputed CROs matched the official rubber stamp at the TRA Office at AZAM-ICD will not detain us as we think it is beside the point. The official rubber stamp was most probably embossed surreptitiously on the forged CROs by an unknown TRA official to give them a semblance and appearance of validity but such embossment could not validate the CROs for them to be deemed to have been processed and issued by authorized TRA officials at the depot, who were either PW5 or PW10. That aspect of the evidence does not detract from the cogency of the prosecution case.

We also recall Mr. Halfani's contention questioning PW7's opinion, as against the second appellant, that the disputed CROs contained the second appellant's handwriting. The learned counsel argued that PW7's opinion was

contradicted by PW2, who was categorical, as shown at page 209 of the record of appeal, that the second appellant did not sign anywhere on any of the disputed CROs. Having reviewed the relevant parts of the record of appeal, we think it is necessary to put the PW7's evidence vis-à-vis PW2's assertion in a proper perspective. As hinted earlier, what the handwriting expert said was that the endorsement *"AICD/TPA Proceed"* on the disputed CROs tallied with the second appellant's handwriting but he attributed the signature on the CROs to the first appellant. In other words, he did not suggest that the second appellant signed any of the disputed CROs except that he endorsed them with the words *"AICD/TPA Proceed"*. In the premises, PW2's assertion that the second appellant did not sign anywhere on any of the disputed CROs, which of course happened to be true, does not conflict with PW7's evidence. As a matter of fact, PW2 did not testify as to who endorsed the CROs with the words *"AICD/TPA Proceed."*

In view of the foregoing discussion and based on our own evaluation of the handwriting expert's testimony and report (Exhibit P5), which we find, as did the trial court, to be cogent and reliable, we uphold the trial court's finding that the first appellant signed the disputed CROs for the clearance process to proceed. In the same vein, we see no ground to disturb the conclusion that the second appellant, purporting to be PW5, endorsed all the

disputed CROs with words *"AICD/TPA Proceed"* so that the illegal clearance process could advance.

As far as the first appellant is concerned, we agree with Mr. Msigwa that the evidence by PW1 and PW2 linking him to the signature on the disputed CROs is reliable. It was unchallenged that the two witnesses had sufficient familiarity with the first appellant's signature as they had worked with him so closely for some years at AZAM-ICD. It would be instructive to quote with approval what the High Court stated in **Joseph Mapema** (*supra*) on the reliability of this kind of evidence:

> *"For the purpose of enabling a court to decide the author of any piece of handwriting in dispute, the opinion of a person who is conversant with the handwriting of the disputing author is as good as, if not sometimes better than, that of a handwriting expert. In any case, Section 49(1) of the Evidence Act makes admissible opinion evidence of handwriting by anyone acquainted with another's handwriting."*

See also the decision of the Court in **DPP v. Shida Manyama @ Seleman Mabuba**, Criminal Appeal No. 285 of 2012 (unreported).

As hinted earlier, Mr. Msigwa submitted that the first appellant's role in the alleged forgeries was further reinforced by cogent circumstantial

evidence against him. At this point, it is, therefore, necessary to examine each event in the chain to determine its probative value as well as whether all of them as a whole irresistibly link the first appellant to the 105 false CROs.

The first aspect of the circumstantial evidence was the claim by PW1 and PW2 that the first appellant breached the dual control procedure requiring every gate out pass to be countersigned by an authorized official at the depot after it was signed by another authorized official as all gate out passes that he signed were not countersigned. The first appellant admitted having signed the passes singly as he was filling in PW2's role when the latter was absent from office. However, he denied flat out that such a control procedure existed, insisting that such passes could have been signed by one official only. We have carefully weighed the testimonies of the two prosecution witnesses and examined the gate out passes on record against the first appellant's refutation. In our view, the two witnesses consistently maintained the existence of the said control procedure and had no reason to lie about its existence. Like the trial court, we give credence to the two prosecution witnesses.

The second strand relates to the accusation that the first appellant hid the files (Exhibit P1) containing information on the containers so as to hide

the truth. PW1, PW2 and PW4 testified to this fact in detail, saying in particular that most of the files were retrieved from Chris and Raphael at Segerea at the first appellant's direction. PW4 recalled that after being pressed by PW1, the first appellant relented and directed the search party (that included PW4) to a location in Segerea where they met Chris who then handed over the files. The first appellant flatly denied that evidence but the trial court preferred the prosecution's version of the events. Again, we do not find any reason to disbelieve the three witnesses whose account was found credible by the trial court, which saw the witnesses as they testified at the trial. There is no sign that the trial court misapprehended the evidence on record on this aspect. We are also in agreement with Mr. Msigwa that the non-appearance of the said Chris and Raphael as prosecution witnesses had no deleterious effect to the prosecution case in the circumstances of this case.

The third piece of evidence picked out by Mr. Msigwa is the first appellant's instruction to his subordinate, that is PW3, to leave out of her daily reports any information on the containers cleared at the behest of RCS Ltd. Conversely, Mr. Halfani referred us to PW2's police statement (Exhibit D.2), at page 4,631 of the record, suggesting that PW2 too had instructed the deletion from reports of any reference to RCS Ltd. as a CFA that had

cargo cleared at its behest. In the premises, he faulted PW2, advancing that PW2 had an interest to serve and that he ought to have been charged in the case as well.

It may well be true that PW2 had issued the alleged instruction, implying that he also had a hand in the criminal venture that culminated in the illegal clearance and removal of the containers. However, that evidence does not refute PW3's testimony on the instruction he received from the first appellant, which she complied with. So far as the first appellant is concerned, we think it is too plain for argument that the instruction he gave was intended to hide the truth as he must have been aware that any reference to RCS Ltd., a phony company, on the official reports shared with the TRA and the TPA would raise a red flag.

Finally, we deal with the piece of evidence that the first appellant admitted to PW1, as reflected at page 186 of the record of appeal, having authorized the release of the disputed containers from the depot. On this issue, the first appellant prevaricated in his testimony. While he acknowledged, as shown at page 797 of the record of appeal, that he acted in PW2's office of Delivery Manager between July and November, 2015 when the containers in issue were removed from the depot, he appeared to sit on the fence when he was cross-examined as to whether he actually signed and

authorized the release of the said containers. To illustrate the point, we wish to extract from page 798 of the record of appeal, where he adduced in cross-examination as follows:

> *"I do not remember whether the files I attended during the absence of the Delivery Manager included those where the [client was] Regional Cargo Services. In the year 2015, I do not remember whether I attended files dealt [with] by Regional Cargo Services. I was attending more than 1,000 containers by then .... I do not remember the last time I attended to cargo where Regional Cargo Services [was] the agent."*

The first appellant then went on accepting that he had access to the TANCIS from which he could verify the authenticity of any CRO presented to him. He was categorical that he had never seen on the TANCIS during the material time any CRO citing RCS Ltd. as the CFA engaged in the clearance. It is, therefore, baffling that if he did not view any CRO on the TANCIS referring to RCS Ltd., then why did he equivocate when he was queried whether he ever dealt with any CRO issued in the name of the said company during the material time? What is even more confounding is that, at page 799 of the record, he acknowledged that the disputed 329 containers were removed from the depot between July and November, 2015 when he was

acting as the Delivery Manager but still he had the temerity to insist that all requisite procedures for the clearance and removal of the containers were followed. We wish to let the record speak for itself:

> *"329 containers [were] removed from AICD between July and November, 2015. During that period Kessy Mkambala was absent. All containers removed from AICD followed requisite procedure; those with discrepancies did not pass through AICD."*

In our view, it is reasonably inferable from the above evidence that the first appellant's denial as well as the claim that the 329 containers were properly cleared were a palpable lie in view of the totality of the evidence on record. We thus find that the first appellant is the one who authorized the release of the disputed containers from the depot by signing the CROs as well as the gate out passes unilaterally. This conclusion takes us to the determination of the effect of the circumstantial evidence discussed above.

It is settled that in a case depending on circumstantial evidence, the court, before deciding whether the accused is liable, must determine if the inculpatory facts are incompatible with his innocence and incapable of explanation upon any other reasonable hypothesis than that of guilty: see, for instance, **Magendo Paul & Another v. Republic** [1993] TLR 219; and **Hamidu Mussa Thimotheo & Majidi Mussa Thimotheo v. Republic**

[1993] TLR 125. See also **Elisha Ndatange v. Republic**, Criminal Appeal No. 51 of 1999; and **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (both unreported).

We have duly considered the evidence discussed above that the first appellant authorized the clearance of the disputed containers; that he breached the dual control procedure for signing the gate out passes; that he hid 105 files so as to hide the truth; and that he instructed his subordinate (PW3) to falsify and manipulate AZAM-ICD's daily reports on cargo clearance in order to hide the involvement of RCS Ltd., a bogus company, in clearance of the containers. We have no doubt that the above circumstantial evidence (together with the handwriting expert's evidence) irresistibly leads to the conclusion that the first appellant must have made the CROs knowing or believing that they were false. When he signed the CROs as the Delivery Manager in an acting capacity for the clearance process to proceed, he was aware or ought to have been aware that the documents were forged. He must have deliberately ignored using the TANCIS system to verify the authenticity of the CROs as well as the RCS Ltd.'s standing to operate as a licensed CFA.

We must reiterate our finding as regards the second appellant that his liability stems from the fact that he, purporting to be PW5, endorsed all the

forged CROs with words *"AICD/TPA Proceed"* so that the illegal clearance process could advance. By doing so, he usurped PW5's authority.

Next, we deal with the question whether the documents were made with intent to defraud or deceive.

In the landmark decision of the English Chancery Division, **In Re London and Globe Finance Corporation** [1903] 1 Ch 728, Buckley, J. aptly defined the terms "deceive" and "defraud" thus:

> *"To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."*

What is apparent from the above definition is that the "intent to defraud" contemplates a graver criminal intent as its effect is to induce a course of action while the "intent to deceive" imports a lower threshold of criminal intent as it induces a state of mind.

In the instant case, we have no difficulty in finding, on the evidence on record, that the forged CROs were made, signed or endorsed so as to make

the officials involved in the clearance at AZAM-ICD believe that the customs duties or taxes for the 329 containers had been paid, which was untrue, to facilitate the removal of the containers from the depot without the taxes being paid. The first and second appellants knew or ought to have known that the CROs were false but they acted in the manner they did so as to induce a course of action on the part of their subordinates and other co-workers at AZAM-ICD. We thus sustain the trial court's finding that the intent to deceive was proven.

In view of the foregoing analysis, we uphold the trial court's finding that Counts 2 to 106 were proven beyond reasonable doubt.

As we shall demonstrate shortly, we think that we do not need to travel a long distance in determining the issue whether the offence of occasioning loss to a specified authority (Count 107) was proven or not. To appreciate the gravamen of the offence at hand, we extract the provisions of paragraph 10 (1) of the First Schedule of the EOCCA under which Count 107 was laid:

> *"**10**.-(1) Any person who, whether or not he is an employee of a specified authority by any wilful act or omission, or by his negligence or misconduct, or by reason of his failure to take reasonable care or to discharge his duties in a reasonable manner, causes any specified authority to suffer a pecuniary loss or*

causes any damage to any property owned by or in the possession of any specified authority, notwithstanding any written law to the country, commits an offence under this paragraph, if the monetary value of the loss or damage exceeds one million shillings."

The above paragraph criminalises causing any specified authority to suffer a pecuniary loss or causing any damage to any property owned or possessed by any specified authority where the monetary value of the loss or damage exceeds one million shillings. Section 2 of EOCCA defines "specified authority" to mean:

"any department of the Government of the United Republic, a co-operative society, a local government authority or a parastatal organization."

The *mens rea* of the offence is expressed in broad terms that the loss or damage must have been occasioned or caused by any wilful act or omission of the accused person, or by his negligence or misconduct, or by reason of his failure to take reasonable care or to discharge his duties in a reasonable manner. It is striking that it does not matter whether the accused person was or was not an employee of the specified authority concerned at the time the loss or damage was caused.

In the instant case, it is not in dispute that the TRA, an authority alleged to have suffered a pecuniary loss, is a specified authority. Established by section 4 (1) of the Tanzania Revenue Authority Act, 1995 (now Cap. 399 RE 2019), the TRA is stated by section 4 (3) of that law as an agency of the Government, which is under the general supervision of the Minister responsible for finance. We have no doubt that by being an agency of the Government, the TRA fits neatly within the above definition as the term "department of the Government" must be construed as being synonymous with "agency or Ministry of the Government."

In his argument, Mr. Halfani boldly contended that the prosecution neither established whether loss was occasioned to the TRA nor did they prove that the two appellants caused the alleged loss. He reasoned that since it was in the evidence that relevant manifest information was deleted from the TANCIS system after the containers had exited the depot, there was no credible evidence establishing the alleged loss and the identity of the perpetrators thereof. He repeated his earlier submission that the recovered files (Exhibit P1) were unreliable in establishing the alleged loss because there was no assurance as regards their integrity due to the haphazard manner in which they were supposedly retrieved from the said Chris and Raphael at Segerea.

For the respondent, Mr. Msigwa countered that the deletion of the information from the TANCIS had no effect to the veracity of the prosecution case. He maintained that PW1, PW2 and PW4 sufficiently explained how the missing files were retrieved, stored and handed over to the police for investigations. He invited us to look at PW12's Forensic Report on TANCIS System Fraud (Exhibit P7), which he said settled the question at hand.

With respect, we do not agree with Mr. Halfani's submissions on the two issues at hand. We have already explained in detail and found that the first and second appellants were the perpetrators of the forgeries and that they facilitated the illegal removal of the 329 containers from the depot without the chargeable import duties being paid. Their conduct throughout the process was wilful as they knew or ought to have known that the disputed CROs were false and that they deliberately ignored the verification procedure. It is inferable from the absence of valid CROs for the containers that the chargeable import duties for the cargo in the containers were not paid.

More significantly, PW12 Liberatus Charles Mzobola, who conducted an in-depth forensic analysis on the TRA and AZAM-ICD computer systems, established in his report (Forensic Report on TANCIS System Fraud – Exhibit P7) that 329 containers disappeared while under customs control at AZAM-

ICD during the material period without payment of import taxes amounting to TZS. 12,618,970,229.00. Despite acknowledging that manifest information in the TANCIS system was deleted to eliminate traces of the existence of the containers after they had exited the depot, he explained at the trial as to how he traced the containers and established the falsity of the CROs upon which the containers were released from the depot at the request of RCS Ltd, a sham establishment. As shown at page 4,095 of the record of appeal, he established in the report that the customs value of the goods in the 329 containers was TZS. 28,109,510,980.00, hence the amount of unpaid taxes was computed as being TZS. 12,618,970,229.00. To be sure, PW12's testimony and his report were not contradicted in cross-examination, as shown at pages 321 to 337 of the record of appeal. It is, therefore, our finding that the trial court rightly convicted the two appellants of the offence on Court 107.

Based on the foregoing discussion, we find no merit in the first, second and third grounds of appeal. They stand dismissed.

We finally deal with the fourth ground of appeal, faulting the trial court's order on each appellant to pay compensation to the specified authority (TRA) amounting to Tanzania Shillings Two Billion.

It is clear to us that the first and second appellants raised the complaint at hand on the assumption that they would be successful on the first three grounds of appeal. On that basis, Mr. Halfani, rather tersely, urged us to find the order of compensation unwarranted on the reason that there was no evidence that the two appellants caused the loss in the first place. Mr. Msigwa strongly disagreed with his learned friend, contending that it was amply demonstrated in the evidence that the appellants caused the alleged loss due to the forgeries and, consequently, they were liable to bear, at least, a portion of the loss.

Paragraph 10 (4) of the First Schedule of the EOCCA enjoins the trial court to impose an order of compensation for loss occasioned to a specified authority once it convicts the accused of the offence under paragraph 10 (1). For ease of reference, we reproduce the said provision thus:

> *"(4) Where the Court* ***convicts a person of an offence under this paragraph****, it shall, in addition to any other penal measure it imposes,* ***order such person to pay to the specified authority compensation of an amount not exceeding the amount of the actual loss incurred by the specified authority*** *and in assessing such compensation the court shall have regard to any*

extenuating circumstances it may consider relevant."
[Emphasis added]

We think it is too plain for argument that the trial court acted within the law by ordering the first, second and third appellants to pay jointly and equally to the TRA a sum of money amounting to half the loss of TZS. 12,618,970,229.00 after it had convicted them of the offence on Count 107. Needless to say, the fourth ground of appeal fails.

The upshot of the matter is that the appeal lacks merit. We dismiss it in its entirety.

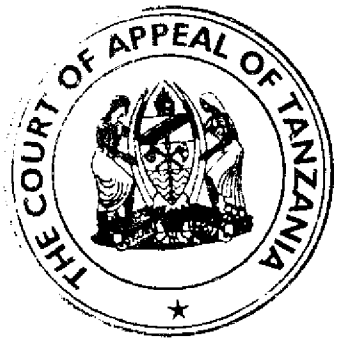
DATED at **DAR ES SALAAM** this 26th day of January, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 27th day of January, 2022 in the presence of Mr. Mashaka Ngole, assisted by Ms. Loveness Denis, learned counsel for the appellants and Ms. Cecilia Shelly, learned Principal State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL