IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 88 OF 2020

GAUDENCE SANGU.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Ndunguru, J.)

dated the 20th day of September, 2019

in

Criminal Appeal No. 119 of 2019

.....

JUDGMENT OF THE COURT

30th November & 7th December, 2022

MWANDAMBO, J.A.:

The Resident Magistrate's Court of Mbeya at Mbeya tried and convicted the appellant Gaudence Sangu on four counts of; fraudulent appropriation of power, malicious damage to property; personating public officers and obtaining money by false pretence all contrary to the Penal Code. Upon such conviction, the appellant earned five years' imprisonment in each count running concurrently. His appeal to the High Court sitting at Mbeya did not succeed as that court sustained

the conviction and sentences and hence this second and final appeal before the Court.

The facts from which the appellant was arraigned and ultimately convicted are relatively simple. Alex Mengo (PW1), Hamisi Sikanyika (DW3) and another person all business men at a place called Ikuti sokoni, in Mbeya City had applied to Tanzania Electric Supply Company Ltd (known by its acronym as TANESCO) for supply of electricity power for their butcher businesses conducted in adjacent rooms. It was DW3 who approached TANESCO with a joint power supply application and upon compliance with the necessary preliminary steps including payment of the requisite charges, TANESCO connected the power to the relevant business premises but a meter was installed in PW1's shop.

It occurred that not all was well after the power connection for, PW1 noted unproportional power consumption which attracted frequent purchase of electricity units which he suspected was too way beyond the actual consumption. After a period of time, PW1 appears to have discovered some foul play in the power connection extending beyond the three shops. That prompted PW1 confronting DW3 for a meter separation which entailed each one of them having have his

own meter to which suggestion DW3 agreed and had the meter removed from PW1 to his shop after refunding PW1 money he had paid for the connection. It would appear that the change of the meter from PW1's business premises to DW3's shop was done by the appellant allegedly an employee of TANESCO for, according to PW1, the appellant had represented to him that he was an employee of TANESCO and that he had an identity card just like any other employee.

Since PW1 was in urgent need of power and upon the alleged representation from the appellant to facilitate electricity power connection in three days, PW1 agreed to pay the appellant a sum of TZS. 600,000.00 for the much-sought reconnection. Initially, PW1 paid TZS. 300,000.00 followed by TZS. 220,000.00 making total a total sum of TZS 520,000.00. That notwithstanding, no electricity was connected within the three days promised or any subsequent date until PW1 made a follow up with TANESCO whereby he learnt that the appellant had indeed lodged an application and paid TZS. 320,000.00 for electricity connection which would be affected within 90 days. Needless to say, TANESCO connected PW1 with electricity in December 2015. It also came to light that contrary to the alleged

representation, the appellant was not an employee of TANESCO. By reason of PW1's complaint, TANESCO mounted an investigation at PW1's and DW3's business premises through its employees; Cyprian Lugazia (PW3) and Fortunatus s/o Fungulima (PW4).

The findings of such investigation revealed that there was a shift of an electricity meter initially installed at PW1's shop to DW3's shop without the knowledge or authorization of TANESCO. It was equally revealed that neither was the appellant an employee of TANESCO nor a registered licenced contractor in the list of contractors in its regional register of electricity contractors. Upon such findings, a complaint was made to the police resulting into the appellant's arrest and arraignment in court to answer the charges as aforesaid to which he pleaded not guilty.

In his defence following evidence by the prosecution through four witnesses and a ruling that he had a case to answer, the appellant disassociated himself from the accusations. He denied having personated himself as an employee of TANESCO. Instead, he maintained that he was an electricity contractor who was engaged by PW1 to facilitate electricity connection for which he paid TZS. 321,000.000 to TANESCO. He denied having shifted the meter from

PW1's shop to DW3's shop. He was supported in that assertion by DW3 who told the trial court that he knew the appellant as an electricity contractor who had done electricity wiring to his premises way back 2012. Otherwise, the appellant contended that the case against him was framed up at the instance of PW3 allegedly as a lesson to all unscrupulous persons involved in interference with power infrastructure in Mbeya region. He denied having obtained any money fraudulently from PW1.

The trial court found the appellant guilty on all counts, convicted and sentences him as aforesaid. His appeal before the first appellate court was predicated upon seven grounds of appeal essentially faulting the trial court for failure to analyse evidence properly and grounding conviction on weak prosecution evidence which did not prove the case against him on the required standard in criminal cases. The High Court (Ndunguru, J), dismissed the appeal having been satisfied that the trial court's judgment convicting him contained points of determination and analysis of evidence on all points for the determination of the case.

Before us, the appellant faults the decision of the first appellate court on three grounds raising complaints against the first appellate

court sustaining conviction based on: **One,** failure to consider defence evidence; **two,** failure to analyse the evidence on record properly and; **three,** weak prosecution evidence which did not prove the case beyond reasonable doubt.

Prosecuting his appeal, the appellant appeared in person fending for himself at the hearing of the appeal. He adopted his grounds of appeal beseeching the Court to find them meritorious and allow the appeal by quashing conviction and setting aside the sentences meted out to him by the trial court and sustained by the High Court.

The respondent Republic was represented by Ms. Hanarose Kasambala and Ms. Xaveria Makombe, both learned State Attorneys resisting the appeal. It was Ms. Kasambala who addressed the Court. Initially Ms. Kasambala chose to address the Court on the first and second grounds conjointly. She was resolute that the lower courts analysed the evidence properly and considered the defence in their judgments. However, at some later stage, the learned State Attorney threw in the towel conceding that indeed, none of the two courts below had regard to defence evidence which was tantamount to failure to analyse properly the evidence on record. In the premises,

realizing that the High Court did not perform its role properly as expected of a first appellate court, the learned State Attorney invited the Court to step into the shoes of the first appellate court and do what that court omitted to do.

In his rejoinder, the appellant reiterated that his defence was ignored by the two courts below.

We shall begin our discussion on the two combined grounds by reiterating the legal position on the role of a first appellate court. It is trite law that the first appellate court has a duty to re-evaluate the evidence on record which is more or less are hearing of the case except for the fact that, unlike the trial court, it does so through reading the transcript of proceedings without hearing witness as they testify which explains why the assessment of demeanour of witnesses is in the domain of a trial court. See: **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported). In doing so, the first appellate court may concur with the finding of fact made by the trial court or come to its own findings. Logically, the principle that a second appellate court should not readily interfere with concurrent findings of fact of the two courts, below is premised on the assumption that the first appellate court's concurrence with the trial

courts finding of fact is a result of an independent re-evaluation and analysis of the evidence on record relied upon by the trial court in arriving at its findings. The Court has consistently held in many of its decisions that, analysis and evaluation of evidence entails an objective scrutiny of both the prosecution and defence evidence and not merely a summary or narration of it. See for instance: **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 of 2014 and **Rashid Issa v. Republic**, Criminal Appeal No. 416 of 2016 (both unreported).

After subjecting the above to the instant appeal, we have no lurking in holding that the appellant's complaints in ground one and two argued conjointly are well founded. An examination of the trial court's judgment which the first appellate court found to be sound containing points for determination, reasons for the decision and analysis of the evidence is, with respect, diametrically the opposite. We shall have the trial court's judgment speak for itself:

> *"...the accused had disputed to shift the metre without any supporting evidence he defended that what he did was to cause the job of installing wiring inside the houses. But from the date of event, there was no job of fixing*

wiring in any of the buildings, because this job had been done previously, the job there was to shift the disputed metre from PW1: Alex's meat shop building to DW3: Hamis Sikanyika's shop, the work which was done by the accused.

I am quite confident that, the accused person fraudulently appropriated power by obstructing and diverting from the meat shop building of [PW1] Aiex to the shop building of DW3; Hamis Sikanyika. So, he is guilty in this first court.

I am quite confident that, the accused by conduct personated himself to be a public officer of TANESCO for wilfully and unlawfully [interfered] TANESCO infrastructure by transferring its metre from one place to another. The accused person cannot deny this fact, because even Mr. Sikanyika did not dispute this fact [that] it was an accused person who transferred power metre to his building where he was fined also. The accused person is guilty in the second and 3rd count, where he also damaged TANESCO property.

For the 4th count, PW1; Alex told this court that, he gave the accused a total amount of

TSHS. 520,000/= first time he gave him TSHS. 300,000/= and second time 220,000/= confirmed that the accused used only TSHS. 320,000/= to pay for power connecting services, but he remained with TSHS. 200,000/= to date. The fact which is corroborated by the testimony of PW2; Mawazo Mwakazi..."

(At pages 97 and 98 of the record of appeal).

There can be no doubt that the first appellate court misapprehended the judgment of the trial court believing that it was composed in compliance with section 312 (1) of the Criminal Procedure Act (the CPA) when it was not so. That judgment lacked analysis of the evidence of both the prosecution and that of the defence. Had the learned first appellate judge directed his mind properly and performed the role of a first appellate court, he could not have held as he did that the appellant's conviction was based on a proper analysis of the evidence.

Next for our determination is the way forward in view of the first appellate court's failure to perform its role. Ms. Kasambala invited us to step into the shoes of the High Court and we respectfully accept. We do so alive to the dictates of section 4(2) of the Appellate

Jurisdiction Act (the AJA) which vests the Court with the power, authority and jurisdiction vested in the court from which the appeal is brought. Apparently, the Court has done so in various of its previous decisions including; **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149**, Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 (unreported).

We shall do just that in this appeal by re-evaluating the evidence on record before making findings whether the appellant's conviction was grounded upon sufficient evidence on the required standard; proof beyond reasonable doubt. This holding disposes grounds one and two in the appellant's favour which takes us to ground three.

The determination of ground three will entail re-evaluating the evidence on record in view of our decision on the preceding grounds. We shall do so by looking at the evidence on each count.

The first count related to fraudulent appropriation of power contrary to section 283 of the Penal Code. Ms. Kasambala urged us to find that there was sufficient evidence from PW1, PW2 and PW4 to convict the appellant in count one. The particulars in this count alleged that on divers dates between September and October, 2015,

at the mentioned place, the appellant did obstruct and divert electrical power delivered from the original machine power the property of TANESCO to the house of Hamis s/o Sikanyika thereby causing a loss of TZS. 1,000,000.00 to the said TANESCO. The appellant denied having diverted the power. Instead, he stated the that he only provided services to PW1 as his client by processing electricity connection application with TANESCO. It was his evidence that the shifting of the meter to DW3 was done by TANESCO employees in his presence as he was not allowed to touch it. He produced DW3 who told the trial court that the role played by the appellant was electrical installation to his business premises and that the connection was done by TANESCO staff in 2014 in the appellant's presence.

The material part of PW1's evidence on this aspect was that after a dispute over power consumption charges on the shared meter, DW3 agreed to the proposal for meter separation which entailed him refunding PW1 TZS 340,000.00 which he did and the appellant shifted the meter installed in PW1's shop to DW3 believing that he was an employee of TANESCO as he possessed a laminated identity card. PW2 Mawazo Makai, an employee of PW2 for his part had similar version on the involvement of the appellant in shifting the meter from

PW1 to DW3's shop in his presence in collaboration with someone Japhet. It was PW2's further evidence that the appellant had represented himself as an employee of TANESCO and that is why he shifted the meter to DW3's shop. In cross examination, PW2 stated:

> *"Gaudence is not TANESCO but he is an employee of TANESCO, he showed us his identity card and he was transferring meter of TANESCO [from] that shop to another shop of Sikanyika ..... when Gaudence was removing that meter I was present and were talking. I had been shown by the accused his identity card.... That identify card was written in English.... (At page 33 and 34 of the record of appeal].*

To prove transfer of the meter, PW3 told the trial court he visited the premises and discovered through GPS coordinates that meter No. 5305508 previously installed in PW1's shop had been transferred to DW3's shop.

Having subjected the appellants' defence through his own evidence and that of DW3, we are satisfied that it did nothing other than containing mere denials. The evidence of the prosecution witnesses, PW2 in particular, was so specific that the appellant

personated himself as an employee of TANESCO and transferred the meter to DW3's shop. We are satisfied that though the trial court did not consider defence evidence, it rightly convicted the appellant on the first count.

The second count was in relation to malicious damage to property contrary to section 326 of the Penal Code. The particulars of the offence had it that on divers dates in September and October, 2015 at Ikuti area, the appellants did unlawfully and wilfully destroy TANESCO meter No. 37135305508 with customer No. 0077586 and electrical wires valued at TZS 1,019,223.00.

Ms. Kasambala urged that there was sufficient evidence through PW4 to convict the appellant and we respectfully agree with her. In view of our finding in respect of the first count, there cannot be any dispute that the appellant's diversion of power by shifting the meter from the original position to DW3's shop was a malicious damage of such meter and the electric installation wires property of TANESCO; an offence under section 326 of the Penal Code. As submitted by Ms. Kasambala, there was sufficient evidence through PW4 which was not controverted on the illegal transfer of the meter and the associated installations causing loss of TZS 1,019,223.00. Like we found in

respect of the first count, notwithstanding the trial court's failure to consider defence evidence, the conviction was properly grounded in the second count as well.

Next we shall consider the complaint in respect of the third count involving personation of a public officer contrary to section 100 (b) of the Penal Code. According to PW1 and PW2, the appellant represented to them as an employee of TANESCO who, as we have found when dealing with the first count, led the duo believe that he was such a person who could connect the much-needed power to PW1's shop following transfer of the meter to DW3's shop. Indeed, according to PW1 and PW2, not only did the appellant show them an identity card resembling those used by TANESCO staff in one occasion, he led them to TANESCO offices in similar uniform used by TANESCO employees. Besides, when he was pursued to deliver on his promise to connect power to PW1's shop, he pleaded with him not to report him to TANESCO lest he got terminated from employment. As it transpired out later, it was revealed upon investigation conducted by PW3 and PW4 in March 2016, that he was not an employee of TANESCO. Undeniably, it was not disputed during the preliminary hearing that the appellant was not an employee of TANESCO. In his

defence through his own evidence and DW3, he stated that he was an electrical contractor whose duties did not extend to touching TANESCO metres and other electrical installations but to do domestic wiring. Be it as it may, that evidence did not suffice to displace PW1's and PW2's evidence on what the appellant represented to them at the time of transferring the meter and subsequently. Yet again, we are satisfied that the appellant's conviction was well founded on the third count.

Finally, on the fourth count; obtaining money by false pretence contrary to section 302 of the Penal Code. The prosecution alleged that on divers dates between September and October 2015 at Ikuti Sokoni area, by false pretence and with intent to defraud, the appellant obtained TZS 200,000.00 from one Alex s/o Mengo pretending that he was TANESCO employee who would connect electricity for him and provide a new meter a fact which he knew to be false.

The prosecution led evidence through PW1 and PW2 aimed at proving that the appellant obtained TZS 520,000.00 from PW1 towards connection of electricity to PW1's shop within three days which he did not do. It was the prosecution's further evidence that

upon follow ups with TANESCO, it was discovered that, the appellant paid (to TANESCO) a sum of TZS 320,000.00 for electricity connection charges. TANESCO connected PW1's shop with electricity sometime in December 2015.

Both PW1 and PW2 stated in evidence that the appellant did not account for the remaining sum of TZS 200,000.00 and that when confronted in January 2016, at a certain bus stop he pleaded with them that he would refund the money but to no avail. Evidence shows that despite the appellant's plea made in January, 2016, he went at large until sometime in March 2016 when PW1 met him in a bar at a place called Nzovwe. At the appellant's instance, the police arrested PW1 on an allegation that he hijacked the appellant and later on he was sent to Nzovwe Police Station where he was released after explaining to them his version and instead, the appellant was kept in custody and subsequently the matter reached TANESCO before the appellant was arraigned in Court on the charged offences.

The appellant admitted in evidence that PW1 was his client whom he had assisted in processing application for electricity connection at his shop as a contractor and not a TANESCO employee. He was adamant that he paid to TANESCO TZS 321,000.00 for which

power was connected and that he was not responsible for the delayed connection. He denied having received any other sum in excess of what he paid to TANESCO. He contended that, he was framed up in the case by PW3 in an offence he had not committed and the fact that the charge alleged that he obtained TZS 255,000.00 fraudulently was proof that the accusations against him were false.

Ms. Kasambala invited us to find that, the appellant was properly found guilty and convicted on the fourth count based on a water tight evidence from PW1 and PW2. We have already made as finding that the appellant personated himself as a TANESCO employee, subject of the third count. Indeed, PW1 paid money to the appellant for electricity power connection to his butcher because the appellant represented himself as a TANESCO employee assuring PW1 to connect him with power in three days in that capacity and not an independent contractor.

The offence of obtaining money by false pretence is committed when two ingredients exist that is to say; false representation and intent to defraud. See: **Juma Swalehe v. Republic** [2003] T.L.R. 304. In the instant appeal, the prosecution led evidence through PW1 and PW2 that the appellant induced PW1 to part with TZS

600,000.00 as charges for connecting the much-needed power to his shop within three days. It was equally proved that the appellant represented himself to be an employee of TANESCO while, in actual fact he was not. Neither was he capable of connecting power to PW1's shop within the time he stated.

Although it turned out later that the appellant paid to TANESCO TZS 320,000.00 as connection charges and power was subsequently connected through the normal procedure without the appellant's involvement, he could not account for the remaining amount of TZS 200,000.00. Apart from the claim that case against him was framed up by PW3 and the alleged discrepancy in the amount subject of the charge, the appellant did not offer any plausible defence on the amount he was paid as compared with the actual connection charges paid to TANESCO. On the whole, we are satisfied that, the prosecution proved the fourth count of obtaining money by false pretences to the required standard and the trial court rightly convicted him.

In the event, upon our own evaluation of the evidence on record, we are satisfied that the prosecution proved the case against the appellant to the required standard and thus, his conviction was

legally sound. We have found no reason to interfere with it so are the sentences imposed against the appellant.

In fine, save for our determination of ground one and two of the appeal in the appellant's favour, the substance of the appeal in ground three fails. We dismiss it for lacking in merit.

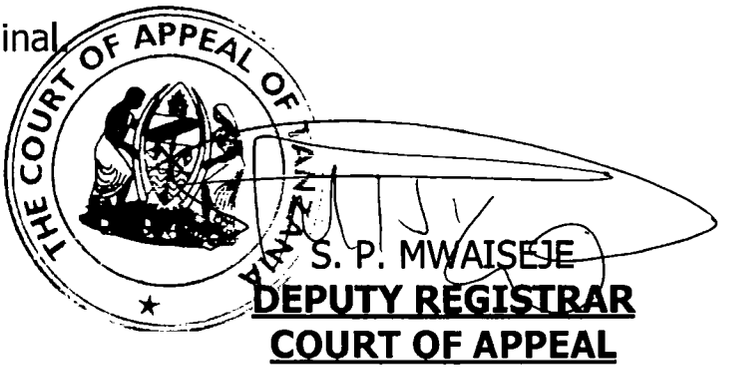
DATED at **MBEYA** this 7th day of December, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2022 in the presence of Appellant in person and Mr. Emmanuel Basnome, learned State Attorney, for the Respondent/Republic is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
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