IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CONSOLIDATED CRIMINAL APPEALS NO.257 OF 2017 & 264 OF 2017
(Originating from the Decision of Hon. M.A.Batulaine-RM of the Temeke District Court issued on 31st July 2017 in Criminal Case No. 79 of 2016)

1. ZACHARIA LUCIANO MBEDULE
2. MWANAHAMISI MOHAMED KHALIFANI .....**APPELLANTS**
3. BERNARD EDIMUND MNDOLWA

VERSUS

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

JUDGEMENT

Date of the last Order 11th April 2018
Date of the Judgement 04th May 2018

SAMEJI KEREFU, R. J.

At the District Court of Temeke, ZACHARIA LUCIANO MBEDULE, MWANAHAMISI MOHAMED KHALIFANI and BERNARD EDIMUND MNDOLWA, (hereinafter referred to as the *1st, 2nd and 3rd appellants respectively*) were charged with eight (8) counts. The **first count** was for all the three appellants on the offence of *conspiracy* contrary to section 384 of the Penal Code, Cap. 16 [R. E 2002] (hereinafter referred to as *Penal Code*). It was alleged that, the three appellants conspired to commit the offence of stealing contrary to sections 258, 265 and 270 of the Penal Code. The **second count** was for the 1st appellant on the offence of *abuse*

of position contrary to section 31 of the Prevention and Combating of Corruption Act, No. 11 of 2007. The **third count** was also for the 1st appellant on the offence of *stealing by persons in public service* contrary to section 258 and 270 of the Penal Code. The **fourth count** was for the 2nd appellant on the offence of *stealing by persons in public service* contrary to section 258 and 270 of the Penal Code. The **fifth count** was for the 2nd appellant on the offence of *fraudulently false accounting* contrary to section 317 of the Penal Code. The **sixth count** was for the 3rd appellant on the offence of *stealing* contrary to sections 258 and 265 of the Penal Code.

The **seventh count** was for the 3rd appellant on the offence of *receiving stolen property* contrary to section 311 of the Penal Code. The **eighth count** was for all the three appellants on the offence of *occasioning loss to specified authority* contrary to paragraph 10 (1) of the First Schedule to and section 57(1) and 60(2) of the Economic and Organized Crime Act, Cap.200 [R.E.2002]. They were all convicted and sentenced to serve custodial sentences as will be demonstrated below.

Briefly, the evidence, which the trial Magistrate relied upon in convicting and sentenced the appellants shows that, on divers dates between 29th and 31st December 2008 at the Temeke Municipal Council within the Temeke District in Dar es Salaam Region, the 1st appellant being an accountant and revenue collector of Temeke Municipal Council, the 2nd appellant being a banker of National Microfinance Bank, (NMB) Msasani Branch and the 3rd appellant being a businessman, respectively they conspired to commit the offence of stealing. That, the 1st appellant by using his position had stolen the cheque No. 009225 worth at Tshs. 37,500,000/= which was intended to be deposited into the Temeke Municipal Council's Bank Account No. 2071200048 at the NMB and illegally the 2nd appellant deposited the said cheque into the Account No. 2113300064 for the IGODEN GENERAL SUPPLIES AND SERVICES the property of the 3rd appellant.

All appellants pleaded not guilty to all counts and the prosecution side before the trial court summoned ten (10) witnesses, *to wit* **PW1**-Eugenia Wesenslaus Peter, Assistant Accountant, Temeke Municipal Council, **PW2** - Lunanilo Mkayula, Banker at the Standard Chartered Bank Tanzania, **PW3** –Heri William Mbanga, Accountant at Temeke Municipal Council, **PW4**, Roida Hamlike Swila, Accountant, **PW5** - Jany Machimbo, the treasurer, at

Chamwino District Council, **PW6**-John Paul Kinimo, Forensic Manager, Temeke Municipality, **PW7**-Okelo Kassian Mponda, Businessman, **PW8**-Mwajuma Omari Mwakimbeji, Accountant, **PW9**-Julius Masanja Katamba, Auditor, **PW10**-Sunday Mokiwa, PCCB Investigator. They also tendered twelve (12) documentary **Exhibits**. The defence side summoned four (4) witnesses, namely **DW1** – the 1st appellant, **DW2-** the 2nd appellant, **DW3** – Asma Mohamed and **DW4** - the 3rd appellant. They also tendered two (2) documentary **Exhibits.**

After full trial and consideration of all the evidence adduced by the said witnesses and the documentary evidence tendered before the trial court, the appellant were found guilty, convicted and sentenced as follows:-

(a) *1st count, the 1st 2nd and 3rd appellants were sentenced to serve five (5) years imprisonment term;*

(b) *2nd count, the 1st appellant was sentenced to pay fine of Tshs 2,000,000/=only or in default, to serve three (3) years imprisonment;*

(c) *3rd and 4th counts, the 1st and 2nd appellants were sentenced to serve four (4) years imprisonment;*

(d) *5th count, the 2nd appellant was sentenced to serve five (5) years imprisonment;*

(e) *7th count, the 3rd appellant was sentenced to serve five (5) years imprisonment; and*

(f) *8th count, the 1st 2nd and 3rd appellants were sentenced to serve five (5) years imprisonment.*

Being aggrieved with both conviction and sentence, the appellants at different times lodged Petition of Appeal, the 1st appellant filed his Appeal on 4th September 2017 accompanied with five (5) grounds and the 2nd and 3rd appellants filed their Appeal on 7th September 2017 accompanied with fifteen (15) grounds of appeal. Since, the two Appeals, *to wit Criminal Appeal no 257 of 2017* and *Criminal Appeal No. 264 of 2017* emanated from the same case, i.e *Criminal Case No. 79 of 2016*, the two Appeals were consolidated and proceeded as one Appeal. Specifically, in his Petition of Appeal, the 1st appellant raised the following grounds, that the Honourable trial Magistrate erred in law and facts when-

1. *she found the 1st appellant guilty as charged;*
2. *arrived at the conclusion that, the 1st appellant is the one who was supposed to deposit the fateful cheque No. 009225 in his employer's (Temeke Municipal Council) Bank Account;*
3. *she held that, the prosecution proved all charges against the 1st appellant beyond reasonable;*
4. *she based her findings that, the 1st appellant was guilty as charged based on presumption than facts on record; and*
5. *she shifted burden of proof on the 1st appellant to prove that he was not guilty as charged.*

In their joint Petition of Appeal, the 2nd and 3rd appellants indicated fifteen (15) grounds, which the same being repetitive have been reduced to only six (6) grounds *to wit* the trial Magistrate erred both in law and fact for:-

(1) admitting and relying her decision in a photocopy of a disputed cheque as an exhibit without following the law, hence reaching to an erroneously decision;

(2) *relying and basing her decision in a computer generated documents without following the procedures of admission of the same as exhibits;*

(3) *total disregarding the defense given by all the appellants;*

(4) *failure to properly evaluate evidence and exhibits given by both sides;*

(5) *failure to craft a judgement in accordance with the law, and*

(6) *failure to consider the recommendations from the Controller and Auditor General.*

By looking on the list of the grounds of the appeal above for all the appellants, one can easily notice that, all the grounds are essentially challenging the trial court's decision on the aspect that, the eight (8) counts charged against the appellants were not proved to the standard required by the law. That is beyond reasonable doubt.

At the hearing of the Appeal the 1st appellant enjoyed the services from Mr. Gregory C. N. Lugaila, the learned Counsel, the 2nd appellant was represented by Mr. A. Mokily, the learned Counsel, the 3rd appellant was

represented by Mr. Melkior Saul Sanga, the learned Counsel, while Ms. Florida Wenceslaus, the learned State Attorney, represented the respondent, the Republic.

By consent of the parties, the Appeal was argued by way of written submissions. This was adequately done and I am grateful to the Counsel for the parties for the energy and industrious research involved. I have thoroughly considered the written submissions by both parties which are in the record of this case and I do not need to reproduce the same herein verbatim, but the same will be summarized when considering the specific ground(s) herein.

Having scrutinized thoroughly the record of the case and the submissions made by the Counsel for the parties, I have observed that, the main issue to be considered by this Court is *whether the two appeals lodged before me are meritorious.*

I must state at the outset that, this court being the first appellate court enjoys great liberty in re-evaluating the evidence and the law. See the decision in the case of **Yohana Dionizi and Shija Simon Versus The Republic,** Criminal Appeal No. 114 and 115 of 2009, Court of Appeal of

Tanzania at Mwanza, (Unreported). In the case of **Kisembo V. Uganda** [1999] 1 EA it was held that:-

> *"The court of appeal had the duty to properly scrutinize and evaluate the evidence of both the prosecution and the defence. It would be a misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable."*

Before addressing the grounds of appeal, let me first address my mind to few predominant legal principles, which I think, are of relevancy to the case at hand and will guide me in analyzing the record of the case and the evidence tendered before the trial court. These covers aspects of criminal law as well as the law of evidence and they are borne out of the Constitution of the United Republic of Tanzania, 1977, the Law of Evidence Act, Cap 6 [R. E. 2002] (henceforth *"the Evidence Act"),* Criminal Procedure Act, Cap 20 [R.E. 2002] (henceforth *"the CPA"),* the *Penal Code* and precedents.

These principles are meant to ensure that, no innocent person is convicted on freak or flimsy evidence. The **first principle** is that the *onus of proof in criminal cases, that the accused has committed the offence for, which he is charged with, is on the shoulders of the prosecution and not on the accused*

person. This is a long established principle in criminal justice and there are multitudes of authorities enforcing the same. See for instance the case of **Joseph John Makune Vs The Republic** [1986] TLR 44 at page 49, where the Court of Appeal considered the prosecution evidence adduced in the particular case and held that; "*The cardinal principle of our criminal law is that, the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence. There are a few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities.....*"

The **second principle** is that, the standard of proof in criminal cases is *proof beyond reasonable doubt*. The Court of Appeal of Tanzania in the case of **Mohamed Haruna @ Mtupeni & Another Vs The Republic**, Criminal Appeal No. 25 of 2007 (unreported) held that; "*Of course in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that, an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence.*" Therefore, evidence adduced by the prosecution side in this case, must be so convincing that no reasonable person would ever question or doubt as whether the appellants have really committed the offence. See the cases of **Anatory Mutafungwa Vs**

Republic, Criminal Appeal No. 267 of 2010, Court of Appeal of Tanzania and **Festo Komba Vs Republic**, Criminal Appeal No.77 of 2015, Court of Appeal of Tanzania (both unreported).

Third, it is also a principle of the law that, suspicion, however grave, is not a basis for a conviction in a criminal trial. See the decision of the Court of Appeal in **MT.60330 PTE Nassoro Mohamed Ally V Republic,** Criminal Appeal No. 73 of 2002.

Fourth, it is also important to highlight that the accused person cannot be convicted on the weakness of his defence, but on the strength of the prosecution case. In the case of **John s/o Makolobela Kulwa Makolobela and Eric Juma alias Tanganyika v. Republic** [2002] TLR 296 it was held that-"***A person is not guilty of a criminal offence because his defence is not believed, rather a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt."*** *[Emphasis added].*

It is also important to highlight that, section 66 of the law of Tanzania Evidence Act provides strictly that *documents must be proved by primary evidence except as otherwise provided in the Act.* Therefore, the secondary

evidence, (photocopies) are acceptable in Court only after one has complied with certain conditions itemized under section 67 of the same law. Lastly and taking into account that this case involved the electronic documentary evidence, it is crucial to highlight in this background that, in 2007 and 2015 the Tanzania Evidence Act was amended through *Written Laws (Miscellaneous Amendments) Act, No. 15 of 2007* and *The Electronic Transactions Act, No. 13 of 2015* to embrace the technology development in this country and specifically the admissibility of the electronic generated evidence in courts. However, the admissibility of such evidence is subject to the compliance with certain legal conditions, which will be demonstrated herein below.

It is therefore with these legal principles and the provisions of the law in mind that I will now turn to analyze the evidence adduced by both parties before the Court in relation with the grounds of appeal lodged in this Court by the appellants.

To start with the 1st and 2nd grounds of Appeal raised by the 1st appellant together with the 1st ground of Appeal by the 2nd and 3rd appellants, I wish to note that, Mr. Lugaila has submitted in general terms that the trial Magistrate convicted and sentenced the 1st appellant on wrong premises,

presumptions and supposition that since the 1st appellant was the accountant at Temeke Municipal Council on 29th December 2008 he received a total amount of Tshs. 80, 383, 534/= including the cheque No. 009225 issued by Bakhresa Co. Ltd and that he is the one who conspired with the other appellants to steal the said cheque. Mr. Lugaila argued that, there was no conclusive evidence as to:-

(a) who presented the said cheque at the NMB Bank PLC, Msasani Branch. There was no any pay-in-slip tendered before the trial court to prove that fact;

(b) whether the cheque was not deposited to the Temeke Municipal Council's account, because a stamp on the cheque (Exhibit P2) was a photocopy which does not clearly show which NMB Bank Branch received the same. He referred to pages 23 of the typed proceedings and said, the cheque has the bank account of the Temeke Municipal Council;

Mr. Lugaila submitted further that, the testimonies by the prosecution side were tainted with contradictions, as whether the 1st appellant was introduced to the NMB Bank, Temeke Branch. He referred to page 25 lines

16-18 and page 91 lines 1-11 of the typed proceedings. He further noted that, the 1st appellant was not the one who submitted the said cheque to the Bank, but one Mwajuma Omari, who took all the cheque worth Tshs. 79, 548,494/= but cheque No. 009225 was not deposited. He referred to the Report of the Controller and Auditor General (CAG) *Exhibit P12*, which supported that fact, but he said the trial Magistrate never considered the said *Exhibit P12.*

On his side Mr. Mokily challenged that, the trial Magistrate accepted a photocopy, a cheque which was the subject matter of the case without any proper and grounded reasons as to why the original cheque was not available. He said this is in violation of section 64 (1) of the Evidence Act. He further submitted that, even the person who certified the said photocopy was not legally recognized as such.

Mr. sanga submitted that, the central issue before the trial court was in respect of the *cheque No. 009225 worth Tshs. 37,500,000/=* which was supposed to be paid to the Temeke Municipal Council's Bank Account. That, during the trial what was tendered was a photocopy of that cheque and the original was never produced. He referred to Section 66 of the

Evidence Act and emphasized that, *documents must be proved by primary evidence except as otherwise provided in the Act.* Mr. Sanga then said, the main issue is *whether the admission of the said photocopy was properly made.* He cited the case of **Janet Tijan v the Republic,** Criminal Appeal No. 152 of 2013, where Hon. Mwarija J, (as he then was) emphasized that documents must be proved by primary evidence and proceeded to expunge a photocopy document which was admitted by the trial court and allowed the appeal.

In response to the submission made by Mr. Lugaila, Ms. Florida submitted that, the evidence adduced by the prosecution witnesses was watertight to warrant conviction of the 1st appellant. She referred to page 91 of the trial court typed proceedings and noted that, it was not in dispute that, in December 2008 the 1st appellant was the main cashier at Temeke Municipal Council and he is the one who received the disputed cheque No. 009225 worth Tshs. 37,500,000/= issued by Bakhresa Co. She said, after receiving the said cheque, the 1st appellant, as the main cashier at that time was duty bound to deposit the said cheque to the Bank Account owned by Temeke Municipal Council No. 2071200048 maintained at NMB PLC, Temeke Branch and not NMB Msasani Branch in Account No.

21133300064 owned by IGODEN GENERAL SUPPLIES AND SERVICES LTD. She thus concluded that the 1st appellant is responsible with the stealing of that cheque.

As for the submission made by Mr. Mokily and Mr. Sanga, specifically on the concerns raised on the admissibility of a photocopy i.e *Exhibit P2*, Ms. Florida referred to the testimony of PW2 at page 20 of the trial court typed proceedings where PW2 said, "...*the original cheque was at the hands of the Standard Charted Bank, the office is still looking for original cheque, I based my evidence on the copy which I certify...*" and then argued that, section 85 of the Tanzania Evidence Act, provides for conditions to be considered when a photocopy document is tendered before the Court and according to her, all the legal procedures in respect of the admissibility of the photocopy were complied with. She thus referred to section 66, 67(1)(c) of the Evidence Act and argued that secondary evidence (photocopy) may be admitted in court, when it is established that the original has been lost. She insisted that, since the original cheque was lost then the trial Magistrate has complied with the required procedures to admit the photocopy document in court. Since almost all the Counsel for the parties herein have referred to several provisions in the Law of

Evidence Act, for the sake of clarity, I have endeavored to reproduce the same hereunder:-

"Section 66 "***Documents must be proved by primary evidence except as otherwise provided in this Act***". [Emphasis added].

Section 67, which is giving powers to the courts to allow proof of documents by secondary evidence and admit photocopies, provides that:-

"67 (1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases–

(a) when the original is shown or appears to be in the possession or power of–

(i) the person against whom the document is sought to be proved;

(ii) a ***person out of reach*** *of, or not subject to, the process of the court; or*

(iii) *a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;*

(b) NA;

(c) ***when the original has been destroyed or lost,*** *or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time" [Emphasis added].*

In the case at hand, I have perused the trial court's typed proceedings at pages 17 – 19, when the *Exhibit P2 (photocopy of a cheque)* was produced and tendered before the trial court. I have failed to see anywhere indicated to show that, the trial Magistrate has bothered to comply with the above conditions for the admission of the said photocopy. Moreover, in his testimony, before the trial court, PW2 who is the person who tendered the said photocopy, he has never indicated or even proved anywhere in the record that, the said cheque was ***lost*** or ***that, the person, who is the custodian of the original cheque is out of reach.*** To bring this matter home and for the sake of clarity, I have endeavored to reproduce the

testimony of PW2 adduced before the trial court, when he tendered a photocopy. At page 17 - 18 of the trial court's typed proceedings when testifying in chief to enable the trial to receive and admit a photocopy PW2 said:-

> *"...I know that cheque No. 009225 is for Standard Charted Bank and the customer was Bakhresa. That cheque was issued on 24/12/2008. When I will see that cheque I will be able to identify it. I was the one who signed it,* ***the owner of that cheque was Bakhresa*** *and it concerns with my office.*

S/A: "I pray to show witness the document.

Court: Prayer granted.

Witness: This is the cheque I wrote. I pray to tender this cheque as exhibit.

S/A: We pray to tender the cheque as exhibit, if no objection.

Then all the defence Counsel objected the admissibility of that cheque and said the same is a photocopy and does not meet the requirement of the law. They further argued that, the custodian of the cheque is the Standard

Charted Bank, but the document is certified by the PW2, who said is the one who wrote it and he is not a Manager of that Bank to certify the photocopy. They further argued that, PW2 cannot be the writer, custodian and the certifying authority. They thus insisted that, the original cheque should be produced before the court.

Then, the trial court ruled out that, since the court is the court of justice and law, where every party has the right to be heard. Then, specifically the trial Magistrate said – "...*in that case I find that,* ***it is the wisdom of this court to admit this document*** *to enable it to rule on this matter..." [Emphasis added].*

From the extracted part of the proceedings above, it is clear that, when PW2 tendered the said photocopy, he did not establish any condition itemized under section 67 of the Evidence Act to justify the admissibility of the photocopy. Furthermore, the learned State Attorney never led his witnesses to satisfy those legal conditionality for the admissibility of a secondary evidence. I even find it strange, that in her submission to this Court, Ms. Florida had since referred this Court to 67(1) (c) of the Evidence Act, claiming that, *it was proper for the trial Magistrate to admit a*

photocopy, because the prosecution witness has established that, the original cheque has been ***lost.*** With due respect, I wonder where the learned Counsel is getting those information that the original cheque was lost, as I have perused the entire evidence of PW2 adduced before the trial court and I have failed to glean therefrom an iota of evidence, which suggest that PW2 said that the original cheque was lost. PW2 during examination in chief he never said that the original cheque was lost. In addition upon cross examination by Mr. Sanga at page 20 of the same proceedings PW2 testified that:-

> *"The* ***original document of this cheque is with the Standard Charted Bank Headquarters in Makumbusho - Dar es Salaam.*** *I saw the original cheque on 15th October 2014, when I was signing the photocopy. The* ***Head of the Department*** *who gave me the original cheque to photocopy is* ***Nina Ishuri"***

The same PW2, at page 21 first paragraph of the same proceedings, upon being cross examined by Mr. Mokili, responded that:-

> *"When I was getting a copy of the cheque (sic) the original cheque I handled it to Ezekiel Herman... Herman is the one who handled*

to me the original cheque. ***At that time Ezekiel Herman was the custodian of that cheque, the original one"***

It is very clear that, though PW2 was testifying under oath and explaining one incident, but his testimony contain contradictions, which in my view were supposed to be considered by the trial court. It is also clear that, PW2 has never said that the original cheque was lost, but mentioned several people to have custody of the same. But surprisingly, in her Judgement at page 7 third paragraph, the trial Magistrate when referred to the testimony of PW2 to justify the admissibility of the photocopy, she said, *"...the original cheque was handled over to him* ***by Ezekiel Herman who was the custodian of that cheque.*** *In that case there was a presumption that PW2 tendered in court certified copy of the disputed cheque* ***after the original cheque got lost and the bank was still looking for it".***

With due respect, I wonder where the trial Magistrate gathered this information and conclusion that the custodian of the original cheque was ***only Ezekiel Herman***, despite the fact that PW2 mentioned several sources to be the custodian of the original cheque *to wit*, ***the bank***, the

Head of the Department *by the name of* ***Nina Ishun*** and one **Ezekiel Herman**. So, what was required for the prosecution side to establish with concrete evidence as who exactly was the custodian of that cheque was to call these people to testify before the trial court, but not for the Magistrate to draw *assumptions* and give wrong conclusion that, the original cheque was lost. Anyhow and even if we go by that assumption of the trial Magistrate that, the original cheque was lost, there was no any police loss report submitted before the trial court to prove that fact.

As I have indicated above, in admitting a photocopy cheque the trial Magistrate never bothered to follow the procedure entailed under section 67 of the Evidence Act, but only indicated that the said photocopy is admitted as per the wisdom of the Court. Though, I do respect the wisdom of the learned trial Magistrate, but with due respect, courts are creatures of the law and procedures, the wisdom of the Magistrate can only be invoked after one has complied with the mandatory requirement of the law.

In addition, going by the testimony of PW2 reproduced above, PW2 was not the custodian of that cheque neither the manager of the Standard Charted Bank. PW2 though contradicted himself on who exactly handled

the original cheque to him, but at least he mentioned two people, ***Nina Ishun*** and **Ezekiel Herman** to be the custodian of that original cheque. In my considered view these two people were material witnesses who were supposed to be summoned by the prosecution side to testify before the trial court. I am alive to the fact that, no specific number of witnesses is required to prove a case, and it is the discretion of the prosecution to call the witnesses, which they find most suitable for their case. See Section 143 of the Evidence Act. However, the said discretion on the part of the prosecution must be exercised judiciously to advance the cause of justice. See **Separatus Theonest V Republic,** Criminal Appeal No. 138 of 2005; **Riziki Method V Republic,** Criminal Appeal No. 80 of 2008 Court of Appeal, (both unreported) and **Azizi Abdallah V Republic** (1991) TLR 71. In Azizi's case the Court stated that:-

> *"...the general and well known rule is that, the prosecutor is under prima facie duty to call those witnesses, who from their connection with the transaction in question are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution"*

Surprisingly, in the case at hand, even after the PW2 has mentioned those two people to be the custodian of the original cheque, the prosecution side never bothered to summon them to testify before the trial court and shed more light on this matter. On the other hand, even the trial Magistrate did not bothered to summon the same to satisfy herself, as to whereabouts of that original document. It is therefore my considered view that, if these witnesses could have been called and testify before the trial court would have shed more light on the matter. Failure to call the said witnesses without good cause being shown left a question mark, which prejudiced the appellants' case and invite this Court to raise some doubts and more so, to draw an inference adverse to the prosecution side. In the event, the 1st and 2nd grounds of appeal raised by the 1st appellant together with the 1st ground of appeal by the 2nd and 3rd appellants are all answered in the affirmative and subsequently, *Exhibit P2* is expunged from the record of this case.

With the foregoing observation, I now proceed to consider the 2nd ground of appeal raised by the 2nd and 3rd appellants that, the trial Magistrate erred in law and fact by *relying and basing her decision on a computer*

generated documents without following the procedures of admission of the same as exhibits.

It is common ground that in 2007 and 2015 the Tanzania Evidence Act was amended through the two Acts indicated above. Specifically, Act No.15 of 2007, among others introduced three sets of important amendments to the Evidence Act, namely sections 40A, 76 and 78A. These changes were made through sections 33, 34 and 35 of the Act 2007 respectively. The said amendments allowed the admissibility of information retrieved from computer systems, networks and servers, in any criminal proceedings, provided that the said information are supported ***by a proof that it was made in the usual and ordinary course of business.***

In addition, section 42 of the Electronic Transactions Act, (supra) amended section 3 of the Evidence Act to broaden the definition of the word 'document' to include electronic generated documents. The Act also introduced section 64A on the admissibility of electronic evidence which provides that:-

64A (1) in every proceedings, electronic evidence shall be admissible;

(2) the admissibility and weight of electronic evidence shall be determined in ***the manner prescribed under section 18 of the Electronic Transactions Act, 2015;***

(3) for the purposes of this section 'electronic evidence' means any data or information stored in electronic form or electronic media or retrieved from a computer system, which can be presented as evidence.

Therefore, in order for a computer generated information to be admitted in Court, the same shall comply with the conditions stipulated under section 18 of the Electronic Transactions Act, the said section provides that:-

"18 (1) *In any legal proceedings, nothing in the rules of evidence shall apply so as to deny admissibility of data message on ground that it is a data message.*

(2) *In determining admissibility and evidential weight of data message the following shall be considered:-*

(a) *the* ***reliability of the manner in which the data message was generated, stored and communicated;***

(b) *the* ***reliability of the manner in which the integrity of the data message was maintained;***

(c) the ***manner in which the original was identified****; and*

(d) any other factor that may be relevant in assessing the weight of evidence.

(3) *the* ***authenticity of an electronic records in which an electronic record is recorded or stored*** *shall in the absence of evidence to the contrary be presumed where:-*

(a)*there is evidence that supports a finding that* ***at all material times that computer system or other similar device was operating properly*** *or,* ***if it was not,*** *the fact of its not operating properly* ***did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic records system;***

(b) *it is* ***established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it;***

(c) it is established that an electronic record was ***recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings*** *and who did not record or store it under the control of the party seeking to introduce the record.*

(4) For purposes of ***determining whether an electronic record is admissible*** *under this section, an evidence may be presented in respect on any* ***set standard, procedure, usage or practice on how electronic records are to be recorded or stored, with regard to the type of business or endeavors that used, recorded or stored the electronic record*** *and the nature and purpose of the electronic record. [Emphasis supplied].*

Furthermore, section 78 and 79 of the Evidence Act provides conditions to be complied with when admitting such evidence. In the case of **Exim Bank (T) LTD V Kilimanjaro Coffee Company Limited,** Commercial Case No. 29 of 2011, Hon. Nyangarika, J, as he then was, when interpreting the provisions of the law above and explaining the procedure on how to accept and admit electronically generated printouts he said:-

> "...***for a computer generated printouts to be accepted in evidence one has to comply to the standards set out in section 78 and 79 of the Evidence Act*** *and such* ***printouts must be accompanied by a certificate to the effect that,*** *it is a printouts of such an entry by the accountant or branch manager of the relevant bank and further to the that,* ***there must be a certificate from the person in charge of the computer system*** *to the effect that to the best of his knowledge and beliefs such* ***computer system operated properly at the material time*** *when he was provided with all the relevant data and print out in question represent correctly or is appropriately derived from the relevant data and* ***the print out statement were examined with the original entries and were found to be***

correct, *and a* ***brief description of the computer system where the printout was retrieved from the person in-charge of the computer*** *for purposes of* ***authenticity showing that the print out statement were not tempered with and are correct in every aspect".*** *[Emphasis added].*

From the above legal requirements, it is therefore clear that, any documentary evidence by way of an electronic record under the evidence Act, in view of section 64A, can be proved only in accordance with the procedure prescribed under section 18 of the Electronic Transaction Act. That, a person who wants to produce, as evidence, a data message or computer stored information must comply with the prescribed conditions under section 18 of the Electronic Transactions Act and must also submit a certificate certifying the reliability of the manner in which the electronic document was generated, stored and communicated, the integrity of the electronic document and the manner in which it was maintained and on how the original was identified.

In the case at hand, I have perused the record of the case before the trial court and specifically from pages 40 – 50 of the trial court typed

proceedings, when PW6 was testifying and tendered the computer generated information, and I have failed to glean evidence indicating that the conditions under section 18 of the Act have been complied with. The trial Magistrate never bothered to find out ***on the reliability of the manner in which the information was generated, stored and communicated; the integrity of the computer system where the said information was generated, stored and maintained; how was the original identified; the authenticity of the said information; whether at all material time the computer was operating properly and if not, whether the same has affected the intergrity of the said information; whether the information was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it, or as whether the information was generated in the usual and ordinary course of business by a person who is not a party to the proceedings.*** All these issues remained un-answered and yet the trial Magistrate proceeded to admit the computer generated evidence in court as *Exhibits P4 – P11* without observing the prescribed legal procedures and conditions. In my respectful view the said *Exhibits P4 –P11* were admitted wrongly and are also hereby

expunged from the record of this case. Consequently, ground No. 2 of the appeal for the 2nd and 3rd appellants is answered in the affirmative.

It is also on record that, the appellants, among others, were charged with the offence of conspiracy contrary to section 384 of the Penal Code. Pursuant to that provision of the law (section 384 of the Penal Code) the offence of conspiracy exists where one person agrees with another person to commit any offence, in this case *'stealing'*.

Conspiracy is thus an agreement to do unlawful act or a lawful act by unlawful means. Since it is difficult to see criminals making an agreement to commit an offence, conspiracy is thus proved by proof of conduct (s) of each conspirator towards commission of a crime or criminal racket. An agreement to conspire may be deduced from any acts which raise the presumption of a common plan (See **Stanley Musinga and another Vs R.** [1951] EACA 211 and **Wanjiru Waimathi V.R** [1955] EACA 512.

In the present case, I have perused the evidence on record and I have since failed to glean therefrom an iota of evidence, which is proving that, there was conspiracy between and among the appellants. Even the trial Magistrate did not bother to find out how the **appellants shared the**

knowledge (if any) amongst themselves or with other thugs who were charged or not charged.

In her submission on this matter, Ms. Florida argued that, the fact that, all the necessary documents concerning the cheque No. 009225, (*the original cheque, pay-in-slip at Temeke Municipal Council, pay-in-slip at NMB Msasani Branch*) went missing, as testified by PW2, PW5, PW6, PW9 and PW10 the same substantiate the offence of conspiracy.

With due respect to Ms. Florida, the testimonies of these witnesses on this matter are tainted with contradictions and they never said the same story to substantiate the offence of conspiracy as claimed. For instance, **PW2** testimony as indicated above never proved that the cheque was lost. **PW6** when testifying on the cheque he mainly referred to the Controllers Auditor's General Report (CAG) at page 10 and noted that, the 1st appellant took the cash to the bank and all cheque were taken and deposited by one Mwajuma Omary. **PW6** also said that, he is the one who, through a letter, appointed the 1st appellant to act as a main cashier at the period, when the main cashier was on leave. **PW6** further testified that, *he does not remember if he has introduced the 1st appellant to the Bank, as the main*

cashier with the Temeke Municipal Council. He further said according to the CAG Report, the 1st appellant is not responsible with the loss of the cheque worth Tshs. 37 million.

Following the above analysis, I respectfully find that, the first count, which was the main count in this matter, was not proved to the required standard, i.e beyond reasonable doubt. I am therefore at one with Mr. Lugaila that, there is no evidence on record to prove the offence of conspiracy and I do appreciate the authority of the Court of Appeal he once cited in **Director of Public Prosecutions v Elias Laurent Mkoba and Another,** 1990 TLR 115 (CAT) where the Court of Appeal held that:-

> "(ii) ***Where in the absence of evidence of common intention, it is not possible on the evidence to say which of the accused persons jointly charged committed the offence, then all the accused persons must be given the benefit of doubt***". [Emphasis added].

Therefore and taking into account that I have already expunged the *Exhibits P2, P4 – P11,* I find the remaining evidence to be weak and tainted with contradictions, hence has no weighty to convict the appellants. By all

stretch of imagination the conduct of this case was succumbed to eccentric procedures amounting to serious irregularities. The prosecution evidence was equally shallow and tinted with exaggerations and inconsistencies, hence unreliable to form a sound conviction.

In conclusion and with respect, I find that, the case against the appellants was not proved beyond reasonable doubt. Furthermore, the non-compliance on the part of the trial Magistrate with mandatory procedures in admitting exhibits and properly analyze the evidence tendered before her, has since caused unduly prejudice to the appellants. The appellants have not received a fair trial and due process of the law. As such, the trial was vitiated. In the event and for the above stated reasons, I do not see the need to tackle other grounds of the Appeals. I proceed to declare that, the Appeals are hereby allowed, the conviction is quashed and sentence set aside. The appellants are to be released from prison forthwith unless lawfully held. It is so ordered.

DATED at Dar es Salaam this 04th day of May 2018.

R. K. Sameji.
JUDGE

COURT – Judgement delivered in Court Chambers in the presence of Mr. Sosthenes Mbedule, the learned Counsel, who appeared for Mr. Gregory Lugaila, the learned Counsel for the 1st appellant, Mr. Melkior Saul Sanga the learned Counsel for the 3rd appellant and also who was holding brief for Mr. A. Mokily, the learned Counsel for the 2nd appellant and Ms. Florida Wencenslaus, the learned State Attorney who appeared for the Respondent, the Republic.

A right of Appeal explained.

R. K. Sameji

JUDGE

04/05/2018