IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 193 OF 2019

(Appeal from the decision of the District Court of Ileje in Economic Criminal Case No. 01of 2018)

BARAKA MKUNGI.....1ST APPELLANT

MOSES AUGUSTINO SINYIZA.....2ND APPELLANT

ASHER TAIFA MBEMBELA.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Hearing : 13/07/2020
Date of Judgement: 31/08/2020

MONGELLA, J.

In the District court of Ileje at Itumba, the appellants together with other two persons were charged as follows: The first count was on interference with necessary services contrary to section 3 (d) of the National Security Act, Cap 47 R.E. 2002 as amended, read together with paragraph 12 of the first Schedule and section 57 (1) of the Economic and Organised Crime Control Act, Cap 200, R.E. 2002 as amended. This count involved all of them. In this offence, it was alleged that on diverse dates between December 2017 and January 2018, within Ileje District, Songwe Region, the accused persons jointly, without lawful permission interfered with the

necessary service of communication whereby they removed Tanzania Telecommunication Company Limited (TTCL) wires from the poles.

The second count was specifically for the 3rd accused person and it concerned being found in unlawful possession of stolen property contrary to section 311 of the Penal Code, Cap 16 R.E. 2002. It was alleged that the 3rd accused person, on 2nd January 2018, was found in unlawful possession of five TTCL wires which were already burnt. The third count concerned the 4th accused person whereby he was alleged to be found in unlawful possession of TTCL wires on 1st January 2018.

In the end, the trial court found the 1st, 2nd, and 5th accused persons (the 1st, 2nd, and 3rd appellants respectively) guilty on the first count and sentenced them to a 10 years' imprisonment term. The 3rd and 4th accused persons were acquitted on all counts. Aggrieved by this decision the appellants preferred this appeal on four grounds as follows:

1. *That the trial court grossly erred in law and in fact by holding that the prosecution has proved the case beyond all reasonable doubts against all the appellants while it was not.*

2. *That the trial court erred in law for convicting the appellants of an incurable defective charge, and has failed to address his mind to the effect, hence making the whole trial a nullity.*

3. *That the trial court was influenced by prosecution evidence, and in bias ignored the defence evidence with the written submissions filed by the defence which is fatal.*

4. *That the trial court invoked extraneous matters and erred in law and fact by holding that the second appellant has confessed to have engaged in stealing and or buying stolen TTCL wires.*

Both parties were represented. The appellants were represented by Mr. Patience Maumba, learned advocate and the respondent was represented by Ms. Sara Anesius, learned State Attorney. The appeal was argued orally through virtual court.

Mr. Maumba started by abandoning the 2nd ground on defective charge. He then argued collectively on the 1st and 4th grounds, which happened to be related as they concerned proof of the prosecution case beyond reasonable doubt. On these grounds, Mr. Maumba submitted that among the 12 prosecution witnesses, none of them witnessed the appellants committing the offence. He contended that, the appellants were instead convicted on circumstantial evidence. He described the circumstantial evidence surrounding the exhibits brought in court to wit, burnt wires, exhibit P1, 4 mobile phones, exhibit P7, a bundle of burnt wires and bricks, exhibit P6, caution statement of the 2nd appellant, exhibit P5, extra-judicial statement of the 2nd appellant, exhibit P10, Cyber Crime Unit Report, exhibit P8 and one CD, exhibit P9.

Regarding exhibit P1, Mr. Maumba argued that the witnesses called, including the police officers that searched the 3rd appellant's house on 2nd January 2018 testified to have found the 3rd and 1st appellants inside the 3rd appellant's house. The said police officers locked the two inside the house and searched the house. Then they took them to an unfinished house about 25 meters from the 3rd appellant's house whereby they found

exhibit P1. The 3rd and 1st appellants denied knowing anything regarding the incident when interrogated. Mr. Maumba further contended that between the 3rd appellant's house and the unfinished house there is a footpath. He was thus of the argument that exhibit P1 might have been planted against the 3rd appellant. He added that all the witnesses proved that the first appellant lives in another village. Thus the evidence provided failed to link the 1st and 3rd appellants to the crime.

Regarding the mobile phone, exhibit P7, Mr. Maumba contended that the prosecution tried to show that there was conspiracy on commission of the crime between the appellants and other two persons named Michael Nyundo and Omary Mwazombe, who were acquitted. He said that in the process of arrest, seven phones were confiscated, but among these, only four were taken to the Cyber Crimes Unit (CCU) for investigation after seeing there was important information in the sms and whatsap. He said that the investigation by the CCU was done by PW11 whereby he prepared a report being exhibit P8 and a CD, exhibit P9. He argued that, exhibit P8 was read over, but was very ambiguous. He said so arguing that the said exhibit did not show from whom the sms and whatsap messages came from and to whom they were directed. He added that even the messages were not extracted and issued as evidence in court, thus making the whole evidence ambiguous.

Mr. Maumba further argued that the soft copy in CD, exhibit P9, was not played in court so that the appellants know its contents. He was of the view that this defect led to failure of justice on the appellants. He argued further that PW11 testified to have received the phones and labeled them

as Exhibit A, B, C, & D, collectively marked as exhibit P7 by the trial court. However, he never clarified in court as to which phone belonged to which appellant and in court PW11 said that the obligation to prove that aspect is on the investigator.

Regarding exhibit P6, a bundle of burnt wires and bricks, Mr. Maumba argued that the liability of the 2nd appellant as per the police officers who arrested him is that, he showed the shop in which he sells iron scraps in Mbeya town. That he took them to Soweto area whereby exhibit P6 was found. Mr. Maumba argued that the 2nd appellant is not the owner of the said shop, thus it was mis-direction on the part of the trial court to link the 2nd appellant with the crime. He contended that, the owner of the said shop, one Abuu Twalib, was not called to adduce evidence to clear the gap. He said that Abuu Twalib was arrested but was not included in the charge and was never brought to adduce evidence.

Mr. Maumba also challenged the admission of exhibit P5 and P10, the caution statement and extra-judicial statement respectively, which were used to link the 2nd appellant with the 1st and 3rd appellants. He contended that exhibit P5 was objected by the 2nd appellant for being taken after the lapse of five days and through threats, however no inquiry was done. He argued that this prejudices the 2nd appellant's rights. Referring to the case of ***Lack Kilingani v. Republic***, Criminal Appeal No. 402 of 2015 (CAT at Iringa, unreported) he argued that it is an established position of the law that doubts have to be cleared before exhibits are admitted in evidence.

Considering exhibit P10, Mr. Maumba argued that a close scrutiny of the exhibit reveals that it does not meet the criteria of being a confession because it lacks self-incriminatory facts by the 2nd appellant. He argued so saying that the 2nd appellant did not know that they were unlawfully acquired when buying them. He referred the court to the case of ***DPP v. ACP Abdallah Zombe & 8 Others*** [2017] TLS Law Report 182 whereby a non-self-incriminatory confession was treated as no confession. He thus argued that for the District court to find exhibit P10 amounting to confession was a mis-direction. To this point, he concluded that the prosecution evidence was insufficient to convict the appellants. He urged the court to consider the findings of the Court in the case of ***Ally Bakari & Pili Bakari v. Republic*** [1992] TLR 10 on circumstantial evidence.

Arguing on the 3rd ground, Mr. Maumba contended that the principle of fair hearing demands both parties to be equally heard. He argued that the judgment of the trial court reveals that the Hon. trial Magistrate changed himself into a prosecutor and not an adjudicator whereby he was deeply influenced by the prosecution evidence. He said that the defence evidence was insufficiently summarised in the judgment compared to the prosecution evidence. The trial Magistrate found the appellants guilty without analysing their evidence. He stated further that, the proceedings indicate that on 29th January 2019, the trial Magistrate ordered both parties to file their final written submissions by 19th February 2019. He referred the court to page 3 of the judgment whereby the trial Magistrate appears to acknowledge that he received the final written submissions. However, Mr. Maumba argued that the trial Magistrate never considered the defence evidence and submissions in his whole judgment

thus exerting biasness. On these grounds he prayed for the appeal to be allowed and the appellants set free.

On her part, Ms. Anesius opposed the appeal. She argued that the charge was proved beyond reasonable doubt against all the appellants. Remarking on exhibit P1, she contended that the same was tendered by PW4 who witnessed the search and seizure of the exhibit at the house of the 3rd appellant whereby the 1st appellant was also present. She argued that exhibit P1 was found in the 3rd appellant's house and not in an unfinished house as claimed by the appellants' counsel. She added that the search was also experienced by PW3 and PW6 who tendered the search warrant and testified that the wires were found in the 3rd appellant's house. She further contended that the wires were identified as belonging to TTCL and upon being interrogated they confessed that they used to take the wires and sell them to the 2nd appellant.

Regarding exhibit P7, the phones, Ms. Anesius argued that the same were not the only evidence under which the conviction was based on as there were other pieces of evidence. She argued that PW11 explained in his testimony that the purpose of the exhibit was to investigate the phones which were found in possession of the appellants. Therefore, she was of the view that non-mentioning of the owners of the phones does not mean that the offence was not proved.

Ms. Anesius added that the 2nd appellant confessed buying the wires from the 1st and 3rd appellants and went to show the shop where he used to take them. She argued that as per section 143 of the Evidence Act, no

particular number of witnesses is needed to prove commission of an offence. Thus the non-summoning of the owner of the shop does not render the case not proved beyond reasonable doubt. She was of the view that the number of witnesses summoned was enough to prove the case against the appellants.

Ms. Anesius also replied on the challenge posed by Mr. Maumba to the admission of exhibits P5 and P10 without conducting an inquiry following being objected. She argued that, as seen at page 39 and 40 of the proceedings, the exhibit P5 was objected on the ground that it was taken out of time. She said that the trial court made a ruling that the content was not objected and it shall consider the same in the judgment. Ms. Anesius argued that it is not in every objection where inquiry has to be done. She was of the view that the court properly admitted the exhibit. She further submitted that the witness explained that the statement was taken within time as seen at page 33 to 43 of the proceedings. Further that the 2nd appellant also stated that he was arrested on 5th January 2018, which was the same date the statement was taken. Regarding exhibit P10, Ms. Anesius argued that the extra judicial statement was properly taken. She referred the court to page 66 of the proceedings whereby there is explanation on how the same was taken and that the 2nd appellant admitted commission of the crime in the extra judicial statement.

On the 3rd ground, Ms. Anesius conceded that the trial court just summarised the defence evidence, but did not analyse it. However, referring to the case of ***Prince Charles Junior v. Republic***, Criminal Appeal

No. 250 of 2014 (CAT at Mbeya, unreported) she argued that since this is the first appellate court, it has the chance to analyse and evaluate the evidence.

Mr. Maumba made a brief rejoinder whereby he addressed the court on the admission of the exhibit P5 and P10. On exhibit P5, he maintained his position that since the same was objected, the trial court ought to have done an inquiry. He added that the trial Magistrate in his judgment did not explain the reasons as to why it admitted and considered the statement taken outside four hours. Regarding exhibit P10, Mr. Maumba rejoined that PW2 explained in the statement that he trades in scraps and takes them to Soweto for sale. He contended that the 2nd appellant did not state that among the scrappers were the TTCL wires and that he knew they were stolen property.

He further rejoined that the owner of the shop where the 2nd appellant was alleged to have taken the wires for sale was an important witness and thus it was imperative for him to be called. Regarding exhibit P7, he maintained his position that no message was read in court thus depriving the appellants the right to know the contents therein. He said that this was against the rules of natural justice. He further reiterated his argument that there were 4 phones and five accused persons whereby two of them were acquitted, thus it is not known to whom exactly the phones belonged to among the appellants. With regard to exhibit P1, he maintained his position that the wires were burnt thus the natural appearance removed. He argued further that PW4 came from TTCL Company, but is not an expert and he failed to contrast between TTCL

wires and TANESCO wires which were burnt. He concluded that all these doubts ought to have been considered by the trial court to reach a just decision.

I have duly considered the arguments by both counsels. A close scrutiny of the submissions and grounds of appeal, leads me to conclude that there are two main issues calling for determination by this Court. These are: first, whether the prosecution proved the case beyond reasonable doubt; and second, whether the trial court did not consider the evidence of the defence side. I shall however, start with the second issue for reasons to be apparent shortly.

Regarding the second issue, it is trite law that the failure to analyse and consider defence evidence is fatal and can vitiate the decision of the court. In ***Leonard Mwanashoka v. Republic***, Criminal Appeal No. 226 of 2014 (CAT, unreported), the Court ruled that the failure to analyse and consider the defence evidence leads to wrong or biased conclusions. At page 6, the Court specifically held:

> *"We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice."*

The CAT went further and stated that failure to consider the defence is fatal and usually vitiates the conviction. (Quoted in approval the case of ***Lockhart Smith v. R*** [1965] EA 211; ***Okth Okale v. Uganda*** [1965] EA 555; ***Elias Steven v. R*** [1982] TLR 313; ***Hussein Idd & Another v. R*** [1986] TLR 283; ***Luhemeja Buswelu v. R***, Criminal Appeal No. 164 of 2012 and that of ***Venance Nkuba & Another v. R***, Criminal Appeal No. 425 of 2013 (unreported)). In the matter at hand, it is undisputed that the trial court Magistrate summarised the defence evidence but did not analyse the same. The trial court also did not consider the submissions by the defence side. However, this being the first appellate court, I agree with Ms. Anesius that the defence evidence and submission can be analysed and considered. I shall thus analyse the defence evidence and submission as I deliberate on the first issue on whether the prosecution proved the case beyond reasonable doubt.

Going through the proceedings and judgement of the trial court, I agree with Mr. Maumba that the evidence was circumstantial and the conviction relied on this kind of evidence, particularly with regard to the 1st and 3rd appellants. It is trite law that for a conviction to be based on circumstantial evidence, such evidence must be undoubtedly connecting the accused to the commission of the offence. In the case of ***Ecksevia Silasi and Another v. The Republic***, Criminal Appeal No. 93 of 2011 (CAT at Mtwara, unreported), the Court of Appeal while quoting its previous decision in ***Shabani Abdallah v. The Republic***, Criminal Appeal No. 127 of 2003 held:

> *"The law on circumstantial evidence is that it must irresistibly lead to the conclusion that it is the accused and no one else who committed the crime."*

In the case of ***Mohamed Selemani v. The Republic***, Criminal Appeal No. 105 of 2012 the Court also while quoting a decision in an Indian case of ***Balwinder Singh v. State of Punjab***, 1996 AIR 607 held:

> *"In a case based on circumstantial evidence the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof."*

It also quoted in approval the case of ***R. v. Kipkering Arap Koske and Kimure Arap Matatu*** (1949) 16 E.A.L.R 135 whereby the Eastern Africa Court of Appeal held:

> *"That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."*

Considering the above settled legal position, my task is thus to scrutinize and establish whether the facts in evidence adduced by the prosecution establish the culpability of the appellants in connection with the offence charged and convicted.

The prosecution mounted twelve witnesses and 10 exhibits. I have examined the testimonies of the prosecution witnesses and found contradiction with regard to the place the burnt wires, suspected to be TTCL wires, were found. While PW3, PW4, PW5, and PW6 testified that the wires were found inside the 3rd appellant's house, PW8, a neighbour taken to witness the search testified that the burnt wires were found in an unfinished house near the 3rd appellant's house. PW10, a police officer also involved in the search, did not state if the wires were found inside the 3rd appellant's house. The things he stated to have seized at the 3rd appellant's house include cutting player, prize, and spanners, which were suspected to be the tools used to cut the TTCL wires, and the 1st and 2nd appellant failed to give an explanation as to which activities the said tools were used for. These tools were also testified to have been found at the 3rd appellant's house by the rest of the witnesses.

The 1st and 3rd appellants in their defence claimed that the burnt wires, exhibit P1 were found at an unfinished house. Mr. Maumba argued that there is a footpath near the said unfinished house something which shows that some other people might have planted the wires. Considering the contradictions by the prosecution witnesses, the defence by the appellants and the argument by Mr. Maumba, I find the contradiction going to the root of the case and thus I am made to believe that the burnt wires were found in the unfinished house and not inside the 2nd appellant's house. To this point I find that I still have the duty to determine as to whether the rest of the evidence connects the appellants to the offence charged.

Among the exhibits, the ones that have been challenged in this appeal are exhibit P1, burnt wires, exhibit P6, bundle of burnt wires and bricks, exhibit P7, 7 mobile phones, exhibit P8, CCU Report, exhibit P9, CD, exhibit P5, 2nd appellant's caution statement and exhibit P10, 2nd appellant's extra-judicial statement.

I wish to start with exhibit P7, mobile phones; exhibit P8, the CCU Report and exhibit P9, CD. I find these exhibits being insufficient as they did not show what exactly the messages were contained therein and to whom they were addressed to or belonged to among the appellants and the accused persons who were acquitted. PW4 stated that the phone of the 2nd appellant contained a message saying "*mwaka mpya lazima nitoke*" to him this message connotes that he was planning to cut the TTCL wires. With all due respect, I do not find the message connoting what PW4 stated. The contents of the CD, exhibit P9, were not read over after being cleared for admission. It can thus not be considered. I thus expunge exhibit P9 from the record.

The bundle of burnt wires and bricks, exhibit P6, were identified by an expert from TTCL, PW4. The marks he used to identify them are the aluminum protection and suspension strand, which he said that they remain even if the wires are burnt and of which were found along with the burnt wires at the shop and at the unfinished house. By the description I find the burnt wires belonging to TTCL.

Then caution statement and extra-judicial statement of the 2nd appellant, exhibit P5 and P10 respectively. The general position of the law is to the

effect that a caution statement has to be taken within 4 hours from the time a suspect is arrested. See: Section 50 (1) (a) of the Criminal Procedure Act. Section 50 (2) however, provides for an exception to the four hours so long as there are justifiable reasons. See also: ***Saganda Saganda Kasanzu v. The Republic***, Criminal Appeal No. 53 of 2019 (CAT at Dodoma, unreported); ***Yusuph Masalu @ Jiduvi & 3 Others v. The Republic***, Criminal Appeal No. 163 of 2017 (unreported); and ***Michael Mgowole & Another v. The Republic***, Criminal Appeal No. 205 of 2017 (unreported).

Considering the above authorities, it follows therefore that a caution statement taken outside four hours without justifiable reasons ought not to be admitted. The record of the trial court shows that the 2nd appellant through his advocate, Mr. Maumba raised the issue. The witness tendering the caution statement could not even recall the time the same was taken and thus no justifiable explanation was offered. Under the circumstances, I expunged exhibit P5, caution statement from the record.

Mr. Maumba challenged the extra judicial statement on the ground that that it was not self-incriminatory as the 2nd appellant only stated that "*I trade in iron scraps.*" I have taken the trouble to read the extra judicial statement. I do not agree with Mr. Maumba's contention that it was not self-incriminatory. In the statement, the 2nd appellant categorically stated that he bought the copper wires from the 1st and 3rd appellants at the price of T.shs. 518,000/-. He took the said wires to the shop owned by one Abuu Twalib believing it weighed 74 kilograms, only to find that the 1st and 3rd appellants had mixed the same with bricks to increase the weight. He even took the police to the said shop were the said bundle of wires and

bricks were found. In my settled view these statements are self-incriminatory and they connect the 2nd appellant to the offence charged.

Mr. Maumba argued that the said Abuu Twalib was a key witness to prove the involvement of the 2nd appellant in the offence charged. It is true that non calling of a material witness is always interpreted to the disadvantage of the party supposed to call the said witness. See: ***Hemed Said v. Mohamed Mbilu*** [1983] TLR 113. However, the law as enshrined under section 143 of the Tanzania Evidence Act, Cap 6 R.E. 2019, does not compel a particular number of witnesses to be called to prove a certain fact. What matters is the credibility of those witnesses. See also: ***Daffa Mbwana Kedi v. The Republic***, Criminal Appeal No. 65 of 2017 (CAT at Tanga, unreported); ***Hassan Juma Kanenyera v. Republic*** [1992] TLR 100; ***Yohanis Msigwa v. Republic*** [1990] TLR 148; and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017. Considering the testimony of PW12, the justice of peace and exhibit P10, I do not find that the said Abuu Twalib was such a material witness to the extent of ruining the prosecution case for not being brought to testify.

1st and 3rd appellant found with tools used to cut wires among other things and failed to explain the activities they use such tools for during interrogations. However, during trial, the 3rd appellant agreed to the tools being found in his house and stated that he used them for his motorcycle. Nevertheless, no explanation on how the same were used in the said motorcycle was provided to refute the assertion by the prosecution witnesses that they are also used to cut wires. The trial court found the prosecution witnesses credible and is better placed in assessing the

credibility of the witnessed than an appellate court. This court cannot interfere with the trial court's finding unless where there are compelling reasons to do so of which I do not find in this case on this particular piece of evidecne. The Court of Appeal in ***Alex Wilfred v. The Republic***, Criminal Appeal No. 44 of 2015 ruled that:

> *"The trial court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a re-assessment of their credibility."*

Taking into account the that the 1st and 3rd appellants failed to explain properly the use of the tools they were found with, which are also used to cut wires and also considering the prosecution evidence, particularly that of PW12, the justice of peace and exhibit P10, which I find credible, it is my finding that the appellants are connected to the offence charged. I therefore uphold the conviction and sentence of the trial court.

Appeal dismissed.

Dated at Mbeya on this 31st day of August 2020

L. M. MONGELLA
JUDGE

Court: Judgment delivered at Mbeya through video conference on this 31st day of August 2020 in the presence of the appellants, and their legal counsel, Mr. Patience Maumba and Mr. Baraka Mgaya, learned State Attorney for the respondent.

L. M. MONGELLA
JUDGE