IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CRIMINAL APPEAL CASE NO 30 OF 2021

(Originating from Criminal Case No 104 of 2018 Rufiji District Court at Utete)

DEUS FRANCIS MALYA..... APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Last Date of Order: *22/06/2021*

Date of Judgement: *29/06/2021*

LALTAIKA, J.

Deus Francis Malya hereinafter the Appellant was indicted for trial by the District Court of Rufiji seating at Utete, with ten counts. The counts can be summarized as follows: 1st Forgery contrary to Section 335 (a), (b), (c), (d), 336 and 337 of the Penal Code [CAP 16 of the Laws R.E. 2002] 2nd Procuring Execution of Documents by False Pretense Contrary to Section 344

of the Penal Code [CAP 16 of the Laws R.E. 2002] and 3rd to 10th Cheating Contrary to Section 304 of the Penal Code [CAP 16 of the Laws R.E. 2002]. Counts number three to ten were committed against seven different individuals residing in or around Kibiti area in the district of Rufiji. For avoidance of unnecessary repetition, they are grouped as one in (iii) above.

The accused, now appellant, was convicted for six out of the ten counts and sentenced to serve a jail term of seven years. Aggrieved by both conviction and the sentence he has appealed to this court. Before examining the grounds of appeal, it is helpful to revisit, albeit briefly, the facts of the case as recorded in the trial court.

It all started when the accused person allegedly assumed a false identity as Danford Chingole, General Secretary of an allegedly fictitious Non-Governmental Organization (NGO) styled as Tanzania Youth Forum. The appellant in that pretentious capacity sent out a letter to the District Executive Director (hereinafter DED) of Rufiji one Ms. Ndabagoye. In the letter, the appellant requested the DED to, among other things, propose

names of upcoming entrepreneurs from Kibiti to be considered for training in Norway.

Acting on such information, the DED shared the news with potential and upcoming entrepreneurs within her district. She asked them to communicate directly with the "General Secretary" of the "Tanzania Youth Forum" one Danford Chingole as per the contact information shared in the letter. Excited with the idea of travelling abroad and prospects to sharpen their entrepreneurship skills, Swalehe Njoma, Daniel Mgirwana, Omary Lukolo, Latifa Renadia Augustino and Kilabi Kilahama all from Kibiti, like any entrepreneur worth his/her salt, took the risk. Entrepreneur are good at taking risks. They, allegedly, communicated with the appellant at different times on the envisaged trip to Norway.

It is alleged further that the appellant seized that opportunity to request the entrepreneurs to send him Tanzanian Shillings 300,000 (three hundred thousand each) for processing a new passport, procuring a Norwegian Visa and for health checkup. Each of the named entrepreneurs

sent the money to one Danford Chingole through mobile money services to number 0756927849.

No sooner had the entrepreneurs suspected that they had been conned than the DED reported the matter to the police. Through commendable efforts of the Cybercrimes Unit of the Tanzania Police Force, the mobile phone number 0756927849 was traced and the bearing fall squarely in Travertine Hotel located in the Magomeni Area in the City of Dar-es-Salaam. To cut the long story short, the appellant was arrested at the said hotel and, shortly thereafter, arraigned to Rufiji District Court.

The Republic, vigorously prosecuting the case, brought about a total of 11 Prosecution Witnesses (herein after PWs) and tendered a handful of exhibits. The trial lasted many months. After such a long process, the trial court found the appellant guilty of six counts. These are counts 1, 2, 5, 6, 8, and 10. The Learned Magistrate F.B. Muyanja, having been convinced, among other things, that the prosecution had proven the case beyond

reasonable doubt, did convict the appellant on the six counts and sentenced him to serve a jail term of seven years for each count, running concurrently.

As already provided for, no sooner had the learned Magistrate concluded the trial than the appellant started yet another process to approach this court in its appellate jurisdiction. The appellant, through his Memorandum of Appeal lodged in fourteen grounds for challenging both the conviction and sentence of the trial court. When the case came up for hearing, learned State Attorney Florida Wenceslaws, representing the Respondent, helpfully assisted this court in classifying the fourteen grounds into five. These five groups with their respective original grounds bracketed, are as paraphrased bellow.

(1) Lack of proof that the crime was committed by the accused person (ground 1)
(2) Irregularity in tendering and admission of exhibits (ground 2, 3, 5, 6, 7, 9, 11, 14)
(3) Lack of any link between the accused and the offence charged against the appellant (ground 8)
(4) The whereabouts of the appellant during commission of the offences (ground 10)
(5) Whether the case has been proven beyond reasonable doubt (ground 13)

The issue before this court is therefore, through weighing in submissions of both the appellant and respondent, determine whether or not the fourteen grounds have merit and should be allowed.

During the hearing of the appeal, the appellant chose to adopt the fourteen grounds as they appear in his memorandum of appeal without much elaboration. Nevertheless, while on disclaimer that he is not a lawyer by profession, the appellant requested to bring to the attention of this court a decision of the Court of Appeal of Tanzania in **Kisonga Ahmad Issa and another Cr App 171 of 2016.**

Responding to the fourteen grounds of appeal, State Attorney Florida Wenceslaws exhibited uttermost diligence. Having grouped the grounds into five as hinted above, Ms. Wenceslaws took this court through a prolific analysis of evidence tendered in the trial court, the process thereof and the sum total of the exercise namely proving the case beyond reasonable doubt.

On the first ground the Learned State Attorney was quick to question the validity of the police arresting **one Deus Malya** while they were in fact looking for **one Danford Chingole.** Ms. Wenceslaws submitted that the evidence adduced by PW1, PW2, PW3, PW4 and PW8 as appears in the trial

court proceedings point to the effect that they (PWs) all sent the money to number 0756927849 to a person who introduced himself as Danford Chingole. Having taken the court through a detailed submission indicating that the trial court had not taken trouble to reconcile between the persons of Danford Chingole and Deus Malya, the learned State Attorney Concluded that the first ground has merit.

Moving on to the second group of grounds, Ms. Wenceslaws submitted that in the trial court, the prosecution had tendered among other exhibits, the following:

(i) P1 which is a letter requesting that emerging entrepreneurs be proposed for a trip to Norway. This appears at page 30 of the proceedings of the trial court

(ii) P2 A [Customers'] Register Book [of Travertine Lodge] tendered at page 36

(iii) P5 Cautioned Statement [of the accused person Deus Malya] tendered at page 60-63

(iv) P6 Printout from Vodacom tendered at page 46

(v) P7 A Letter to the Ministry of Health written by PW10 at p. 63

(vi) P4 Certificate of seizure tendered at p.43

Ms. Wenceslaws was quick to point out that in her considered opinion, there were procedural defects in the production of the exhibits that were tendered since, in many instances, as appeared in the trial court records, the Public Prosecutor was the one who prayed to tender them to court.

The learned State Attorney submitted that this is contrary to the law as provided for under Section 198(1) of the Criminal Procedure Act (CPA) CAP 20 RE 2002 which requires that Prosecution Witnesses take oath and that the Public Prosecutor was not under oath.

Ms. Wenceslaws stressed that it was improper for the Prosecutor to play two roles both as a Prosecutor and a Witness. To this end, Ms. Wenceslaws prayed that the exhibits be expunged**.** To cement her prayer the Learned State Attorney brought to the attention of this court the case of **Frank Masawe vs Republic Cr. App No. 302 of 2012 CAT Arusha** (Unreported). She reiterated that in this case, the Court of Appeal observed that a Public Prosecutor cannot assume the role of a prosecutor and a witness at the same time.

The learned State Attorney moved on to address the court on the grounds of appeal she chose to place in the third group. These, according to

the Learned State Attorney bring in the issue of Chain of Custody. She was particularly focusing on the exhibit marked as P3. She opined that there was no link of chain of custody relating to exhibit P3, a mobile phone with a SIM card (Subscriber Identification Module) that has been assigned the user number 0756927849 found with the appellant as explained by PW9 at page 42 of the records of the trial court.

Ms. Wenceslaws argued strongly that her perusal of the trial court records indicated that in the testimonies of all witnesses, no one came to tell the court where the phones were taken, how were they taken and who took them to PW7 (officer in charge of cyber forensics) for examination. To this end, she is convinced that there was no swift connection of the chain of custody. Consequently, the learned State Attorney opined that the grounds of appeal be upheld.

When it came to ground of appeal number ten, which ground the Learned State Attorney had grouped it in the fourth category, she chose not to argue further since, she contended, it was not disputed by the appellant that he was at Travetine Hotel at Magomeni as it appears at page 72 of the proceedings of the trial court.

The learned State Attorney came to her last category that comprises original ground number 13. She summed it up as to whether the prosecution case was proven beyond reasonable doubt. This, she advised, remains an important part of the criminal justice system in our country as required by The Tanzania Evidence Act Cap 6 RE 2019 particularly section 110(1).

The learned State Attorney did not hesitate to advice the court that the ground of appeal was equally merited. She stressed that among all the witnesses whose testimonies were meticulously recorded in the proceedings of the trial court, no one met the appellant physically. That being the case, the Learned State Attorney contended, there was no any proof that the Deus Malya in the court was the same as the Danford Chingole.

To cement further her contention that the prosecution had not proved the case beyond reasonable doubt the learned state attorney started faulting the value of a printout from Vodacom showing incoming and outgoing calls. Although it was insightful listening to her submission, I find it unnecessary repetition since she had already prayed that this court expunges the exhibits for procedural irregularity. The Learned State Attorney concluded her submission by a bold utterance that, in her considered opinion, all the

grounds submitted by the appellant have merit and the appeal should be allowed.

Before I pronounce my decision, I feel obliged to provide here, albeit in passing, that I am immensely flabbergasted if not utterly bewildered to see no reference whatsoever in this case to Information Communication Technology (ICT) related laws throughout the prosecution of this case. This is in spite of commendable efforts of the cybercrimes unit of the police of tracking the location of the mobile phone number given and subsequent arrest of the accused person in Magomeni. This omission, whether by default or by design, is too conspicuous to be ignored. This is because, in this case, the offences allegedly committed by the appellant touch upon if not squarely fall under the ICT parlance.

I do not want to interfere with the art and craft of prosecution nor their choice of law to build a particular case. However, I just want to remind them that Tanzania has in place a special legislation for Cybercrimes. This is **The Cybercrimes Act Number 14 of 2015.** According to Government Notice No 328 of 14th August 2015, the then Minister of Communication, Science and Technology appointed the 1st of September 2015 as commencement date**.** It has been six years since the law came into force. I am not saying

this is the ultimate law for all cybercrimes in our country. It may not contain provisions for a number of offences. Nevertheless, the law should not remain in the book shelves. It is through constant interpretation of its various sections by this court that inadequacies can be discovered and the legislator be invited to take necessary actions. Moreover, it is through the dispassionate interpretation of the law by this court that a clear and coherent jurisprudence will develop. As the world economy becomes increasingly digitized, the importance of legal rules especially newly enacted laws in keeping the cyberspace in Tanzania safe for all users cannot be overemphasized. Efforts to ensure such safety for the current and future generations starts now. The future cannot be postponed.

I do not intend to say that cybercrimes are entirely new and have no relationship whatsoever to the Penal Code. In fact, the traditional division of cybercrimes into computer-enabled and computer-dependent is suggestive of the fact that the "old crimes" such as computer-related forgery are intertwined with new ones. The only risk associated with lack of courage to explore new and emerging areas of law is that futile efforts may be exerted to fit in new crimes into old laws.

In ***R. V GOLD AND SCHIFREEN [1988] 2 WLR 984, 1063*** the Court of Appeal of the United Kingdom, faced by a situation where the prosecution tried to force facts related to a cybercrime into a statute not designed for the same, made the following often quoted statement:

> *"The Procrustean attempt to force these facts into the language of an Act not designed to fit them produced grave difficulties for both judge and jury which we would not wish to see repeated."*

Coming back to our present case, I agree with the Learned State Attorney that the prosecution team has not proved the case beyond reasonable doubt as required by law. I allow the appeal, quash the conviction and set aside the sentence of seven years imprisonment. The appellant is to be released forthwith unless otherwise lawfully held.

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

E.I. Laltaika

JUDGE

29/6/2021

Court: Judgement delivered in the Court Chamber in the presence of the appellant and the respondent

E.I. Laltaika

JUDGE

29/6/2021