

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 77 OF 2021**

*(Appeal from the Judgment of the Resident Magistrates Court of Dar es slaam Region at
Kisutu, Economic Case No. 73 of 2018 before Hon. A.W. Mbandu, SRM dated
02/02/2021)*

ROGERS FESTO..... APPELLANT
VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1st November, 2021 & 10th December, 2021

E.E. KAKOLAKI J.

In the Resident Magistrates Court of Dar es salaam at Kisutu, the appellant was arraigned jointly and together with his fellow (who is not before this court) on two counts namely **Damaging Properties Used for the Purposes of Providing Necessary Services**; Contrary to paragraph 20(1) (2) (b) and 3 (a) of the Economic and Organized Crime Control Act, [Cap 200 R.E 2002] as amended and **Occasioning Loss to the Specified Authority**; Contrary to paragraph 10 (1) of the First Schedule to, and sections 57 and 60(2) of the Economic and Organized Crimes Control Act, [Cap 200 R.E 2002] as amended. Appellant and his co accused, were

convicted on both counts and sentenced accordingly. Aggrieved with both conviction and sentence, only the appellant preferred this appeal on two grounds to be stated soon hereunder.

Brief facts of the case leading to the filing of this appeal as discerned from the records are going thus. On 16th day of September, 2018 at Mbezi area within Kinondoni District in Dar es Salaam Region, the appellant and his co-accused before the trial court, were arrested in possession of the cut telecommunication cable wires, the properties of Tanzania Telecommunication Company Limited (TTCL), used for the purposes of providing necessary services, i.e. Telecommunication. It was also alleged further in the second count that, on the same date and place both accused persons willfully cut/damaged the said telecommunication cables, thereby caused TTCL to suffer pecuniary loss of Tsh. 25,027,875.18. Upon both denying the charges levelled against them, the case proceeded to a full trial, whereby the prosecution case premised on evidence of four (4) witnesses and four (4) exhibits while the appellant and his co-accused marshalled defence on their own without calling witnesses and tendering exhibits. At the conclusion of the trial, both were found guilty and convicted as charged. They were thus sentenced to serve the term of 15 and 20 years

imprisonment for the 1st and 2nd counts respectively. Sentence to run concurrently. Aggrieved with both conviction and sentence as alluded to above only the Appellant lodged this appeal consisting of two grounds going thus:

- (1) That, the trial magistrate erred in law and fact by convicting the appellant for the offences he was charged as the prosecution did not prove their case against the appellant beyond reasonable doubt.
- (2) That, the trial magistrate erred in law and facts by failure to have properly analyze and evaluate evidence before it and consequently thereof convicted the appellant.

On the strength of those grounds of appeal, the appellant is praying the Court to allow his appeal, quash the conviction and set aside the sentence, and/or grant him any other reliefs.

On 23/08/2021 when the matter came for hearing, the appellant appeared represented by Mr. Emmanuel William Kessy, learned advocate, while the Respondent was represented by Mr. Adolf Kisima, learned State Attorney. By consensus both parties agreed to dispose of the appeal by way of written submission. In addressing the grounds of appeal, Appellant's counsel

consolidated the two grounds of appeal and sought leave of the court to argue them jointly and together.

Submitting in support of the appeal, Mr. Kessy informed the Court that, in criminal law, it is the duty of prosecution to prove beyond reasonable doubt all the ingredients of the offence with which the accused is charged with. He contended, in the present appeal, prosecution was duty bound to prove the following ingredients; **one**, whether on the fateful date there was damage of telecommunication cables, the property of Tanzania Telecommunications Company Limited (TTCL), **two**, whether the said damaged cables were used for providing necessary services and **three**, whether it is the appellant who damaged the said telecommunication cables. In this judgment, I am prepared to determine the appeal by responding to all three issues as raised and addressed by both parties in their submissions in which Mr. Kisima for the respondent submits were all proved beyond reasonable doubt.

I have dispassionately and critically considered the fighting arguments advanced by the parties for and against this appeal as stated in their submission as well as perusing the trial Court records. It is Mr. Kessy's view that, there is neither circumstantial nor direct evidence from the prosecution witnesses which proved the first ingredient or ground. According to him,

none of the four prosecution witnesses witnessed the commission or perpetration of the alleged offence. He added that, even after receiving the information from good Samaritan no witness visited the scene of crime to see the extent of damage if any existed nor was there evidence to establish at what time was the offence committed. It was Mr. Kessy's argument that, PW4's testimony that, he received the calls from the customer concerning destroyed infrastructure after arrest of the appellant and his colleague and the fact that, he went direct to the Local Government Office where the accused were detained without visiting the scene of crime to establish whether the telecommunication cables were cut and 100 customers affected as alleged, is not direct evidence and cannot prove the fact that, the offence was in deed committed and was so committed on 16/09/2018. He contended that, prosecution did not bring even a single victim out of the alleged 100 affected customers to testify about damaged telecommunication cable wires, hence failure of prosecution to prove the circumstances on which the alleged offence was committed instead, demonstrated only the circumstances under which the appellant was arrested.

Mr. Kessy submitted further that, the prosecution failed to prove that, the stolen wires (exhibit P2) were used for providing services to 100 customers

who are alleged to have been affected by the damage caused by the appellant. In his view, the prosecution ought to prove that, it was accused persons who committed the offence charged with, but none of the prosecution witnesses testified to that effect, as the appellant was not found in possession of the TTCL cables at the time he was arrested nor was he arrested at the crime scene. He added, the fact that the alleged buyer of the stolen property was not arrested and charged together with the appellant paints a lot of doubts to the prosecution case, as to whether the appellant participated in commission of the alleged crime or not.

Concerning the second Count, it was his submission that, the prosecution ought to have proved the alleged occasioned loss of Tsh. 25,027,875/- resulted from the damaged/stolen property(ies). Mr. Kessy contended that, PW4 testified that, he prepared a report showing TTCL suffered pecuniary loss of Tsh 25,027 875 but the report was never tendered as exhibit in court to prove the said loss. And further that, loss ought to be obtained from measuring the exhibit seized rather than visiting and interviewing 100 customers at the site Mbezi Goig Area. Relying on the case of **Mnyele Vs. Republic**, EALR [2010] Vol 2 at page 316, Mr. Kessy concluded that, the

prosecution did not prove their case beyond reasonable doubt and prayed the court to allow the appeal.

Reacting to the Appellant counsel's submission, Mr. Kisima with force of argument contended that, the prosecution case was proved beyond reasonable doubt by the evidence of PW1, PW2, PW3 and PW4 as well as exhibits PE1 and PE2. He argued, it is PW2 who arrested the appellant with scissor cutter and bundle of TTCL wires before he reported the matter to the police and TTCL officers, the result of which was to re-arrest him. Further to that he argued, it is the appellant who after re-arrest disclosed to the police officer (PW1) the place in which melting of the cut cable wires was taking place and places where the same were disposed of, before he took them to the scrapper shops in which they used to dispose the said TTCL wires, where a ladder and one bag contained 3 bundle of TTCL wires were retrieved and seized after search. The said seized properties were identified by PW4, the officer from TCCL as TTCL properties, who also established the loss sustained to the tune of TShs. 25,027,875/- as more than 100 customers were affected. That aside he argued, there is appellant's caution statement in which the appellant satisfactorily explained the whole story on how the offence was perpetrated. With such strong evidence and placing reliance on

the case of **Andius George Songoloka and Others v DPP**, Criminal Appeal No 373 of 2017 (CAT-unreported) Mr. Kisima submitted, the prosecution case against the appellant was proved beyond reasonable doubt as the evidence addressed all three issues raised by the appellant herein above and invited this court to dismiss the appeal and uphold both conviction and sentence. In his rejoinder submission Mr. Kessy almost reiterated his earlier submission in chief and added that, the caution statement in this matter cannot base conviction of the appellant for want of corroboration unlike what was the case in the case of **Andius George Songoloka** (supra) which case is distinguishable to the circumstances of this case as in that case the cautioned statement was corroborated with extrajudicial statement. He therefore prayed the court to allow the appeal as prayed before.

Now the issue before the court is whether the prosecution case was proved beyond reasonable doubt against the appellant. Starting with the first and third ingredients as raised by the appellant, it is true there is no direct evidence proving that, the appellant was found ready handed damaging the alleged TTCL properties. However, as submitted by Mr. Kisima for the respondent, there is sufficient evidence both circumstantial and direct evidence proving that on 16/09/2018 TTCL properties (telecommunication

cables) were damaged at Mbezi area in Kinondoni District and that it is the appellant and his co-accused who damaged them. It is the law, circumstantial evidence being indirect in its nature must be water tight and irresistibly pointing to the accused guilty and in exclusion of any other person. The conditions for convicting accused basing on circumstantial evidence are well articulated in a litany of cases. For instance in the case of **Shaban Mpunzu alias Elisha Vs. Republic**, Criminal appeal No 12 of 2002 (Unreported) the Court of Appeal of Tanzania held that:

*It is a settled trite principle of law that in a criminal case in which the evidence is based purely on circumstantial evidence, in order for the court to found a conviction on such evidence, **it must be satisfied that the evidence irresistibly points to the guilt of the accused, the appellant in this case to the exclusion of any other person.** (Emphasis added)*

In another case of **The Republic Vs. Kagwa aris Luoga and Others**, Economic Case No 06 of 2020, High Court of Tanzania Economic Crimes Division at Dar es Salaam, which quoted with approval the case of **Inspector of Police, Tamil Nadu Vs. John David (2011) NSC 418**, this Court stated that:

The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and circumstance so proved must form a chain of events

from which the only irresistible conclusion that could be drawn is the guilty of the accused and no other hypothesis against the guilty is possible.

See also the case of **Sikujua Iddi Vs. R**, Criminal Appeal No. 484 of 2019 (CAT-Unreported).

In the instant appeal, as submitted by Mr. Kisima, it is the evidence of PW2 which disclosed that, the appellant was arrested in possession of pieces of cable wires together with his co-accused before they took PW2 to the place where they used to melt the said stolen TTCL cable wires and later on took him together with PW1 to the scraper shops at Tangi bovu and to the area closer to Catholic church where TTCL cable wires already sold and ladder used to climb TTCL poles with, were retrieved. All these items were seized and both tendered and admitted in court as exhibits (certificates of seizure exhibit PE1 collectively) and items seized Exhibits PE2. That piece of evidence aside, there is appellant's cautioned statement exhibit PE3 admitted in court without appellant's objection carrying detailed account on how the appellant and his co-accused engaged themselves in sabotaging the TTCL infrastructure by cutting cable wires and melting them at Ndumbwi river area before the same were sold to the scraper shop owners. I am live to the fact that as a matter of practice uncorroborated retracted or repudiated confession cannot solely base conviction of the accused person. See the case of **Abubakari**

Hamis and Another Vs. R, Criminal Appeal No. 253 of 2012 (CAT-unreported).

Though the confession statement in exhibit PE3 does not fall under that category of confession for not being retracted or repudiated still the same is corroborated by the evidence of PW1 and PW2, who gave similar account in their testimonies before the trial court. I therefore entertain no doubt that, the prosecution evidence was watertight and pointed irresistibly to the conclusion that it was the appellant and his co-accused only in the exclusion of any other person who cut the said TTCL wires at Mbezi area within Kinondoni District. Thus the first and third ingredients were proved to the required standard which is beyond reasonable doubt. I so conclude as even the trial magistrate in her judgment at page 11 correctly considered this piece of evidence and rightly concluded when stated thus:

"There is no dispute that, on the fateful date accused persons were arrested while in possession of a scissor type cutter, TTCL wires and Tsh 90,000...Evidence further revealed that on fateful date accused person took the police up to the area where they used to melt wires to obtain copper and the place where they used to sell the melted copper... and when police conducted search, they managed to come across TTCL wires and a ladder which was used by accused persons to climb TTCL poles."

As regard to the second ingredient whether the said damaged cables were used for providing necessary services, there is no doubt PW4 said it all at page 67 of the typed proceedings when testified and I quote:

*“...while at my office **I received a phone call from customers who were complaining that they had no service/communication.** They told me that they were at Mbezi Beach/Mbezi chini – Goig area. **I then went up to Goig area and made investigations and noted that there were a TTCL wires of 100 customers of 150 metres length which were damaged/cut/stolen...** I returned to the office and prepared costs and materials needed and revenue loss. I prepared a report to that effect...”*

From the above excerpt of PW4’s evidence, there is no doubt it is the customers of Mbezi Goig area who were affected with the damaged/disrupted/stolen TTCL cable wires used to provide them with telecommunication services. I say so as PW4 visited the crime scene and observed the damages sustained contrary to what Mr. Kessy would want this court to believe that, no prosecution witnesses visited the scene of crime to establish whether the alleged cables were damaged or not. Whether that damaged/disrupted service is necessary services or not paragraph 20(3)(a) of the Economic and Organised Crime Control Act, [Cap. 200 R.E 2002] as

amended provides the answer. The provision of paragraph 20(3) of EOCCA reads:

(3) In this paragraph, "necessary service" includes any-
*(a) service relating to **installation, transmission, supply or distribution** of electricity or **telecommunication**;*

Applying the above cited provision to the facts of this case, term "necessary services" includes installation, transmission, supply or distribution of telecommunication services. With that stance and relying on the evidence of PW1, PW2 and PW4, I can safely conclude that, the prosecution proved that the damaged telecommunication cable wires by the appellant were used for provision of necessary services. With all such evidence in totality I am satisfied that, the first count of **Damaging Property Used for the Purposes of Providing Necessary Services** was proved against the appellant beyond reasonable doubt hence the two grounds of appeal lack merit as regard to proof of the first court.

As regard to the second count where Mr. Kessy contended the alleged report prepared by PW4 showing that the loss occasioned was to the tune of Tsh.25,027,875/- was not tendered and admitted in court to prove that fact, I find the submission is wrongly premised for not being supported by the record. It is on record at page 68 of the typed proceedings that on

27/08/2020 the said report was tendered and admitted before the trial court by PW4 as exhibit P4. For easy of reference, I find it imperative to quote the said part of the proceedings at page 68:

***XD Continues:** This is the report I prepared. It has my names, signature and revenue loss caused. I would like to tender it as exhibit.*

***Mr. Hekima:** I have no objection.*

***2nd accused:** I have no objection.*

***COURT:** The TTCL report dated 30/09/2018 admitted and marked as exhibit P4*

Sgd: A.W. Mmbando –SRM.

27/08/2020.

With the above evidence I find Mr. Kessy's submission is without merit and proceed to dismiss it. As regard to the contention that, the established loss ought to be obtained from measuring the exhibits seized rather than visiting and interviewing 100 customers at the site Mbezi Goig Area, this court also is of the finding that, the contention is unfounded. It is in evidence of PW4 as quoted above from page 67 of the typed proceedings that, after receiving phone calls from the customers at Mbezi Beach/Mbezi Chini – Goig area he went there and investigated the matter only to establish that TTCL wires covering services of 100 customers measuring 150 metres were

damaged/cut/stolen. PW4 stated further that, it is after that site visit where he prepared report of the sustained loss that included the costs and material needed for fixing the damages caused as well as loss of revenue. As quoted above, the report was tendered and admitted in court without objection, thus a proof that the occasioned damages/loss by the appellant's act of disrupting the telecommunication cable wires, the properties of TTCL was Tshs. 25,027,875/- as stated in the charge sheet. It is from that strong evidence I am convinced and therefore inclined to hold the prosecution proved the second count against the appellant beyond reasonable doubt.

As rightly submitted by Mr. Kessy when relying on **Mnyere's case** (supra) it is trite law that, in criminal cases the burden of proving the case always lies on the prosecution and no conviction shall be entered on account of weak defence but upon proof of the case beyond reasonable doubt. Guided with that principle of law, in this matter I took time to read the appellant's defence which was well and properly considered by the trial court and satisfied myself that, the same did not in any way shake the prosecution case. It was in the appellant's defence that one Nanai Daud and Amos whom he alleged to have found at office of Local Government arrested in possession of TTCL properties before they were later released at Oysterbay

police station are the ones who committed the alleged offence and not him. PW2 whose evidence was never discredited, in his evidence stated together with his fellow arrested the appellant and his co-accused only in possession of TTCL cable wires before other wires were retrieved by him and PW1 under appellant's guidance and directives. The appellant never cross-examined PW2 on the fact of the two mentioned persons to be arrested by PW2 and found in possession of TTCL properties so as to raise doubt and support his defence raised later on. The appellant's acquiescence on that fact connoted nothing than admission of the fact that, when arrested in possession of cable wires were only two, himself and co-accused. It is the law that failure to cross-examine on important matters implies admission of the facts stated by the opposite party. See the cases of **Jaspini s/o Daniel @Sizakwe vs DPP, Criminal No. 519 of 2019**, (CAT-unreported) and **Hatari Masharuby @Babu Ayubu vs Republic** Criminal appeal No. 590 of 2017. Since the appellant impliedly admitted was arrested in company of his co-accused whom he was charged and convicted with, his story that there were two other persons whom they were arrested with in possession of TTCL properties could not be believed and therefore did not shake the prosecution case.

Taking into consideration of what I have discussed above at length, I am of the firm views that, prosecution discharged its duty in proving the case against appellant beyond reasonable doubt, and the trial magistrate correctly convicted the appellant. In the event, the appeal is devoid of merit and it is hereby dismissed in its entirety.

It is so ordered.



E. E. KAKOLAKI

JUDGE

10/12/2021.

Judgment delivered at Dar es Salaam in chambers this 10th December, 2021 in the presence of the appellant in person, Mr. Adolf Kisima, State Attorney for the Respondent and Ms. Monica Msuya, Court clerk.

Right of appeal explained.



E. E. KAKOLAKI

JUDGE

10/12/2021

