IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 21 OF 2019

(From Economic Crime Criminal Case No.33 before the Court of the Resident Magistrate Court for Dar es Salaam at Kisutu)

ERIC MALYA .....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT.

Last date: 8/04/2022
Date of judgment: 13/04/2022

MASABO, J:-

The appellant, Erick Malya, was convicted by the Court of the Resident Magistrate for Dar es Salaam at Kisutu for damaging property to wit, cutting telephone cable lines owned by Tanzania Telecommunications Company Limited (TTCL). It was alleged that the telephone cable cut by the appellant was used for the purpose of providing necessary services and that by cutting it, the appellant occasioned a pecuniary loss of TZ 10,640,000/- to TTCL contrary to section 60 (2) and paragraphs 10(1), 20 (1), (2)(b) of the 1st schedule to the Economic and Organized Crimes Control Act [Cap 200 R.E

2002]. He was subsequently sentenced to thirteen (13) and ten (10) years, respectively.

Aggrieved, he is now challenging the conviction and sentence. His memorandum of appeal contains five grounds of appeal, which can be summarized as follows: **One**, the trial court erred in admitting exhibit P1 and P2 without leading PW1 and PW2 to describe them. **Two**, the chain of custody regarding movement and storage of exhibit P.1, P.2 and P.3 was not established. **Three,** PW1 and PW2's evidence was contradictory on when exactly the offence was committed**. Four**, the caution statement (Exhbit P5) was unprocedural admitted. And, **lastly,** the prosecution failed to prove its case beyond reasonable doubt.

The appeal was argued in writing. The appellant who appeared unrepresented preferred to argue his appeal by way of a written submission which he had brought along on the date fixed for hearing. In his written submission, the appellant clustered his grounds of appeal into three clusters, that is, *first,* Exh P1, P2, P3, P4 and P5 were wrongly tendered and admitted in court. *Second,* he was subjected to unfair trial /hearing as the prosecution

evidence was insufficient and not watertight to ground a conviction known by law. *Third*, the case against him was not proved beyond reasonable doubt.

Amplifying the first cluster, he submitted that the trial court did not make a proper scrutiny, assessment and consideration of how and where the exhibits were obtained, tendered and admitted in court. He proceeded that, exhibit P1, P2 and P3 containing a cable, an axe and a pair of slipper (Yeboyebo) and plastic bag respectively, were illegally tendered and admitted as neither PW1, PW2, PW3 nor PW4 graphically described them in colour, size, length and place from where they were recovered. Also, the admission of these exhibits offended the provision of section 38(3) of the Criminal Procedure Act [Cap 20 RE 2019] as they were not accompanied by a certificate of seizure or evidence of an independent witness who witnessed the seizure. He proceeded that; the absence of the certificate is fatal as it offends a mandatory legal requirement. Moreover, he argued that, there is nothing on record to show the distance between the premises where the said exhibits were recovered and the place where the appellant was arrested. Lastly on this point he argued that the chain of custody as regards seizure, handling

and storing of the exhibits was not established. In fortification he cited the case of **Paulo Maduka v R,** Criminal Appeal No. 110 of 2007, CAT.

The appellant's further argument was that, contrary to the requirement of the law, the content of Exhibit P4 was not read over after its admission. He supported his argument with the case of **Robinson Mwanjisi and 3 Others v R** [2003] TLR 218. He also argued that, the caution statement Exhibit P5, was irregularly procured in total disregard of sections 48, 50, 51, 53 and 58 of the Criminal Procedure Act.

Regarding the 2nd cluster, he argued that, he was subjected to an unfair trial as the trial court out rightly rejected and disregarded his sworn evidence which was not contested and choose to wrongly rely on the testimony of PW1, PW2 and PW3 which was mainly suspicion hence unreliable and seriously wanting. He supported his submission with the case of **Hakimu Mfaume v. R** (1984) TLR 201 where it was held that, suspicion however strong cannot ground a conviction.

On the last cluster, he argued that section 3(2)(a) of the Law of Evidence Act [Cap 6 RE 2019], requires the prosecution to prove its case beyond reasonable doubt but, this requirement as articulated in **Joseph John Makune** v R [1986] TLR 44 and **Jonas Nkize v R** [1992] TLR 213 was not met in the present case. Thus, it is in the interest of justice that the appeal be allowed and he be discharged.

In a reply submission, the Respondent represented by Ms. Jacqueline Werema, learned State Attorney, supported the appeal. She submitted that it is a cardinal law that the burden of proof rests upon the prosecution and the standard of proof is proof beyond reasonable doubt but in this case the burden was not fully discharged because: *First*, no certificate of seizure was tendered in proof that the properties tendered in court were seized from the appellant and not any other person. *Second,* assuming that the exhibits were seized from the appellant, there was no proof that the cables belonged to TTCL. *Third***,** the witnesses did not describe the exhibits by colour, length, size or any other mark. *Fourth*, there was no proof of chain of custody. *Fifth,* the content of the loss report (Exhibit P4) was not read out after admission hence liable for expungement. If it is expunged, there will remain no tangible

evidence to sustain the conviction for the loss allegedly occasioned. S*ix,* Exhibit P5 was tendered by the prosecutor which is completely wrong. Also, even if the court was to find that there was no fault in tendering of this exhibit, this confession cannot be relied upon without another evidence corroborating it admission as it was repudiated by the appellant. Since there is no other evidence in proof that the appellant was interfering with necessary service and that he occasioned loss to the TTCL, the conviction cannot be sustained.

I have carefully read and considered the submission from both parties. Starting with the contention with regard to admission of exhibit P4, both parties have argued that, the content of this document was not read out after its admission. Thus, it is liable for expungement from the record because the omission to read out the content constitutes a fatal irregularity as it offends a mandatory requirement of the law. Both have relied in the case of **Robinson Mwanjisi & 3 Others v R** (supra). I hastily join hands with the parties on this point as the position of law in this area is fairly settled that once a document has been cleared for admission as exhibits, its content must be read out. As correctly submitted by the parties, the omission is fatal

and renders the respective document liable for expungement. Dealing with a similar issue in **Thomas Joseph Charles @ Chitoto @ Chitema vs Republic,** Criminal Appeal No. 95 of 2020 (unreported), the Court of Appeal of Tanzania having recalled its previous decisions in J**umanne Mohamed and Two Others v. Republic,** Criminal Appeal No. 534 of 2015, **Florence Atanas @ Baba Ali and Another v. Republic**, Criminal Appeal No. 438 of 2016, **Lack Kilingani v. Republic,** Criminal Appeal No. 402 of 2015 and **Magina Kubillu @John v. Republic**, Criminal Appeal No.564 of 2016 (all unreported) and other cases, it held that:

> The law on documentary evidence tendered in evidence, as rightly submitted by both parties, is settled. Once a document is cleared for admission and admitted in evidence, it must be read out in court. Alongside the case of **Robinson Mwanjisi** (supra), there is a long unbroken chain of authorities which underscore the duty of courts to read out any document after the same has been cleared and admitted in evidence.

Having made this observation, it expunged from the record the caution statement whose content was not read out after it was cleared for admission. Likewise, in the present case the record show there was a similar irregularity

in the admission of the document titled 'works estimates' which stipulated the pecuniary loss of Tshs 10, 640,000/= allegedly occasioned to TTCL. Page 18 of the word-processed proceedings from the trial court, show that, the content of this document which was tendered by PW3 and admitted as Exhibit P4, was not read out in court after it was admitted in evidence. As held in **Thomas Joseph Charles @ Chitoto @ Chitema vs Republic** (supra) the omission was a fatal irregularity as it denied the appellant his right of knowing the contents of the said statement to which he was entitled. In the premises, I agree with the learned State Attorney that there is merit in this ground of appeal and I consequently allow it by expunging the exhibit from the record.

I similarly agree with her that as the report was the only tangible evidence of the pecuniary loss occasioned to the TCCL, its expungement from record has left this court with no materials upon which to sustain the conviction and sentence in respect of the second account in which the appellant was convicted and to have occasioned a pecuniary loss at a tune of Tshs 10, 640,000/= to TTCL. I, therefore, allow the appeal, quash and set aside the conviction and sentence in respect of the 2nd count.

With regard to the first count which implicated the appellant for cutting TTCL cable lines, I prefer to start with the admissibility of the cautioned statement which was admitted as exhibit P5. The appellant has contended that it ought not to have been relied upon as it was repudiated whereas on the respondent's side, it has been passionately argued that the cautioned statement was erroneously rendered by the prosecutor. The record as appearing on page 21 of the proceedings shows that when PW4: E5247 Dt Cpl. Elia sought to tender the caution statement as evidence on 9/8/2016, the appellant herein objected. Thereafter, inquiry proceedings ensured and at its conclusion on 16/11/2016, the objection was overruled. When the hearing resumed on 7/12/2016, the prosecutor prayed to tender it and the same was admitted as Exhibit P5.

Much as I subscribe to the argument that the prosecutor is not competent to tender an exhibit, the circumstances of this case are slightly different as the record clearly shows, as intimated earlier on that, that when the document was produced in court for the first time, it was PW4 who tendered it for admission. In my settled view, as the document has already been

tendered for admission, having overruled the objection, the trial magistrate ought to have proceeded to admit it. There was no need for a further prayer to tender the document as the prayer had been made and the document had already been cleared for admission. The prayer made by the prosecutor was, in my settled view, redundant. Thus, although offensive of the law, it does not vitiate the proceedings nor render the document so admitted liable for expungement. In the foregoing, the reasoning by the learned State Attorney is misconceived and I, respectfully, reject it.

Further to the above, the appellant has argued that just like exhibit P4, the content of the caution statement was not read out after its admission as Exhibit P5. This argument is self-defeated as the records vividly demonstrate that after the statement was admitted as exhibit P5, it was read out by PW4.

Reverting to exhibit P1, P2 and P3 and the alleged break down of the chain of custody, both parties converge on two issues, namely, the exhibits were not accompanied by a certificate of seizure and there was no chronological explanation as to their seizure, movement and storage. In addition, they

have all submitted and argued that, none of the prosecution witnesses identified the objects by their colour, length etc before their production.

On the certificate of seizure, section 38 of the Criminal Procedure Act [Cap 20 RE 2019], requires that where anything is seized, the officer seizing shall issue a receipt in acknowledgment of the seizure. The receipt shall, among other things, bear the signature of the owner and of a witness if any. The law further requires that there be a chronological recording of the chain of custody which is crucial in establishing that the item that is finally exhibited in court and relied on as evidence is in fact related to the alleged crime. In other words, the handling of exhibits so seized should be recorded and there should be a chronological documentation of such exhibits from the point of seizure, custody/storage, control, transfer and disposition of evidence. Whenever the exhibit is passed or changes hands from one person to the other, the officer who hands over the exhibit must record the movement. This position is as espoused in **Illuminatus Mloka v. R.** (2003) TLR 245, **Paul Maduka and 4 other vs R,** Crim. Appeal No 110 of 2007(unreported) and **Julius Matama @Babu @Mzee Mzima v. R**, Criminal Appeal No.137 of 2015. It is however to be noted that, much as the chronological paper

documentation of the chain of custody is crucial, the law has been slightly relaxed to the effect that, the absence of paper trail would not necessarily lead to acquittal especially in cases where the exhibit cannot easily change hands. This position is summarized in **DPP vs Stephen Gerald Sipuka**, Criminal Appeal No.373 of 2019 (all unreported) where the Court of Appeal held that:

> It is settled law that, though the chain of custody can be proved by way of trail of documentation, this is not the only prerequisite in dealing with exhibits. There are other factors to be considered depending on prevailing circumstances in each particular case. In cases where the relevant exhibit can neither change hands easily nor be easily compromised then principles as laid down in the case of Paulo Maduka (supra) can be relaxed. In all circumstances, the underlying rationale for ascertaining a chain of custody, is to show to a reasonable possibility that the item that is finally exhibited in court and relied on as evidence, has not been tampered with along the way to the court.

In the instant case, the appellant was accussed to have been found in possession of a telephone cable which was admitted as Exhibit P1, an exe

(Exhibit P2) and a plastic bag containing sandals (yeboyebo) which were admitted as Exhibit P3 collectively. Contrary to the requirement of the law there was neither a certificate of seizure nor any paper documentation as to the movement and storage of these items from 21/11/2015 when they were allegedly seized from the appellant to 23/6/2016 when they were tendered in court by PW1. As there is similarly no oral explanation from the witnesses as to how these items were handled and stored, I find merit in the submission that the chain of custody was not established. The breakdown of the chain of custody casts a serious doubt on whether the three items were indeed recovered from the appellant. The 1st ground of appeal is thus allowed.

Having allowed the first ground of appeal, I am in a serious doubt if the conviction and sentence with regard to the first count can be sustained because these three exhibits and especially Exhibit P1 was the basis of conviction. For this reason, I will resolve the doubts in favour of the appellant and proceed to allow the appeal.

The conviction and sentence are quashed and set aside. The appellant, is to be released forthwith from custody unless he is held for another lawful purpose.

DATED at DAR ES SALAAM this 13th day of April 2022.

X 

Signed by: J.L.MASABO

J.L. MASABO

JUDGE