IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL No. 22 OF 2021

(Originating from Criminal case No. 25 of 2019 of the Resident Magistrates Court of Geita at Geita)

AMAN YOHANA MWANDEMILE----------APPELLANT

VERSUS

THE REPUBLIC----------RESPONDENT

JUDGMENT

Last Order: 11.04.2022

Judgement date: 17.05.2022

M.MNYUKWA, J.

The appellant, Aman s/o Yohana Mwandemile was charged before the Resident Magistrate Court of Geita with three counts. The 1st count was Computer Related Forgery c/s 11(1) and (2) of the Cyber Crime Act No 04 of 2015, 2nd count being in possession of Illegal Device c/s 10(1)(a) and (2) of the Cyber Crime Act No 04 of 2015 and 3rd count: Data Espionage c/s 8(1) and (2) of the Cyber Crime Act No 04 of 2015.

At the trial, the prosecution paraded 5 witnesses and at the close of the prosecution case, the trial court found that the prosecution failed to establish a case to answer against the appellant in respect of the 2nd and

3rd offence and was satisfied that the appellant had a case to answer in respect of the 1st count and was afforded his defence. The court entered verdict against the appellant and sentenced the appellant to pay fine at a tune of Tshs. 20,000,000/= and in default of payment of fine, the appellant had to serve 7 years imprisonment.

The appellant dissatisfied by the decision of the trial court appealed before this court advancing 10 grounds of appeal. This appeal was argued orally in the presence of all parties and the appellant had a service of Mr. Elias Hezron learned advocate and the respondent (the Republic) was represented by Ms. Sabina Choghogwe, learned state attorney.

Mr. Hezron was the first to submit and he prays to regroup the 10 advanced grounds of appeal to three grounds as he will argue together 1st, 5th and 6th grounds to form 1st ground that, the trial court convicted and sentenced the appellant while there was no sufficient evidence. Ground 2, 3 and 10 to form 2nd ground which challenges the seizure and admissibility of exhibit P1 and P2 and 4th, 7th, 8th and 9th grounds to form the 3rd ground which challenges the admissibility of the caution statement.

Starting with the 3rd ground, that the Caution statement which was admitted to the court was admitted contrary to the law. He avers that, the evidence of PW5 as reflected on page 45 of the trial court proceedings

shows that the appellant was arrested on 13:00hrs and his statement was taken and completed at 17:52 hrs but at the hearing the testimony of the prosecution witnesses shows that the appellant's statement was started to be taken from 16:50 and completed at 17:52 hrs.

He avers that the law under section 50(1)(a) and (b) of the Criminal Procedure Act, Cap 20 RE: 2019, provides that the statement needs to be taken within four hours and in calculation of time the statement was taken beyond 4 hours. Insisting, he cited the case of **Lumuda Mahushi vs Republic** Criminal appeal No. 239 of 2011. Referring to page 6 and 8 of the cited judgement, he avers that the court found that the caution statement was not recorded within 4 hours and that failure to comply with the above requirement was fatal where they proceeded to expunge the statement in the court records. Reverting to our case at hand he prays this court to expunge the caution statement in the court records.

He went on stating that, the trial magistrate erred to rely on the caution statement for the reason that the accused confessed to be found with the flash disk but did not confess to the offence charged of forging electronic evidence as per section 11(1) of the Cyber Crime Act No 04 of 2015. He insisted that, since the trial court found that the accused had no case to answer in respect of being in possession of illegal device, it was

not possible for the appellant to be convicted with the offence of computer forgery.

On the 2nd, 3rd and 10th grounds of appeal which makes the 1st formed ground, which challenges the admissibility of exhibit P2 which is the Flash Disk, he avers that exhibit P2 was tendered before the trial court by PW5 and admitted in court. He claims that there were three legal errors in admission of the exhibit. First, he claims that PW2 who was purported to have taken Exhibit P2 from the appellant did not properly identify the exhibit as reflected on page 13 of the trial court's proceedings. He insisted that PW4 testified that exhibit P2 had black and red colour as reflected on page 35 of the proceedings but PW4 ought to describe exhibit P2 to differentiate it from other flash disk with the same colour to include, the maker, serial number and any other unique character. He also avers that, despite the identification of exhibit P2 by colour, the contents of the flash disk were not identified and described by PW4.

Second, he avers that the contents of exhibit P2 was not proved by PW2, PW3 and PW4 that they were made by the appellant. Referring to page 35 of the trial court proceedings, he avers that PW2, PW3 and PW4 admitted to have accessed exhibit P2 in the absence of the appellant. In that case it is hard to believe that the contents of exhibit P2 were not

tempered to incriminate the appellant. He also insisted that there was no certificate of authentication filed in court in support of Exhibit P2.

Lastly, he avers that, exhibit P2 tendered by PW5 was not seized from the appellant by PW5 as shown on exhibit P1 the certificate of seizure that was seized by PW3 on 07.12.2018 and since PW5 found the flash disk in possession of PW4 it was not proper for the court to hold that Exhibit P2 was seized from the appellant.

On the 1st, 5th and 6th grounds of appeal that makes the 2nd formed ground of appeal challenging the onus of proof that the case was not proved to the standard required. He avers that, it is the duty of the prosecution to prove the case beyond reasonable doubts. He claims that, even if the flash disk was proved to belong to the appellant still the contents in the flash disk did not prove the offence charged. He went on that, requirement to prove the offence charged is stated under section 11(1) of the Cyber Crime Act No 04 of 2015 and among others, is alteration of the electronic data.

He went on that, the prosecution did not tender the original receipt before the court to distinguish the two. He insisted that, the prosecution failed to establish that it was an offence for the appellant to have the electronic data and has intention to act upon rather it was a mere

suspicion. Insisting he referred this court to the case of **Jonas Bulai vs Republic,** Criminal appeal No. 49 of 2006 where it was held that suspicion however strong cannot ground conviction. He therefore, prays this court to allow the appeal and set the appellant free.

Ms. Sabina responded to the appellant submissions and in the upshot, she supported the appeal. Submitting further she did not agree with the learned counsel submissions that the caution statement was taken out of time for she insisted that the appellant was arrested on 13:00 hrs and his statement was taken from 16:50 hrs and completed on 17:52 hrs. She avers that, in computing time from 13:00 hrs to 16:50 hrs the statement was taken on time. She went on that, going through the contents of the caution statement, the appellant confessed to own the flash disk and the trial court rightly held that owning a flash disk was not a crime.

Again, she agrees with Mr. Hezron that the flash disk exhibit P2 was not properly identified as it is reflected on the evidence of PW4 on page 35 who identified the flash disk by colour and there is no specific mark that distinguish the same with another. She went on submitting that, the issue before the court was the contents in the flash disk which were the receipts where PW1 to PW5 testified that it was the appellant who saved

the receipts. She avers that there is irregularity in the seizure of the flash disk (exhibit P2) and handling for it as it is reflected on the record that the flash disk was accessed in the absence of the appellant and agrees with Mr. Hezron that it is hard to believe if the contents was not tempered.

Citing section 18(2) and (3) of the Cyber Crime Act No 04 of 2015, she submitted that, it is a requirement of law that a party wishes to rely on electronic evidence must file a certificate of authenticity. She cited the case of **Exim Bank TZ Limited vs Kilimanjaro Coffee Limited,** HC Commercial Division no 29 of 2011 which went further that in admissibility of electronic evidence a person tendering the same must swear an affidavit. She insisted that the same was not done by the trial court.

She also noted that the conviction of the appellant based on suspicion alone. She referred to the case of **Hakim Mfaume vs Republic** [1994] TLR 201 that it is a principle of law that suspicious however strong cannot ground conviction.

Again, she submitted on PW2 evidence as reflected on page 29-30 of the trial court proceedings that PW2 role as computer expert was expected to show how did the accused tempered with the electronic payment system but PW2 stated that he did not know that the system

was tempered. For what has been stated by the expert, Ms. Sabina ended supporting the appeal.

Re-joining, Mr. Hezron still insisted that the caution statement was taken out of time and the time calculation should be from the time the appellant was arrested that's on 13:00 hrs to the time when the interview was completed that is on 17:53 hrs as stated. He maintains his prayers that this appeal to be allowed.

In determination of this appeal, Mr. Hezron submitted on the legal discrepancies that the cautioned statement was taken out of the prescribed time required by the law and that the prosecution case was not proved beyond reasonable doubts to ground the conviction and sentence entered against the appellant. The same were noted by Ms. Sabina for the respondent who ended supporting the appeal though contested that it was not true that the cautioned statement was taken out of the prescribed time required by the law.

From the submission of the parties, I agree with the counsels' findings that both factual and legal issues raised entails that the prosecution case was not proved to hilt.

Starting with the issue of cautioned statement it is the appellant's counsel submission that the same was taken out of the prescribed four

hours as it is required under section 50 of the Criminal Procedure Act, Cap 20 R.E 2019, for the appellant was arrested at 13:00 hrs and his statement was taken from 16:50 hrs up to 17:52 hrs. This argument was strongly opposed by the counsel for the Respondent who avers that the appellant's statement was taken within time as the same was taken starting from 16:50 hrs.

From the above competing argument of the counsel of both parties, I revisited section 50 of the Criminal Procedure Act, Cap 20 R. E 2019 and it is my understanding that the interview is supposed to be conducted within four hours from the time of restraint. In other words, the interview should be completed within four hours unless the reasons for delay are clearly explained away. For that reason, I agree with the appellant's learned counsel that the appellant statement was started to be taken within time but ended out of the prescribed time as it was taken from 16:50 hrs and ended on 17:52 hrs while the same was supposed to have been ended on 17:00 hrs.

The Court of Appeal of Tanzania in different occasion emphasized on the requirement of taking the cautioned statement within four hours from the time the appellant was restraint unless when the reasons for delay is explained away. See the case of **Adinardi Iddy Salimu and Joseph Evarist @Msoma v Republic,** Criminal Appeal No 298 of 2018, CAT at

Arusha and the case of **Jibril Okash Ahmed v Republic,** Criminal Appeal No 331 of 2017, CAT at Arusha.

In our case at hand, the records are silent if the reasons for delay to complete recording the appellant's statement are explained away. For that reason, I am satisfied that the same was taken out of the prescribed time provided for by the law and for that reason the same is expunged from the court record.

Coming now to the issue of standard of proof, it is a settled position of law that, the first long-established principle in criminal justice is that of the onus of proof in criminal cases, that the accused committed the offense for which he is charged with, is always on the side of the prosecution and not on the accused person. It is reflected under section 110 and Section 112 of the Evidence Act, Cap.6 [RE: 2019] and cemented in the case of **Joseph John Makune v R** [1986] TLR 44 at page 49, where the Court of Appeal 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.*

(See also **Yusuph Abdallah Ally V R Criminal,** Appeal No 300 Of 2009 CAT (Unreported)*)*

As submitted by the appellant's learned counsel that the court heavily relied on the flash disk (Exhibit P2) and the caution statement (exhibit P1)

in convicting the appellant. In records, it is evident that the admissibility of Exhibit P2 fall short of procedural required and it was not proper for the court to rely on it in convicting the same.

The law is clear on the issues of admissibility and weight of electronic evidence as guided by section 64A (2) of the Evidence Act read together with subsection (2) of section 18 of the Electronic Transaction Act quoted above. Section 64A (2) of the Evidence Act provides thus;

> *"(2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transactions Act."*

The point here is that, the above are procedural provisions establishing the manner of presenting electronic evidence before the court. Section 18(2) complained of requires that for electronic evidence to be admitted at the trial court must consider the criteria detailed at paragraphs (a) (b) (c) and (d) of section 18(2) of the Eelectronic Transaction Act. The same provides as it states: -

> *"18.-(1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.*
> *(2) In determining admissibility and evidential weight of a data message, the following shall be considered-*
> *(a) the reliability of the manner in which the data message was generated, stored or communicated;*

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

(c) the manner in which its originator was identified; and

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

Admittedly, none of the above was complied of by the trial court. Much weight by the prosecution evidence was to the admissibility of the flash disk (exhibit P2) rather than tendering the contents in the flash disk in accordance with section 18 of the Electronic Transaction Act No. 13 of 2015 in proving the offence of computer related forgery against the appellant. In that regard, the prosecution did not tender evidence to support the offence of computer related forgery c/s 11(1) and (2) of the Cyber Crime Act No. 4 of 2015.

In this regard, I am accord with both the appellant's learned counsel and the prosecution state attorney that, from this findings and other noted discrepancies both factual and legal, that the prosecution failed to prove the offence of computer related forgery c/s 11(1) and (2) of the Cyber Crime Act No. 4 of 2015 against the appellant. In fine therefore I proceed to allow the appeal and conviction is hereby quashed and the sentence meted is set aside. The appellant be released from prison forthwith unless held for any other lawful cause.

It is so ordered

M.MNYUKWA
JUDGE
17/05/2022

Court: Judgement delivered this 17th day of May 2022 through audio tele conference in the presence of the appellant's learned counsel and the counsel for the respondent.

M.MNYUKWA
JUDGE
17/05/2022