

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 18 OF 2023**

*(Originating from the conviction and sentence of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Economic Crime Case No. 20 of 2019)*

**OLAF PETER MUMBURI.....APPELLANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 24<sup>th</sup> April, 2023*

*Date of Judgment: 26<sup>th</sup> May, 2023*

**POMO, J.**

It is an appeal against conviction and sentence on the appellant's own plea of guilty to the charge sheet arraigned to him by the Respondent Republic in the Resident Magistrates' Court of Dar es Salaam at Kisutu (the Trial Court). The plea of guilt was made by him on 11<sup>th</sup> day of 2019.

Briefly stated, on 21<sup>st</sup> March, 2019 the Respondent republic preferred a charge sheet against three (3) accused persons before the trial court which contained six counts, the charge sheet which excluded the Appellant.



On 3<sup>rd</sup> April, 2019 the Respondent republic filed a substituted charge sheet in which the number of accused persons increased from three to nine and this time around the Appellant was made the 6<sup>th</sup> accused person. Furthermore, the respondent republic increased the number of counts from six to a total of ten (10) counts. Out of the ten counts, the appellant was charged in the 1<sup>st</sup>; 9<sup>th</sup> and 10<sup>th</sup> counts. The 9<sup>th</sup> and 10<sup>th</sup> counts read as follows: -

### **CHARGE**

#### **"1<sup>st</sup> COUNT**

*FOR 4<sup>TH</sup>, 5<sup>TH</sup>, 6<sup>TH</sup> AND 7<sup>TH</sup> ACCUSED*

#### **STATEMENT OF OFFENCE**

**LEADING ORGANISED CRIME:** *Contrary to Paragraph 4(1)(a) of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organised Crimes Control Act [Cap.200 R.E.2002] as amended*

#### **PARTICULARS OF OFFENCE**

**HISAM ABDEL HENDE, JOSEPH GICHUHI NDERITU, OLAF PETER MUMBURI, JOSEPH MUHERE and IBRAHIM BONZO** *on diverse dates between 1<sup>st</sup> January,2018 and 11<sup>th</sup> March, 2019 at various places within the city and Region of Dar es Salaam , intentionally and willfully organized a criminal racket which caused the Government of the United Republic of Tanzania and Tanzania Regulatory Authority to suffer a*

*pecuniary loss of Tanzania Shillings Five Billion Eight Hundred Ninety Two Million Five Hundred Thirteen Thousand (5,892,513,000/-) only*

*"9<sup>th</sup> COUNT*

*FOR 4<sup>TH</sup>; 5<sup>TH</sup>; 6<sup>TH</sup>; 7<sup>TH</sup>; 8<sup>TH</sup> and 9<sup>TH</sup>*

*STATEMENT OF OFFENCE*

***PERMITTING USE OF NETWORK SERVICES WITHOUT RELEVANT ASSIGNMENT:*** *Contrary to section 118(d) and 153 of the Economic and Organized Crimes Control Act, [Cap.200 R.E.2002] as amended*

*PARTICULARS OF OFFENCE*

***HISHEM HENDI; JOSEPH GICHUHI NDERITU; OLAF PETER MUMBURI; JOSEPH MUHERE, IBRAHIM BONZO and VODACOM TANZANIA PLC*** *on diverse dates from 17<sup>th</sup> April,2018 to 11<sup>th</sup> March,2019 at Vodacom Tower, Ursino Estate, Bagamoyo Road within Kinondoni District in the City and Region of Dar es Salaam, permitted AHMED HASHIM NGASSA, BRIAN KENETH LUSIOLA and INVETURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA to fraudulently use 813 Vodacom Tanzania PLC Virtual Numbers without having first obtained any relevant individual assignment from Tanzania Communication Regulatory Authority"*

*"10<sup>th</sup> COUNT*

*FOR 4<sup>TH</sup>; 5<sup>TH</sup>; 6<sup>TH</sup>; 7<sup>TH</sup>; 8<sup>TH</sup> and 9<sup>TH</sup>*

*STATEMENT OF OFFENCE*

***OCCASSIONING LOSS TO A SPECIFIED AUTHORITY:*** *Contrary to paragraph 10(1) of the First Schedule to and*



*Section 57 (1) and 60(2) of the Economic and Organized Crimes Control Act, [Cap.200 R.E.2002] as amended*

*PARTICULARS OF OFFENCE*

***HISHEM HENDI; JOSEPH GICHUHI NDERITU; OLAF PETER MUMBURI; JOSEPH MUHERE, IBRAHIM BONZO and VODACOM TANZANIA PLC from 17<sup>th</sup> April,2018 to 11<sup>th</sup> March,2019 at Vodacom Tower, Ursino Estate, Bagamoyo Road within Kinondoni District in the City and Region of Dar es Salaam, jointly and together by their willful acts caused the Government of the United Republic of Tanzania and Tanzania Communication Regulatory Authority to suffer a pecuniary loss of Tanzania Shillings Five Billion, Two Hundred Fifty Million, Two Hundred Thirty Seven Thousand (5,250,237,000/=)***

On 21<sup>st</sup> March, 2019 when the respondent republic charge sheet was read over the accused persons, the appellant, as hinted above, pleaded guilty to the charge in the manner recorded by the trial court henceforth, for the 8<sup>th</sup> count, convicted him on his own plea of guilty and fined him to pay five million (5,000,000/-) and in case of default he had to serve twelve months jail sentence. Regarding the 9<sup>th</sup> count the appellant together with those charged under that count were ordered to pay the occasioned loss of Five Billion, Two hundred Fifty million, Two hundred thirty seven thousand only (5,250,237,000/-).

The appellant is aggrieved with the conviction and sentence hence the appeal herein which contains two grounds, to wit: -

*1. The learned trial magistrate erred in law and fact by treating the imperfect, equivocal /ambiguous and unfinished plea of the Appellant as a plea of guilty. In particular, the learned trial magistrate erred*

*(a) in failing to ensure that the Appellant has fully understood and appreciated the charge that was laid against him by explaining to the Appellant the nature and ingredients constituting the offences being charged with and the consequences of the Appellant's plea of own guilty*

*(b) by failing to record the exact words used by the Appellant to plead guilty*

*(c) failing to note that the words used by the Appellant to plea did not amount to a plea of guilty*

*(d) by failing to give the Appellant an opportunity to dispute and explain the facts or add anything to the facts*

*2. The learned trial magistrate erred in law by failing to note and treat the Appellant mitigation statement led by Mr. Malimi Advocate as a recantation of the Appellant plea of guilty*

When the appeal was called on for hearing on 14<sup>th</sup> March, 2023 the appellant was present represented by Mr. Gasper Nyika, learned advocate while the respondent republic enjoyed the service of Ms. Dorothy Massawe,

learned Principal State Attorney. I ordered disposal of the appeal be by way of written submissions of which both side of the appeal have timely filed their respective submissions. I commend their job well done and their punctuality

Arguing the first ground of appeal, it is the appellant's submission that it is now settled that the Court must explain to the accused the essential ingredients constituting the offence being charged and must allow the accused to plea on every ingredient constituting such offence. To bolster he cited the decision in *Michael Adrian Chaki versus Republic, Criminal Appeal No. 399 of 2019, CAT at Dar es Salaam (unreported)*. That, from the plea by the appellant, who was the 6<sup>th</sup> accused person, it is clear according to the typed proceedings that the charge was only read to the 6<sup>th</sup> accused and what followed is a plea "I permitted use of Network Without Assignment" that is for the 8<sup>th</sup> count and "I occasioned loss to the Government" that is for the 9<sup>th</sup> count. The Court does not tell the accused what elements constitute an offence under sections **118(d) and 153 of the Electronic and Postal Communications Act No.3 of 2010**. That, the trial court was required to explain the ingredients of such offence to the accused contending that had he explained those ingredients it would have become clear to the accused that one of the essential ingredients of the offence

under section 118(d) is that for such permission to be granted the network services or application services must be under that person's control. There were no particulars read or provided in the charge to show that the service or application allegedly permitted to be used was under the 6<sup>th</sup> accused/appellant control.

It is the appellant further submission that, in addition, the trial court gave no explanation of the ingredients and or elements constituting the offence of occasioning loss to a specified authority which was count 9 in the charge sheet. Such elements include willful act or omission, or misconduct, or failure to take reasonable care or failure to discharge one's duties in reasonable manner resulting to pecuniary loss or damages to property by a specified organization

That, the appellant was not asked to plead on each element and ingredient, the facts read did not disclose and establish all the elements of the offence charged and indeed the learned magistrate took no steps to determine that all the elements of the offence had been established and proved by the facts to establish the offence arguing that the plea of guilty was equivocal and should not have been upheld

That, section 228(2) of the CPA requires the Court to record the words used by the Appellant/Accused to admit the charge he is facing and it was not complied with

That, the learned trial magistrate failed to note and rule that the mitigation led by Advocate Malimi on behalf of the appellant did in law amount to incarnation or recantation of the accused plea of guilty as set out in *Ally Shabani@ Swalehe versus The Republic Criminal Appeal No. 351 of 2022 (unreported)* at page 10 citing with approval the case of *Kamundi versus Republic* among other earlier decisions and as stated in the case of *DPP v Salum Madito (supra)*. That, the learned trial magistrate ought to have entered a plea of not guilty because the mitigation was clearly an indication that the accused the 6<sup>th</sup> included believed that they were not guilty. In the end, the appellant prayed the appeal be allowed by quashing and setting aside the conviction and sentence.

In reply, the respondent republic while supporting the appellant's appeal, basically reiterated what the appellant has submitted in chief a reason for the Appellant in his rejoinder submission to only take note of it and agreed what is contained in that reply submission and the authorities cited thereto without more or less



I have given due scrutiny the submissions made by both side in support of the grounds of appeal and keenly followed the trial court record thus I am in a position to determine the appeal.

In determining the appeal, it is worthy appreciating the respondent republic's charge sheet which was laid down before the trial court to which the accused persons, the appellant herein being the 6<sup>th</sup>, are said to have pleaded guilty to the counts thereto. As hinted above, the charge sheet was a substituted one containing ten counts having been filed in court on 3<sup>rd</sup> April,2019. It reads thus: -

***"IN THE RESIDENT MAGISTRATE'S COURT OF DAR ES SALAAM  
AT KISUTU***

***ECONOMIC CRIMES CASE NO.20 OF 2019***

***REPUBLIC***

***VERSUS***

- 1. AHMED HASHIM NGASSA***
- 2. BRIAN KENETH LUSIOLA***
- 3. INVETURE MOBILE TANZANIA LIMITED T/A TALA  
TANZANIA***
- 4. HISHAM ABDEL HENDE***
- 5. JOSEPH GICHUI NDERITU***
- 6. OLAF PETER MUMBURI***
- 7. JOSEPH MUHERE***
- 8. IBRAHIM BONZO***

## **9. VODACOM TANZANIA PLC**

### **CHARGE**

#### **1<sup>st</sup> COUNT**

*FOR 4<sup>TH</sup>, 5<sup>TH</sup>, 6<sup>TH</sup> AND 7<sup>TH</sup> ACCUSED*

#### STATEMENT OF OFFENCE

**LEADING ORGANISED CRIME:** *Contrary to Paragraph 4(1)(a) of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organised Crimes Control Act [Cap.200 R.E.2002] as amended*

#### PARTICULARS OF OFFENCE

**HISAM ABDEL HENDE, JOSEPH GICHUHI NDERITU, OLAF PETER MUMBURI, JOSEPH MUHERE and IBRAHIM BONZO** on diverse dates between 1<sup>st</sup> January,2018 and 11<sup>th</sup> March, 2019 at various places within the city and Region of Dar es Salaam , intentionally and willfully organized a criminal racket which caused the Government of the United Republic of Tanzania and Tanzania Regulatory Authority to suffer a pecuniary loss of Tanzania Shillings Five Billion Eight Hundred Ninety Two Million Five Hundred Thirteen Thousand (5,892,513,000/-) only

#### **2<sup>ND</sup> COUNT**

**FOR 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> ACCUSED**

#### STATEMENT OF OFFENCE

**IMPORTATION OF ELECTRONIC COMMUNICATIONS EQUIPMENT WITHOUT LICENCE:** *Contrary to section 116(3)(c) of Electronic and Postal Communications Act No.3 of 2010*

#### PARTICULARS OF OFFENCE

**AHMED HASIM NGASSA, BRIAN KENETH LUSIOLA and INVENTURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA,** on unknown dates between 1<sup>st</sup> January 2018 and 31<sup>st</sup> December 2018 at

*Tanzanite Park Building within Kinondoni District in the City and Region of Dar es Salaam, unlawfully imported into the United Republic of Tanzania , Electronic Communication equipment namely, PROLIANT MLI GEN 9 SERVER (PABX VIRTUAL MACHINE with serial number 76520D88838129-425 without a license issued by the Tanzania Communication Regulatory Authority*

**3<sup>RD</sup> COUNT**

**FOR 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> ACCUSED**

STATEMENT OF OFFENCE

**INSTALLATION OF ELECTRONIC COMMUNICATION EQUIPMENT WITHOUT A LICENSE:** *Contrary to section 116(3)(c) and 153 of Electronic and Postal Communications Act No.3 of 2010*

PARTICULARS OF OFFENCE

**AHMED HASIM NGASSA, BRIAN KENETH LUSIOLA and INVENTURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA,** *on unknown dates between 1<sup>st</sup> January 2018 and 31<sup>st</sup> December 2018 at Tanzanite Park Building within Kinondoni District in the City and Region of Dar es Salaam, unlawfully installed and maintained an electronic equipment namely, PROLIANT MLI GEN 9 SERVER (PABX VIRTUAL MACHINE with serial number 76520D88838129-425 without a license issued by the Tanzania Communication Regulatory Authority*

**4<sup>th</sup> COUNT**

**FOR 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> ACCUSED**

STATEMENT OF OFFENCE

**OPERATING NETWORK FACILITIES WITHOUT A LICENCE:** *Contrary to section 116(1) and 153 of Electronic and Postal Communications Act No.3 of 2010*

PARTICULARS OF OFFENCE

**AHMED HASIM NGASSA, BRIAN KENETH LUSIOLA and INVENTURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA,** from 17<sup>th</sup> April,2018 to 11<sup>th</sup> March,2019 at Tanzanite Park Building within Kinondoni District in the City and Region of Dar es Salaam, unlawfully Operated Electronic Communication Equipment namely, PROLIANT MLI GEN 9 SERVER (PABX VIRTUAL MACHINE for receiving and transmitting international incoming voice calls without a license issued by the Tanzania Communication Regulatory Authority

**5<sup>th</sup> COUNT**

**FOR 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> ACCUSED**

STATEMENT OF OFFENCE

**FRAUDULENT USE OF NETWORK FACILITIES:** Contrary to section 122(a) and 153 of Electronic and Postal Communications Act No.3 of 2010 read together with Regulation 7(1)(2)(a) and (b) of Electronic and Postal Communications (Telecommunications Traffic Monitoring System) Regulations,2013

PARTICULARS OF OFFENCE

**AHMED HASIM NGASSA, BRIAN KENETH LUSIOLA and INVENTURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA,** from 17<sup>th</sup> April,2018 to 11<sup>th</sup> March,2019 at Tanzanite Park Building within Kinondoni District in the City and Region of Dar es Salaam, with intent to avoid rates payable for receiving or transmitting international incoming voice calls, dishonestly transmitted communication by terminating international incoming voice calls

**6<sup>th</sup> COUNT**

**FOR 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> ACCUSED**

STATEMENT OF OFFENCE

**USE OF UNAPPROVED ELECTRONIC EQUIPMENT CONNECTED TO ELECTRONIC COMMUNICATION NETWORK SERVICE:** *Contrary to section 83(1), 152(1) and and 153 of Electronic and Postal Communications Act No.3 of 2010*

PARTICULARS OF OFFENCE

**AHMED HASIM NGASSA, BRIAN KENETH LUSIOLA and INVENTURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA,** *from 17<sup>th</sup> April,2018 to 11<sup>th</sup> March,2019 at Tanzanite Park Building within Kinondoni District in the City and Region of Dar es Salaam, unlawfully used Communication Equipment namely, PROLIANT MLI GEN 9 SERVER (PABX VIRTUAL MACHINE with serial number 76520D88838129-425 connected to electronic communication network service for the purpose of receiving and transmitting electronic communications signals without approval from the Tanzania Communication Regulatory Authority*

**7<sup>th</sup> COUNT**

**FOR 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> ACCUSED**

STATEMENT OF OFFENCE

**USE OF NUMBERS WITHOUT RELEVANT ASSIGNMENT:** *Contrary to section 117(3) and 153 of Electronic and Postal Communications Act No.3 of 2010*

PARTICULARS OF OFFENCE

**AHMED HASIM NGASSA, BRIAN KENETH LUSIOLA and INVENTURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA,** *from 17<sup>th</sup> April,2018 to 11<sup>th</sup> March,2019 at Tanzanite Park Building within Kinondoni District in the City and Region of Dar es Salaam, fraudulently used 813 Vodacom Tanzania PLC Virtual numbers without having any*

*relevant individual or class assignment from Tanzania Communication Regulatory Authority*

**8<sup>th</sup> COUNT**

**FOR 1<sup>ST</sup>, 2<sup>ND</sup> AND 3<sup>RD</sup> ACCUSED**

STATEMENT OF OFFENCE

**OCCASSIONING LOSS TO A SPECIFIED AUTHORITY:** *Contrary to paragraph 10(1) of the First Schedule to and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap 200 R.E,2002] as amended*

PARTICULARS OF OFFENCE

**AHMED HASIM NGASSA, BRIAN KENETH LUSIOLA and INVENTURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA,** *from 17<sup>th</sup> April,2018 to 11<sup>th</sup> March,2019 at Tanzanite Park Building within Kinondoni District in the City and Region of Dar es Salaam, jointly and together by their willful acts caused the Government of the United Republic of Tanzania and Tanzania Communication Regulatory Authority to suffer a pecuniary loss of Tanzania Shillings Six Hundred Forty Two Million Two Hundred Seventy Six Thousand (642,276,000/-) only*

**9<sup>th</sup> COUNT**

**FOR 4<sup>th</sup> , 5<sup>th</sup> , 6<sup>th</sup> , 7<sup>th</sup> , 8<sup>th</sup> AND 9<sup>th</sup>**

STATEMENT OF OFFENCE

**PERMITTING USE OF NETWORK SERVICE WITHOUT RELEVANT ASSIGNMENT:** *Contrary to section 118(d) and 153 of Electronic and Postal Communications Act No.3 of 2010*

PARTICULARS OF OFFENCE

**HISHAM HENDI, JOSEPH GICHUHI, OLAF PETER MUMBURI, JOSEPH MUHERE, IBRAHIM BONZO and VODACOM TANZANIA PLC,** *on diverse dates from 17<sup>th</sup> April,2018 to 11<sup>th</sup> March,2019 at Vodacom Tower, Urisno Estate, Bagamoyo Road within Kinondoni District*

*in the City and Region of Dar es Salaam, permitted AHMED HASHIM NGASSA, BRIAN KENETH LUSIOLA and **INVENTURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA** to fraudulently use 813 Vodacom Tanzania PLC Virtual Numbers without having first obtained any relevant individual assignment from Tanzania Communication Regulatory Authority*

**10<sup>th</sup> COUNT**

**FOR 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup>**

STATEMENT OF OFFENCE

**OCCASSIONING LOSS TO A SPECIFIED AUTHORITY:** *Contrary to paragraph 10(1) of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap 200 R.E,2002] as amended*

PARTICULARS OF OFFENCE

**HISHAM HENDI, JOSEPH GICHUHI NDERITU, OLAF PETER MUMBURI, JOSEPH MUHERE, IBRAHIM BONZO and VODACOM TANZANIA PLC,** *from 17<sup>th</sup> April,2018 to 11<sup>th</sup> March,2019 at Vodacom Tower, Urisno Estate, Bagamoyo Road within Kinondoni District in the City and Region of Dar es Salaam, jointly and together by their willful acts caused the Government of the United Republic of Tanzania and Tanzania Communication Regulatory Authority to suffer a pecuniary loss of Tanzania Shillings Five Billion, Two Hundred Fifty Million, Two Hundred Thirty Seven Thousand (5,250,237,000,.00)".*

From the above reproduced substituted charge sheet, as it can be observed, the appellant herein is involved in three counts, that is to say, **1<sup>st</sup> count; 9<sup>th</sup> Count and 10<sup>th</sup> Count**



Again, for clarity, I find it worthy reproducing what transpired on 11/04/2019 when the accused persons, the Appellant inclusive, upon being brought before the trial court, the date they are said to have pleaded guilty to the charge. I reproduce the respective particular proceedings: -

*"11/04/2019*

*Coram: Hon. H. Shaidi – PRM*

*For Republic: Wankyo – SA, Jacline – SA, Mr. F. Ngulea – SA*

*1<sup>st</sup> Accused*

*2<sup>nd</sup> Accused*

*3<sup>d</sup> Accused*

*4<sup>th</sup> Accused*

*5<sup>th</sup> Accused      All present*

*6<sup>th</sup> Accused*

*7<sup>th</sup> Accused*

*8<sup>th</sup> Accused*

*9<sup>th</sup> Accused*

***SA:*** *This matter is for mention today however we asked the court to issue R/O today and we pray to tell the court that investigation is complete and we pray to file consent and certificate to confer this court with jurisdiction to handle and proceed with hearing*

***Court:*** *Consent and certificate received*

***Court:*** *Charge should be read over to the accused persons*

***SA:*** *I pray to substitute charge sheet*



**Court:** *Substituted charge sheet read over to the accused persons and they enter plea as hereunder: -*

**1<sup>st</sup> Count:**

**1<sup>st</sup> Accused:** *IT IS TRUE, I IMPORTED ELECTRONIC EQUIPMENT FOR COMMUNICATION WITHOUT A LICENCE*

**Court:** *EPG*

**2<sup>nd</sup> Accused:** *IT IS TRUE, I IMPORTED COMMUNICATION EQUIPMENT WITHOUT A LICENCE*

**Court:** *EPG*

**3<sup>rd</sup> Accused:** *COMPANY*

**Court:** *COMPANY*

**9<sup>TH</sup> COUNT**

**4<sup>TH</sup> Accused:** *I OCCASSIONED LOSS TO THE GOVT, SPECIFIED AUTHORITY*

**Court:** *EPG*

**5<sup>TH</sup> Accused:** *I AGREE, I OCCASSIONED LOSS TO THE GOVT*

**Court:** *EPG*

**6<sup>TH</sup> Accused:** *I OCCASSIONED LOSS TO THE GOVT*

**Court:** *EPG*

**7<sup>TH</sup> Accused:** *I OCCASSIONED LOSS TO THE GOVT*

**Court:** *EPG*

**8<sup>TH</sup> Accused:** *I OCCASSIONED LOSS TO THE GOVT*

*Court: EPG*

**9<sup>TH</sup> Accused: COMPANY**

**Court: COMPANY".**

As the proceedings indicates, it is vivid that the plea by the appellant, being the 6<sup>th</sup> accused person, was not recorded by the court in respect of the 1<sup>st</sup> count he faced

Again, as to the 10<sup>th</sup> Count, according to the trial court proceedings (handwritten and typed one), nothing is recorded by the court in respect of this count. It so done as if the said 10<sup>th</sup> count never existed in the charge sheet and nothing is on record as to why the plea in respect of the said 10<sup>th</sup> count was not recorded.

What is gathered, the appellant is recorded to have pleaded guilty to the 8<sup>th</sup> and 9<sup>th</sup> counts but according to the charge sheet laid down the appellant herein, being the 6<sup>th</sup> accused person, was not charged in that 8<sup>th</sup> count. According to the substituted charge sheet as above reproduced, those charged under the 8<sup>th</sup> count were **AHMED HASIM NGASSA, BRIAN KENETH LUSIOLA** and **INVENTURE MOBILE TANZANIA LIMITED T/A TALA TANZANIA**. Under the circumstances therefore, the appellant could not plea guilty to the 8<sup>th</sup> count to which he was not charged with. Therefore, in my considered views, it was an error on the

part of the learned trial magistrate to record the appellant to have pleaded guilty to the 8<sup>th</sup> count and convict him as such.

coming to the 9<sup>th</sup> count, the appellant, being the 6<sup>th</sup> accused person, his plea is recorded by the court as follows:

***"6<sup>TH</sup> Accused: I OCCASSIONED LOSS TO THE GOVT  
Court: EPG"***

But the said 9<sup>th</sup> count was not that of occasioning loss to the government rather it was on permitting use of network service without assignment. Let the 9<sup>th</sup> count speak by itself:

***9<sup>th</sup> COUNT  
FOR 4<sup>th</sup> , 5<sup>th</sup> , 6<sup>th</sup> , 7<sup>th</sup> , 8<sup>th</sup> AND 9<sup>th</sup>***

***STATEMENT OF OFFENCE***

***PERMITTING USE OF NETWORK SERVICE WITHOUT RELEVANT  
ASSIGNMENT: Contrary to section 118(d) and 153 of Electronic and  
Postal Communications Act No.3 of 2010***

Such a plea by the appellant to the 9<sup>th</sup> count, as correctly argued by the appellant, in my view, can not be taken to be unequivocal plea by him to the 9<sup>th</sup> count having pleaded guilty to have occasioned loss to the government while the count of the charge to which he was asked by the court to plead was that of as to whether he admits to have permitted use of network service without assignment.

There is one more serious irregularities and illegalities on the mode taken by the trial court in recording the accused persons' plea, the appellant inclusive. That, the plea by each accused persons was recorded by the trial magistrate without appending his signature at the end of each plea which fact makes the plea to be questionable in terms of their authenticity and genuineness of such plea the remedy of which being that of quashing the same. Proceedings must be authentic especially when it concerns entering the accused's plea. Authenticity of proceedings stands insisted time without number by the court's decision. See: **Chacha S/O Ghati @ Magige V.R, Criminal Appeal No.406 of 2017 CAT; Unilever Tea Tanzania Limited Vs David John, Civil Appeal No.413 of 2020 CAT at Iringa; Yohana Mussa Makubi & Another v.R, Criminal Appeal No.556 of 2015 CAT; Iringa International School Versus Elizabeth Post, Civil Appeal No.155 of 2019 CAT at IRINGA; Masumbuko Makelezi Vs R, Criminal Appeal No.433 of 2017 CAT at Mwanza; (All Unreported)** to mention but a few

For instant, in **Masumbuko Makelezi (supra)** at page 6 referring to the case of **Yohana Mussa Makubi and Another Vs R, Criminal Appeal No.556 of 2015 CAT** had this to state: -

*"We are thus satisfied that **the failure by the judge to append his or her signature** after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. **The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted.** Besides, this emulates the spirit contained in section 201(1)(a) of the Criminal Procedure Act and we find no doubt in taking inspiration therefrom."*

Guided by the above, the mode of recording accused's plea taken by the trial court cannot be left to stand, as such, I find merit in the appellant's appeal.

That said, I allow the appeal and hereby quash the trial court proceedings dated 11/04/2019 on which the accused persons' plea to the charge were taken and set aside the orders subsequent thereto. This is because, **one**, the trial magistrate did not append his signature at the end of every accused person's plea taken the fact which made the recorded plea to lack authenticity, and **two**, the 1<sup>st</sup> and 10<sup>th</sup> counts of the charge sheet, as against the appellant, is as if the same were not read over in court against him and, if anything, the record is silent.

Consequently, I order the case file be remitted back to the trial court and the Respondent republic's substituted charge sheet dated 3/04/2019 be read over the accused persons so that their plea in respect of each count they are charged with be recorded, that is to say, the 1<sup>st</sup> count up to the 10<sup>th</sup> count.

It is so ordered

Rights of appeal fully explained.

DATED at **DAR ES SALAAM** this 26<sup>th</sup> day of May, 2023.

**MUSA K. POMO**

**JUDGE**

**26.05.2023**

Judgment delivered in chamber on this 26<sup>th</sup> day of May, 2023 in presence of the Appellant and Mr. Gasper Nyika, learned Advocate for the Appellant and in present of Ms. Dorothy Massawe, learned Principal State Attorney for the Respondent Republic

**MUSA K. POMO**

**JUDGE**

**28/03/2023**

