IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABOR A DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL CASE NO. 2 OF 2023

(Originating from Criminal Case No. 79 of 2021 at the District Court of Tabora)

RAJABU SAID @ MWAKWAYA.....1ST APPELLANT

RASHID IDDY @ KIYOMBO.....2ND APPELLANT

SAID SHABAN @ ISSA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 2/6/2023
Date of Judgment: 5/6/2023

KADILU, J.

Before the District Court of Tabora, the appellants stood charged with two counts. In the first count, they were charged with the offence of conspiracy to defraud contrary to Section 306 of the Penal Code, [Cap 16 R.E2019] and in the second count, they were charged with the offence of obtaining money by false pretence contrary to Section 302 of the Penal Code. The prosecution alleged that on the 23rd and 24th day of January 2019 during day time within the Municipality and Region of Tabora, jointly and together did conspire to defraud Nzagwa Josephina and did obtain Three Million, Two Hundred Sixty-Six thousand four hundred (Tsh 3,266,400/=) from Nzagwa Josephina as a price for securing the copper deal, pretending to be businessmen dealing with copper the fact they knew to be false.

The appellants pleaded not guilty to the charge hence a full trial ensued. At the end of the trial, they were found guilty on both counts. In the first count, they were sentenced to serve five (5) years imprisonment and for the second count, they were sentenced to serve seven years imprisonment. The sentences were to run concurrently. Discontented with both the conviction and sentence, they filed a petition of appeal consisting of six grounds as follows:

1) *That, the learned trial Magistrate erred in law for failure to consider the effect of non-production of the chain of custody of the Airtel Mobile lines to wit 0689328155, 0787269543, and 0782078778 respectively, (exhibit P3).*
2) *That, the trial court erred grossly by convicting the appellants who were neither identified nor revealed by PW1 or the other three witnesses.*
3) *That, the trial court grossly erred in law by convicting the appellants while the charges levelled against them were all featured under cyber laws and that the appellants were charged under the Penal Code, hence arriving at the wrong findings.*
4) *That, the trial court grossly erred in law by convicting the appellants for failure to note due regard for the seized article/and or otherwise items (exhibit P1) were procured totally against the law as the seizing officer never issued the receipt offer the seizure, hence arrived at wrong findings.*
5) *That, the trial court grossly erred in law by convicting the appellants without considering his defense when composing its judgment.*

6) That, the trial court grossly erred in law and facts to convict and sentence the appellants while the charge against him was not proved beyond a reasonable doubt.

At the oral hearing of the appeal, the appellants were represented by Mr. Hassan Kilingo, learned Advocate whereas the respondent was represented by Mr. Joseph Mwambalulu, learned State Attorney. Arguing in support of the appeal, Mr. Kilingo abandoned the 4th ground of appeal. To start with the 1st ground, the appellant's Counsel submitted that the trial court failed to consider the weaknesses in the chain of custody of the exhibits tendered as "P3". The Counsel said, on page 36 of the proceedings, PW3 was the witness who tendered exhibit P3, but he did not comply with Police General Order (PGO) No. 229 concerning the chain of custody.

Further, the learned Counsel argued that all the prosecution witnesses did not say anything about the chain of custody of exhibit P3. To buttress his position, Mr. Kilingo referred this court to the case of ***Iluminatus Mkoka v. Republic (2003) TLR 245.*** With regard to the 2nd ground, the appellant's Counsel submitted that the appellants were wrongly convicted as they were not identified in connection with the alleged offence. He went on to state that in the trial court's record, there are no clear explanations as to how PW1 identified the appellants as the transaction took place through cell phones. He said that the case was a cybercrime as shown on page 16 of the proceedings.

It was Mr. Kilingo's further submission that as the charged offence was a cybercrime, it was wrong to charge the appellants under the penal code as it was done in this case. He further argued that the two offences

charged do not marry and could not be charged together. His argument was emphasized in the case of ***Hassan Idd Shindo & Another vs Republic,*** *Criminal Appeal No. 324 of 2018) [2021] TZCA 498 (20 September 2021),* where it was stated that the offence of conspiracy cannot stand where an independent offence has been committed.

The other ground of appeal is that the appellants' defence was not considered by the trial court. Mr. Kilingo submitted that the trial court at the last page of the proceedings, the appellants stated that they did not commit the allege offence, but the trial court convicted them despite the fact that the victim (PW1) did not identify the appellants. To conclude his submission, Mr. Kilingo presented that the offences against the appellants were not proved beyond reasonable doubt. He prayed this appeal to be allowed, nullify proceedings of the trial court, set aside the conviction and sentence against the appellants.

Replying to the 1st grounds of appeal, Mr. Joseph conceded with the advocate for the appellants that the chain of custody of the exhibits tendered was not established. With regard to the 2nd ground of appeal, the Counsel said he had failed to understand what the learned Advocate for the appellants intended to achieve in that ground of appeal.

The Counsel for the respondent further submitted that even if the appellants were not charged properly, what matters is the outcome. Mr. Joseph added that the trial court found the appellants guilty based on the evidence presented, hence they were rightly convicted and sentenced. He further conceded that it was contrary to the decision of the Court of Appeal to charge the appellants for both offences, but the appellants were found guilty. The Counsel for the respondent maintained that evidence of

the appellants was well considered and therefore the charged offences were proved to the required standard.

In a brief rejoinder, the Counsel for the appellants added that the respondent has conceded for the 1st ground of appeal, he therefore prayed the court to allow the appeal. He also maintained that the only remedy available with regard to the 2nd and 3rd grounds of appeal is to nullify the proceedings of the trial court and allow the appeal.

I have given due consideration to the arguments of both sides. Now I proceed to determine the appeal which is before me. Regarding the first ground of appeal, the chain of custody was not well handled. The principle of chain of custody entails the court's careful handling of what is seized from the accused up to the time when evidence is tendered in court. In order to maintain the chain of custody, the respondent has to show affirmatively that tempering has not taken place. The prosecution must prove chronological documentation that records the sequence of custody of evidence to the time it is presented in court. The idea behind recording the chain of custody is to establish the alleged evidence is in fact related to the alleged crime. In the case of ***Illumina Mkoka*** (*supra*), the court held that: -

> *"..... the point that proper recording of the chain of custody of exhibits helps to establish that the alleged evidence(exhibits) is in fact related to the alleged crime."*

Part of the items seized from the appellants was claimed to be sent to the safe keeper for custody, but it is not revealed how the seized items were kept. The trial Magistrate admitted the exhibits and noted that the question of chain of custody is pertinent in that it

is not supposed to be disregarded. In the case of the ***Director of Public Prosecutions v. Shirazi Mohamed Sharif Criminal Appeal No. 184 of 2005***, the court stated that:

> *" On the question of mishandling the exhibit... the handling of the exhibit still is the view of the court that it is the question of believing that PW4 and PW5 they found from the accused is what they gave to PW6, I cannot rule out completely the possibility of mixing up the exhibits, but in the absence of clear evidence the court cannot merely rely on that omission to record, as also it is the view of this court that this is a minor irregularity which in the absence of clear evidence, the court cannot rely on it therefore they have been tampering with the exhibit by the police witnesses."*

In the case of ***Paul Maduka & 4 others v R Criminal Appeal No. 110 of 2007,*** the court explained the main risk of breaking chain of custody, which is holding evidence that is inadmissible in court. For this reason, I disregard exhibit P3 which were the sim-cards used in the commission of the charged offence as their chain of custody was broken.

With regard to the second ground of the appeal which relates to the identification of the appellants, I have read the judgment of the trial court and I am satisfied that the appellants were not properly identified by PW1. For instance, on the issue of identification, the trial court had this to say:

> *"The conditions for positive visual identification at the scene left to doubt that the accused persons were not identified by PW1. This is so because the evidence shows that PW1 was in contact with the accused on the phone and never saw them.....their identification left doubt."*

This piece of evidence left doubt as to whether PW1 correctly identified the accused persons, but the trial Magistrate concluded by saying that *"the identification of the accused's came to be connected with the investigation."* Due to the state of not being identified clearly, I am in doubt as to whether the appellants could actually be convicted. It is my position that failure to identify the appellants brings benefits to the side of the appellants.

In respect of the offence of conspiracy against the appellants, this needs not detain me. It is settled law that, the offence of conspiracy cannot stand where the actual offence has been committed. In this regard, it was not proper to charge and convict the appellants of the offence of conspiracy as well as obtaining money by false pretence. This was emphasized in the case of ***Steven Salvatory v. Republic, Criminal Appeal No. 275 of 2018*** (Unreported) the Court of Appeal held that: -

> *"Finally, we find it compelling to say something on the offence of conspiracy, for we agree with the learned Advocate for the appellant that the offence of conspiracy cannot stand where the actual offence has been committed. In our earlier decision in the case of John Paulo@ Shida & Another v R., Criminal Appeal No. 335 of 2009 (unreported), we held that: - "It was not correct in law to indict or charge the appellants with conspiracy and armed robbery in the same charge because as already stated, in a fit case conspiracy is an offence which is capable of standing on its own."*

Thus, in the light of settled law, it was not proper to charge the appellants with the offence of conspiracy to defraud. Therefore, as the offence of conspiracy could not be sustained, the appellants were wrongly convicted of and sentenced for that offence. Did the trial court consider the appellant's defence? This is another complaint by the appellants. It is a trite law that the trial court is duty-bound to consider defence of

meted out against the appellants. I thus, order the immediate release of the appellants from custody unless held for other lawful cause.

Order accordingly.

KADILU, M.J.,

JUDGE

05/06/2023

Judgement delivered in chamber on the 5th Day of June, 2023 in the presence of Mr. Hassan Kilingo, Advocate for the appellants and Ms. Eva Msandi assisted by Ms. Joyce Nkwabi, State Attorneys for the Respondent, Republic.

KADILU, M. J.,

JUDGE

05/06/2023.