IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

CRIMINAL APPEAL NO. 45 OF 2022

(Arising from Karagwe District Court at Kayanga in Criminal Case No. 166 of 2021)

DAVID PETER @ SEMBOSI.....1ST APPELLANT

SEBASTIAN JUSTINIAN @ JOHN.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Date of last Order: 15.05.2023
Date of Judgment: 12.06.2023
A.Y. Mwenda, J

The Appellants were arraigned before the District Court of Karagwe at Kayanga for Violation of Intellectual Property Right Contrary to Section 24(1) & (2) (b) of the Cyber Crimes Act No. 14 of 2015.

In the Charge sheet, the prosecution alleged that from the period of June,2021 to 5th day of October,2021 at various places within Nyamagana District in Mwanza City and at Karagwe District in kagera Region, by using Computer system, the appellants did violate the intellectual property rights of DStv-Multi Choice Tanzania Ltd by distributing its services to various persons without any permit.

Accused persons pleaded not guilty as a result the trial commenced. The prosecution side summoned eight (8) witnesses and tendered Forty-eight (48) exhibits. In defense, the appellant fended for themselves. At the conclusion of

both, the prosecutions and defense cases, the trial court found both appellants guilty as charged. They were thus convicted and ordered, each of them, to pay a fine of Twenty Million Tanzanian Shillings (TZS 20,000,000/=) or to imprisonment for a term of five (5) years in default to pay the said fine.

Aggrieved by the verdict of the trial Court, the appellants decided to lodge an appeal before this Court. Their petition of appeal contains twelve (12) grounds which appears as follows, that:

1) *That the prosecution's evidence cuts (sic) doubt to prove beyond a reasonable doubt that Kabanga website was owned by the appellants (web designers) (sic)*
2) *That, all prosecution's exhibits were improper of tendering that is to say they had no any connection with Kabanga website. (sic)*
3) *That, the Learned Magistrate erred in law and fact when contravened (sic) with the mandatory provision of section 312 (1) and (2) of the Criminal Procedure Act [CAP 20 R.E 2019].*
4) *That, the trial Magistrate erred in law and in fact for not considering the fact that there were no credible evidence linking the appellants with the offence committed.*
5) *That, exhibit P 34 and P 43 (the said certificate of seizure) was fundamentally incurable (sic) defective in admission while no search warrant order was brought to support the same. (sic)*

6) *That, the learned Magistrate erred in law and in fact (sic) to convicted and sentenced the appellants while (sic) contravened with the provision of section 18 (3) (a) and (c) of the Electronic Transactions Act No.130 of 2015*

7) *That, the trial Magistrate erred in law and in fact as she failed to evaluate properly and consider the defense of the appellant.*

8) *That, the learned Magistrate erred in law and in fact to convict the appellant basing on contradictory, unreliable and unsatisfactory evidence, that is to say the court (sic) did not shake the credibility of evidence adduced by the respondent.*

9) *The, hon. Magistrate erred both in law and fact when she relied on materials discrepancies adduced by the prosecution witness to sustain conviction.*

10) That, the whole criminal trial was marred with procedural irregularities.

11) The prosecution failed to prove that DW1 and DW2 had any relationship (business partners) that is to say they did not provide crucial evidence of their business communication for example call records, details of any mobile operations, hence erred relying only on numbers on mobile.

12) That, prosecution case was not proved beyond a (sic) reasonable doubt as required by law.

Having received the records of appeal, this Court fixed this matter for hearing. At the hearing date, the appellants appeared in person without legal representation. On the other hand, the respondent Republic was represented by Mr. Noah Mwakisisile and Elias Subi, learned State Attorneys.

As both parties were ready to proceed, the Court invited David Peter @ Sembusi (the First Appellant) to take the floor. In his submission, while retaining his right to rejoinder, prayed the Court to adopt and consider their joint grounds of appeal as part to his oral submissions. Otherwise, he prayed this appeal to be allowed.

On his part, Sebastian Justian @John (the 2nd Appellant) submitted that the charge against them was not proved. He said that all exhibits and the evidence tendered left a lot to be desired (doubts). He complained that at the trial level, they raised some issued which were not answered to but the court overruled them.

Further to that, the 2nd Appellant submitted that from the charge sheet, the prosecution alleged that they created a website called *Kabanga.gaDStv* and that, PW1, (the DStv's company secretary) tendered pictures (screen shots) which he failed to testify their source. The 2nd appellant said that the said pictures were retrieved from chats with many other numbers but there is no proof that the said numbers were chatting with his number. He said that he objected to their tendering and prayed the said chats to be compared with what was in his mobile phone (since his mobile phone was tendered in court as exhibit), but no chance

was given to switch on his mobile phone to verify the source of the said chats. He said that the Court ended up ignoring the said request by overruling them thereby admitting the same as exhibits.

The 2nd Appellant also submitted that in his cross examination to PW1, he asked him as to why the police officers who seized his mobile phone decided to handle the said mobile phone to him to retrieve pictures, but no answer to that question was given. He also added in that even the police officer who was accompanied by him (Pw1) did not say anything regarding the said pictures. According to him (2nd appellant), he waited for PW2 to testify if he handled the said mobile phone to PW1, but during trial he (PW2) did not say anything. He also said that when he asked PW1 regarding allegations purporting that, while in Mwanza he (PW1) was told that he (the 2nd appellant) had previously been arrested over the same allegation and ended up being warned, PW1 did not give any answer and no proof was tendered to prove the said allegation.

The 2nd Appellant went on with his submission by wondering as to why he was joined with the 1st appellant without any proof linking them. He said that the prosecution alleged that their mobile phones were seen on the website, but they failed to show if their mobile phone numbers, pictures and locations were seen in the said website. He went further to submit that there is no evidence to that effect and even when they cross examined him in that regard the answers were that said the website is blocked. On that basis he was dismayed as to why the prosecution

charged them if the website is blocked (He referred the Court to PW1's evidence), he was then of the view that PW2 was telling lies.

As for PW5's (the investigator's) evidence alleging the appellants admitted that they created a website, the 2nd Appellant submitted that there is no statement which was tendered in Court.

The 2nd appellant also challenged PW8's evidence in that it is doubtful. His reasons are as follows. One, that he did not state the link between the 2nd and the 1st appellant as at first, he (PW8) testified that the appellants were identified through internet but when he was cross examined as to how, the response was that their mobile numbers were found in emails (which he mentioned) but failed to prove if the same (emails) was his(2nd appellant's).The 2nd appellant reiterated that the email must have domain and no domain can show users numbers. According to him PW8 did not say how he managed to find/detect their (appellants) numbers in the said website. He also (The 2nd appellant) challenged PW8's report as being doubtful on the ground that in whatever question PW8 was asked, his response was that the report has it all. On top of that, the 2nd Appellant challenged PW8'S report on the ground that he did not testify how he scientifically managed to prepare it. According to the 2nd appellant, PW8's report is a mere opinion which has no force of law. Again, the 2nd appellant said that in re-examination, PW8 said that the owners of *Kabanga.ga* website was hidden and that all members are the suspects.

The 2nd Appellant further submitted that at page 65 of the typed proceedings there is evidence that, despite the appellant's arrest, the infringement of copyright is still underway. The 2nd Appellant was of the view that if the copyright infringement is still underway then the appellants were arrested and charged as wrong persons. Again, the 2nd Appellant challenged PW3's (Constable Forensic Dept.'s) evidence in that it is doubtful and shaky like that of PW8.He submitted that if PW3 used *CellebriteUFED4PC* machine to examine exhibits then the same would have retrieved pictures by itself and a self-generated report. According to him, PW.3 prepared a typed report by himself which is not proper. Further to that the 2nd appellant said that he also cross examined PW3 if in his (2ndAppellant's) mobile phone there was *Kabanga.ga website's* information and the answer was in affirmative, but when he was asked to switch on the computer to compare the same, they ended up seeing cookies (the previous searched information). The 2nd Appellant also added in that PW3 did not show him (2nd appellant) if he once visited *Kabanga website* but instead he said that the 2nd appellant visited *DStv website* which to him (2nd appellant) is not the problem since the DStv website is public. The 2nd Appellant was also of the view that if PW3 tendered print outs chats why didn't it show the linkage between him and the 1st appellant. Further to that he submitted that since PW3's report was from Forensic department, he ought to have brought answers to key questions regarding the Appellant's communication records between them but that was not availed in Court.

The 2nd appellant submitted that the case against them is full of doubt because when he firstly appeared in court, he prayed to be supplied with the complaint's statement and upon perusal of the same, he noted that the 1st appellant was the only suspect. He went further to stress that in his defense he prayed to tender the same in Court, but the court refused to admit it on the reason that it was photocopy. He also submitted that PW1 testified that he took mobile phone numbers 0756-8808069 and 0742-777747 to DCI's Officer and later to cybercrime department but PW3 testified that when he got the said numbers he decided to arrest the 1st accused (in Karagwe) and charged him, excluding him(the 2nd appellant).Further to that he said that PW3 did not bother to use the said number to call him (2nd appellant) to see if they are linked and again no printout was produced and tendered in Court but he ended up by saying that the forensic expert would come to testify although, when he came, the forensic expert said he was not instructed to investigate the link between the appellant's phone's numbers.

In concluding his submission, the 2nd appellant submitted that the evidence alleging there was a transaction which he received from Kenya i.e., Kshs 1450 is doubtful because the source and destination was not proved. He added in that in the said transaction the recipient number is 255755372002 which is not his and there is no link between him (2nd appellant) and the said number. He then prayed this appeal to be allowed.

In Response to the submissions by the appellants, Mr. Noah Mwakisisile, learned State Attorney informed the Court that he was going merge the 1st, 8th, 11th and the 12th grounds of appeal and the rest argued separately.

According to him the merged 1st, 8th, 11th and the 12th grounds of appeal provide answers to the key issue as to whether the prosecution's side proved its case beyond reasonable doubt.

The learned State Attorney commenced by submitting that it is trite law under section 3(2)(a) of Evidence Act that the onus of proof in Criminal Cases is on prosecution and the standard is beyond reasonable doubt.

According to him the offence against the appellants was proved by the eight (8) prosecution's witnesses and 48 exhibits. The learned State Attorney submitted that PW1 testified that he is anti-piracy consultant of multi choice Co. Ltd, the owners of DStv who testified that on 3rd – 5th October 2021 they discovered that there was piracy where hackers created a website (*https//kabanga.ga-DStv*) run by two persons, one David Peter @ Sembusi assisted by Sebastian Justinian @ John(the appellants).The learned State Attorney said that this witness discovered that the suspects were charging unknown customers to access England Premier league, LALIGA, M-NET, BB-NIGERIA and other movies channels.

According to him, the appellant's action were infringement of intellectual property right under section 9(1) of Copy Right and Neighboring Rights Act [Cap 218 R.E 2002].The learned State Attorney went further to submit that PW1 testified that they prepared a report which was sent to DC's office and efforts were made where

the 1st appellant was arrested in Karagwe. When he was searched, he was found with a TECNO mobile phone, AZUMI and Dell Laptop. That, thereafter they went to Mwanza and arrested 2nd appellant who was also searched and found with OPPO mobile phone with line No. 0742-777747, and other different mobile phone chips (lines). According to the learned Sate Attorney, PW3 (Forensic Constable), cybercrime expert analyzed them using CelebrityUFED4PC where he detected infringement of copyright and prepared a report which was stored in external flash disc and tendered in court as Exhibit P.42 and a written report which was tendered as Exhibit P.41. The learned State Attorney said that in his report he said that he analyzed OPPO mobile phone (2nd appellant's property with line 0742-777747) and detected communication between 2nd appellant no. +2447305363741 where in the 2nd appellant was being asked if he provides DSTV (program) transmissions, and for how long, the communication which took place between 10/10 – 11/10/2021; others on 5/9/2021 vide his number and +254714593986 where the 2nd appellant responded to questions posed. The learned State attorney summarized the WhatsApp communication as appearing in Exhibit P.1 -32

The learned State attorney further submitted that the evidence from PW1, PW2 and PW3 linked the appellants to each other and to the offence they stood charged with. He also was of the view that PW8's evidence, the expert in cyber and employee of DStv testified how the appellant committed the crime in question.

Regarding the 3rd ground of appeal, the learned State Attorney submitted that the trial magistrate did not contravene section 312(1) and (2) of Criminal Procedure

Act [Cap 20 RE 2019] because in the judgment, all the requirements set in the case of JOSEPHAT JOSEPH V. REPUBLIC CRIMINAL APPEAL NO. 558 OF 2017 pages 12 and 13 are met.

Regarding the 5th ground of appeal challenging improper admission of certificate of seizure for lack of search order/warrant the learned State Attorney submitted that the section 38 and 42 of the Criminal Procedure Act provide how seizure is done. According to him search under section 38(1) of Criminal Procedure Act is a planned search meaning a junior officer to OCS need warrant to do so but OCS himself does not need warrant under S. 42 of CPA which carter for emergence searches. He supported this point by citing the case of BADIRU MUSSA HANOGI V. REPUBLIC, CRIMINAL APPEAL NO. 118 OF 2020.

The learned State Attorney submitted that in the present case, exhibits P.34 was preceded by search warrant and according to him, this ground is baseless.

The learned State Attorney submitted that seizure of exhibit P.43 was not proceeded by search warrant and seizure was not under emergence situation. On that basis he was of the view that the said exhibit should be expunged from the record. He however was of the view that even if it is expunged from record the court may still rely on the PW1's oral account and for that matter he was of the view that the 5th ground of appeal is baseless.

Regarding the 10th ground of appeal where the appellants allege the whole proceedings is tainted with irregularities the learned State Attorney submitted that

in the trial court's records there is no procedural irregularity as everything was done in accordance to the law.

Regarding the 6th ground of appeal where the appellants challenge the trial court's failure to comply to section 18 (3) (a) and (c) of the Electronic Transactions Act the Learned State Attorney submitted that under section 3 of Electronic Transaction Act and section 3 of Cybercrime Act, computer system is defined thus the seized exhibits from appellants fall under the category of electronic evidence. According to him, the admissibility of electronic evidence is covered under S. 64A of Evidence Act where guidance on admissibility is under S. 18 (1) of Electronic Transaction Act. According to him the said guidance covers the following to include *(a)reliability of the manner in which the data message was generated stored or communicated (b) reliability of the manner in which the integrity of the data message was maintained (c) the manner in which its originator was identified (d) Any other factor that maybe relevant in assessing the weight of evidence.*

The learned State Attorney submitted that in the list of the above conditions the appellants are challenging the 1st and 3rd conditions. The learned State Attorney said that regarding the condition in part (a), PW3 (Forensic expert) testified that having received exhibits seized from appellant he used a *CellebriteUFED4P* machine. According to him, this provide answers to the question on the manner the data message was generated. The learned State Attorney said the 2nd appellant allegation that he wanted to be shown the said results physically, but the witness

failed to do so is unfounded because his perusal to the court's record failed to see what is alleged by the appellants.

Regarding storage and communication of data message, the learned State Attorney submitted that PW3 testified that having retrieved the data he prepared a report which was stored in the external hard disc which was received as exhibit P.42 and in a written report (exhibit P.41) which was not objected by the appellant to its/their tendering.

Regarding part (c) of section 18 (1) on the manner in which its originator was identified, the learned State Attorney submitted that the evidence from PW1, PW2, PW3 and PW4 provide answers to it as follows. He said that PW1 testified that having detected piracy, they detected 1st and 2nd appellant as persons responsible and as such they went at Karagwe where the 1st appellant was arrested and upon search, he was found with laptop make DELL and a mobile phone make TECNO and these exhibits were later on analyzed. According to the learned State Attorney, since the 1st appellant was found with the said exhibits, he is then the originator of the data. According to him, there is a link between the devices seized from the 1st appellant and the evidence by the PW1 and PW8.

According to the learned State Attorney, when the 2nd appellant was arrested in Mwanza, he was found with OPPO mobile phone and upon switching it on, pictures were found linked to *Kabanga website* and on that basis, he was of the view that the 6th ground of appeal is also baseless.

About the 2nd and 4th ground of appeal challenging the prosecution's failure to show the connection between the appellants and *Kabanga website* the learned State Attorney submitted that the said grounds are baseless because PW1 and PW2 testified on how attempts to call each other's numbers displayed their respective names meaning they knew each other. The learned State Attorney went further and submitted that PW3 testified how the appellants are linked to *Kabanga website*. He also made refence to the evidence from PW8 who testified that the 2nd appellant was logging in to Kabanga website which links him to the website.

Regarding the 7th ground of appeal, the learned State Attorney, while making reference to page 31 and 32 of copy of judgment submitted that the appellants defense was considered.

Regarding the 9th ground of appeal, the learned State Attorney submitted that there are no discrepancies in the prosecution's witnesses and on that basis their conviction was proper. He concluded his submission in that the case against the appellants was proved beyond reasonable doubt and prayed the present appeal to be dismissed.

In rejoinder the 1st Appellant said that PW3 did not say anything regarding his TECNO mobile phone which was seized from him and that is why the trial Magistrate ordered it to be restored to him. He also said that the record is silent on what was found in the said TECNO mobile phone. The 1st Appellant went further and sated that PW3 said he saw four files and the DSTV programs in the DELL laptop, but failed to state which are those programs. He averred further that the

trial Magistrate said that there are files that contain DSTV issues but did not show which are those programs. On top of that he said that the files containing DSTV programs and TV playlist were not described and shown to him.

The 1st appellant rejoindered further that there is no link between him and the kabanga website and that even the laptop purported to be seized by PW4 from him is not his because the said witness, while tendering it in court testified that he would recognize it by serial number but when he was shown the said laptop there was no serial numbers as he alleged it was worn out which is not possible to happen. The 1st appellant said further that the mobile phone lines 0762-4284691 and 0672-693472 which are alleged to be his were objected to their tendering in court, but the trial magistrate overruled him on the ground that it was in his advertisement but failed to say which advertisement. He also challenged the Hon. Trial Magistrate's assumptions that it might be registered using the name of another person while she failed to say which is that other person's name.

Further to that the 1st Appellant rejoindered that the prosecutions alleged that the appellant's details are in Kabanga website without tendering proof in that regard. He also said that there was no proof of his engagement in any transaction with the illegal subscribers. He concluded by stating that their appeal is meritorious and prayed it to be allowed.

On his part, the second appellant briefly rejoindered by beseeching the Court to do justice to them. He said that even if they failed to object to the tendering of

some of exhibits, that should not be considered to be an admission to their respective contents. He then prayed this appeal to be allowed.

Having summarized the rival submission by the parties, the court is now bound to determine the fate of this appeal. In a bid to do so, the issue which need be answered is whether the prosecution's side proved its case to the standard required in Criminal Cases.

At the outset, it is apposite to point out that the law of Evidence Act [Cap 6 R.E 2019] imposes a duty on the prosecution to prove its case. Section 3(2) of the same reads as follows, that:

> *S.3(2) "A fact is said to be proved in criminal matter, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists."*

This legal proposition has been discussed in many decisions of this Court and the Court of Appeal such as in TINO JOHN MAHUNDI V. REPUBLIC Criminal Appeal No. 21 OF 2020, HC, (Unreported); JOSEPH JOHN MAKUNE V. REPUBLIC [1986] TLR 44; NATHANIEL ALPHONCE MAPUNDA AND 1 ANOTHER V. REPUBLIC [2006] TLR 395 and YUSUF ABDALLAH ALLY V. REPUBLIC Criminal Appeal No. 300 of 2009, CAT, (Unreported) to mention a few.

In the present matter, the appellants were arraigned before the trial court for violation of Intellectual property Right of DStv-Multi Choice Tanzania LTD by distributing its services to various persons without permit. The prosecution alleged

that the appellants created a website known as www.kabanga.ga which was also linked to their respective mobile phones.

Before going any further, it is important to note that the case against the appellants hinged on the website alleged to be generated/developed by the appellants. On that basis, this court found it crucial to firstly, determine if there is any link between them and the said website.

From the records, the prosecution, while relying on the evidence of PW.3 (H.4333 FC VICTOR JAMES MSOFE) and PW8. (BARRY PATRICK COLL-The Anti-piracy Manager for Irdeto group, part of Multi Choice, alleged the appellants developed a website which was used to transmit DStv programs illegally. The said conclusion was drawn from analysis of and a laptop Make Dell. While testifying in that regard, PW.3 said that he analyzed the said exhibit by using an Electronic Machine known CellebriteUFED4PC and Forensic Tower. He said that having so analyzed, he prepared a written report and another one was stored in a soft form which is kept in the External Hard Drive. This witness also testified that in the OPPO Mobile phone which had Sim card No. 0742-777747 there was chats with Line No. +2447305363741, Line no. 254714593186 regarding provisions of DStv Services. On the laptop report, PW3 *testified that he found user account information.*

1.Administrator

2.Default Account

3.Wdajutility

4.David Peter Sembosi (1st Accused); and

Software information

Window 10 Enterprises of 2019 which was installed on 02/09/2021, registered owner was David Peter Sembosi.

Evidence obtained from Hard drive;

1.File showing the domain use of www.kabanga.ga

2.Application showing channels stingray.com

3.Website; amazon.com

4.Logging activities Accounts user David Peter Sembosi

5.Default used to log in website www.kabanga.ga.

6.Link of www.kabanga ga.

According to PW3, the above information was retrieved/ found in the DELL laptop which was seized from the 1st Appellant. As per certificate of seizure which was tendered by PW4 as exhibit P.43, the said laptop's serial number (recorded in it) is No.80045-110-9888-839.However from the trial court's record, it was alleged by the said witness that the serial number on the laptop which was tendered in court (see exhibit P.44) is/was worn out and no reasonable explanation was given by the prosecution in that regard. In other words, the laptop, which was tendered in Court had no serial number, thus it is unsafe to conclude that the seized laptop from the 1st appellant is the one which was analyzed by PW3. It is important to note that serial number to the said laptop was key in determining the link between the appellants and the website. This is so because PW3 alleged that in it, there

was DStv programs, and he noted the links between the appellant's and *www.kabanga.ga* website.

As I have stated above, it is unsafe to conclude that Exhibit P.44 is the one which was seized from the 1st appellant. At the hearing of the present appeal, the 1st appellant was of the view that based on the above anomaly, the said laptop is not his. I have considered his argument and came to an agreement with him that the laptop in question cannot be considered as his property because its identification made by the witness based on its make and color (DELL, Silver in Color) is doubtful as there are many DELL laptops of silver in color in the market. The same ought to be described through its serial number which is recorded in the seizure certificate. From the foregoing reasons, a proof on the description of the laptop seized from the 1st appellant is doubtful and the benefit of which should be resolved in favor of the appellants.

Another piece of evidence which the prosecution relied on to link the appellants with *www.kabanga.ga* website came from PW8. This witness testified that he is a qualified project manager whose task is to detect piracy and persons who access DStv Channels without permission through websites. This witness testified that he conducted online investigation and detected kabanga website being linked to the appellant's emails and mobile phone numbers. According to him, an investigation report (exhibit P48) which he generated by using an Apple mark pro-computer was prepared. He said that at the time of generating and printing the said report,

the device was working properly and after printing it he kept it by himself and there was no possibility for anyone to tempering with it.

This Court perused the contents of the said exhibit and noted the following. Firstly, when PW.8 was tendering it in evidence, it was appended to his certified affidavit. In the said affidavit he deponed that during the period of May to October 2021 he performed an online investigation to identify suspects responsible for piracy/copy right infringement. He said that in his investigation he detected the appellants as the persons responsible while using www.kabanga.ga website. According to him the results of the said online investigation is in the accompanied report to his affidavit. Having gazed at the contents of PW 8's affidavit, this court found it falling short of the legal requirements in two scenarios, one the said affidavit has no deponent's signature and two, that the same has no verification clause. The legal position is settled regarding essential ingredients of the valid Affidavit. In the case of JACQUELINE NTUYABALIWE MENGI & TWO OTHERS Vs. ABDIEL REGINALD MENGI &5 OTHERS, CIVIL APPLICATION NO 332/01 OF 2021, CAT (Unreported), the Court, having cited the case of THE DIRECTOR OF PUBLIC PROSECUTIONS V. DODOLI KAPUFI AND ANOTHER, Criminal Application No. 11 of 2008(unreported) had this to say, that:

> *"...In that case, the Court went on to state the essential ingredients of any valid affidavit which include:*
>
> *i) The statement or declaration of facts etc. by the deponent*

ii) *The verification clause.*

iii) *A jurat; and*

iv) *The signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation."*

Guided by the above authority this court noted that the PW8's affidavit defective. As I have hinted earlier, the same has no deponent's signature and verification clause. While emphasizing the importance of verification clause, the Court in JACQUELINE NTUYABALIWE MENGI & TWO OTHERS Vs. ABDIEL REGINALD MENGI &5 OTHERS, (supra), having made reference to the case of LISA E. PETER V. AI-HUSHOOM INVESTMENT, Civil Application No. 147 of 2016(unreported), held inter alia that:

> *"The importance of verification is to test the genuineness and authenticity of allegation and also to make the deponent responsible for allegations. In essence, verification is required to enable the court to find out as to whether it will be safe to act on such affidavit evidence. In absence of proper verification clause, affidavits cannot be admitted as evidence."*

Based on the above authority, it is not known as what among the PW8's averments is based on his personal knowledge and what is based on information obtained

from other persons. That being said, PW.8's affidavit is incompetent and the evidence emanating therefrom (report) is of no legal value.

Having discussed on the validity of PW8's affidavit, the court found it pertinent to go through PW8's oral account and noted the same insufficient to prove the link between the appellant and the website. In his evidence PW8 testified on how he prepared the said report which was taken to their head office in Netherlands and certified by the commissioner for oaths one Mr. Wiggers. During cross examination PW8 did not give a detailed account on what he analyzed. For example, when he was subjected to cross examination by the 1st appellant to some of key questions regarding his analysis, his response was as follows;

> *"The information report I have produced show that you are the owner of Kabanga website and other apps used in piracy.*
>
> *The information report I have produced is very clear. It identified you by your telephone numbers.*
>
> *By identifying you as David Sembosi that led to your arrest. You were identified by the information identified on the internet.*
>
> *My report is clear on how I identified you..."*

From the foregoing quotes, PW.8's oral account does not sufficiently provide answers on the online investigation he performed. In other words, after

investigation report is expunged from the records, his oral account is found weak to support the prosecution's case.

Another evidence which the prosecution relied in establishing the link between the appellant and the website came from PW1.In his evidence he testified that having arrested the 2nd Appellant, his mobile phone was seized and upon switching it on he noted WhatsApp chats with some customers which showed that he was transmitting the DStv programs illegally. This witness said that by using another phone he captured/photographed the said chats by using another mobile phone. The said photographs were tendered in court as exhibit in court as exhibits P.1 to Exhibit P.32, despite objection by the 2nd accused. While overruling him, the trial court was of the view that since he did not object the same to be found in his mobile phone, the same did not affect its admissibility. It is important to note that this evidence was accorded weight by the trial magistrate in convicting the appellants. At the hearing of this appeal, the appellants challenged PW.1 preforming investigative functions. They wondered as to why on earth would the police officers allow him to transfer the said pictures from the seized mobile phone. On top of that they questioned as to why the prosecution failed to switch on the said mobile phone in court before tendering it as exhibit. Before I deliberate on this issue, it is important to note that the evidence relied by the prosecution in this angle is electronic evidence. Under Section 64A of the Evidence Act, [Cap 6 RE.2019] electronic evidence is admissible, but its admissibility shall be determined

in a manner prescribed under section 18 of the Electronic Transaction Act. This Section reads as follows;

> *"S.64A (1) In any proceedings, electronic evidence shall be admissible*
>
> *(2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transaction action.*
>
> *(3) For the purpose of this section, "electronic evidence" means any data or information stored in electronic form or electronic media or retrieved from computer system which can be presented as evidence."*

Based on the above section, exhibit P1-32 fall in the category of electronic evidence as such its admissibility ought to be determined in the manner prescribed under section 18 of the Electronic Transaction Act.

Section 18(1) of the Electronic Transaction Act provides conditions for authenticity and weight to be accorded on the electronic evidence. The same read as follows:

> *S.18 (2) In determining admissibility and evidential weight of data message, the following shall be considered.*
>
> *(a) reliability of the manner in which the data message was generated stored or communicated (b) reliability of*

the manner in which the integrity of the data message was maintained.

(c) The manner in which its originator was identified

(d) Any other factor that maybe relevant in assessing the weight of evidence.

Since PW.1 tendered exhibits P.1-P32, the trial court was bound to see if the requirements as set under Section 18(2) were met. However, in his evidence, PW1 did not follow the required procedure in tendering electronic evidence. It is trite to remind ourselves that PW.1 alleged that Exhibits P.1 to P.32 were captured from the 2nd appellant's mobile phone by another mobile phone and same were printed from that other mobile phone whose owner was not mentioned. Since the said exhibits changed devices from that purported to belonging to the 2nd Appellant to that of PW1 before printing, and taking into account that PW1 is not an investigator (and it is not known as to why the investigators entrusted him to perform investigative functions,) then compliance to the above legal requirement was crucial. Failure to comply with the legal requirement left the authenticity of exhibits P1 to P 32 questionable.

From the foregoing observations, this court is of the view that there is no link between the appellants and the purported www.kabanga.ga website. This appeal therefore succeeds. The trial court's conviction in Criminal Case No. 166 of 2021 before Karagwe District Court is hereby quashed and the sentence passed is set aside.

The appellants shall be released from prison immediately unless they are lawfully held.

It is so ordered.

Right to appeal fully explained.

A.Y. Mwenda

Judge

12.06.2023

Judgment delivered in chamber under the seal of this court in the presence of the Appellants Mr. David Peter @ Sembosi and Mr. Sebastian Justian @ John and in the presence of Mr. Eliasi Subi Learned State Attorney for the republic (respondent)

A.Y. Mwenda

Judge

12.06.2023