

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(MTWARA DISTRICT REGISTRY)**  
**AT MTWARA**

**CRIMINAL APPEAL NO 63 OF 2023**

*(Originating from Economic Case No. 10 of 2022 of Lindi Resident's  
Magistrate Court at Lindi)*

**HAMISI RAPHAEL BANDARI .....1<sup>st</sup> APPELLANT**

**JUMA ALLY KAPILIMA .....2<sup>nd</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

*18<sup>th</sup> and 30<sup>th</sup> October 2023*

**LALTAIKA, J.**

The appellants herein, **HAMISI RAPHAEL BANDARI** and **JUMA ALLY KAPILIMA** were arraigned in the Resident Magistrate's Court of Lindi at Lindi charged with different offences. The 1st appellant was charged with abuse of position c/s 31 of the Prevention and Combating of Corruption Act Cap 329 RE 2019 read in tandem with para 21 of the 1st schedule and section 57(1) and section 60(2) of the Economic and organised Crimes Control Act Cap 200 RE 2019.

Both the 1st and 2nd appellants were charged with "damaging a property used for providing necessary service contrary to para 20(1) and (2) (a) of the First Schedule to and section 57(1) and 60(2) of the EOCA. Moreover, both appellants were charged with occasioning loss to a specified authority contrary to paragraph 10(1) of the 1st schedule to and section 57(1) and 60(2) of the EOCA (supra).

It was the prosecution's allegation that the 1st appellant on unknown dates in February 2022 **at Nahumbika Mashambani Area** in Lindi District and Region, while carrying out his duties did wilfully call the village meeting and informed villagers that he had been permitted by the Tanzania Petroleum Development Cooperation (TPDC) to remove and sell empty natural gas pipeline infrastructures. The acts of the 1st appellant led to sale of the said pipelines against the law. The infrastructure was also destroyed causing a loss of **TZS 109,420,000** to the TPDC.

When the charges were read and explained to the appellants (then accused) they pleaded not guilty. This necessitated the conducting of a full trial. On completion of the prosecution case, the court made a finding that the appellants had a case to answer and were placed on the witness doc. Nevertheless, their defence was not found with merit. The trial court proceeded to convict them and sentence the 1st appellant to 20 years jail for the 1<sup>st</sup> count. As for the 2nd and 3rd counts both appellants were sentenced to 20 years in jail.

Dissatisfied, the appellants have appealed to this court initially on twelve (12) grounds. Sometimes later the appellants **filed four (4) additional grounds.**

When the appeal was called on for hearing on the 18<sup>th</sup> of October 2023, the appellants appeared in person, unrepresented. The respondent Republic, on the other hand, appeared through Mr. Melchior Hurubano, learned State Attorney.

The appellants indicated that, not being learned in law, had nothing to add to their expounded grounds of appeal that accompanied the petition. Nevertheless, they reserved their right to rejoinder.

Taking up the podium to counter the appellant's submissions, Mr. Hurubano announced that the respondent was in support of both conviction and sentence of the trial court.

On the **1st ground**, concerning the absence of a chain of custody for Exhibit P1 (valuation report) and Exhibit P2 (sketch map), Mr. Hurubano argued that the ground had no merit. He pointed out that, according to the proceedings, the exhibits were tendered by their makers themselves, and there was no change of hands.

Regarding the **2nd ground**, which asserted that PW2 and PW4 were not credible due to contradictory testimonies, Mr. Hurubano addressed the basis of this ground—the discrepancy in the number of agendas discussed in a village meeting. He considered the contradiction minor, emphasizing that both witnesses agreed that the sale of gas pipelines was one of the agendas. He also dismissed the variation in evidence about the second

appellant's presence at the meeting as minor, citing the Court of Appeal of Tanzania's (hereinafter CAT) case of **DICKSON ANYOSISYE V. REPUBLIC** Crim Appeal No 155 of 2017, which acknowledged that witnesses may not remember every detail. Mr. Hurubano prayed for the dismissal of this ground.

Concerning **the 3rd, 4th, 5th, 6th, 7th, 8th, 10th, and 11th grounds**, all asserting that the case was not proved beyond reasonable doubt, Mr. Hurubano contended that all three counts were proven beyond reasonable doubt. For the 1st count of "Abuse of position" against the first appellant, he listed the three elements that needed proof (namely: 1. That the accused had powers 2. Such power had been abused and 3. That there was intention to gain profit) and argued that all were established in the proceedings.

The learned State Attorney stated that the first appellant, as a Village Chairman, abused his position by **selling gas pipelines belonging to TPDC to the second appellant** for a profit of TZS 2,000,000. He noted the lack of an explanation for the use of the money and the uncertainty about the value of the pipelines.

For the second count, damaging a property used for providing necessary service, Mr. Hurubano outlined the two elements to be proven. He argued that the pipelines were used for necessary services according to the definition in the EOCA and that they were destroyed, with the appellants responsible for the destruction. He cited testimony from PW6 and PW5 to

support his argument, concluding that the offense was proved beyond a doubt. Mr. Hurubano prayed for the dismissal of all these grounds.

On the **3rd count, involving occasioning loss**, Mr. Hurubano stated that the prosecution needed to prove two main elements: first, that TPDC is a specified authority, and second, that TPDC had incurred loss. He mentioned that the trial court's proceedings included a valuation report, admitted as exhibit P1, which indicated the value of the destroyed infrastructure as TZS 109,420,000.

Mr. Hurubano added that, according to section 2 of the EOCA, TPDC was defined as a specified authority. Consequently, he prayed for the dismissal of this ground.

Concerning **the 9th ground of appeal**, where the appellants claimed the trial court failed to evaluate the evidence, Mr. Hurubano asserted that the ground had no merit. He argued that the trial court's judgment demonstrated a diligent effort to evaluate the evidence. However, the learned State Attorney acknowledged that if the court found otherwise, it should use its authority as the first appellate court to re-evaluate the evidence.

On the **12th ground, related to the failure to call a material witness** (informer), Mr. Hurubano invoked **section 143 of the Evidence Act Cap 6 RE 2019**, stating that there was no specific requirement for the number of witnesses to prove a case. He referred to the CAT case of **PAULO ANDREA @MBWILANDE AND ANOTHER V. R.** Crim Appeal No 613 of

2020 CAT, Bukoba, where it was asserted that summoning an informer was not necessary as informers needed protection.

Moving on, the learned State Attorney addressed the four additional grounds of appeal as follows: Regarding **the 1st additional ground**, which claimed that the trial magistrate erred in convicting the appellants without summoning the owner of the property, Mr. Hurubano argued that the ground had no merit. He referred to the testimony of PW1 and PW7, which indicated that the pipes belonged to TPDC. He further emphasized that, in addressing the elements of the crimes, there was no requirement for summoning the owner, especially in theft offenses. Mr. Hurubano mentioned a case cited by the appellants, **ASHA SWALEHE UMMY @DIAMOND V. R.** Crim Appeal No 74 of 2021 HCT, Mtwara, which was on armed robbery, and prayed for the dismissal of this ground.

On the **2nd additional ground**, claiming that the trial magistrate erred in convicting the appellants without the witness who conducted the valuation proving possession of the requisite qualifications, Mr. Hurubano asserted that the ground had no merit. He argued that PW7 had explained his qualifications, referring to page 67 of the proceedings where the witness detailed how he arrived at the valuation figure. He prayed for the dismissal of this ground.

Regarding **the 4th ground**, asserting that the punishment of 20 years' imprisonment and an order to pay compensation of **TZS 54,710,000/=** is excessive, Mr. Hurubano contended that the ground had no merit. He explained that the sentence of 20 years' imprisonment was

derived from **section 60(2) of the EOCA**, falling under the Minimum Sentence. Mr. Hurubano noted that these sections allowed the court to order compensation. He prayed for the dismissal of this ground as well.

The 1<sup>st</sup> Appellant began by expressing gratitude to the learned State Attorney for his submission and conveyed confidence in the court. The grounds submitted were asserted to be based on the law, and he prayed for their reception. Additionally, he requested the suspension of the sentence to enable their release and reunion with their families.

The 1<sup>st</sup> appellant claimed that the case was not genuine and alleged that it had been framed by the prosecution. He argued that the presented evidence was fabricated.

Concerning the chairmanship, he denied abusing his position and contested the validity of the witnesses' claims that he called a meeting. According to him, these witnesses failed to identify the essential elements of a meeting, such as agenda, attendance, and signatures of attendees. He pointed out that PW2 confirmed not writing minutes, providing vague reasons known only to herself.

The 1<sup>st</sup> appellant highlighted the Tanzanian laws requiring documentation for meetings, emphasizing that the trial court did not demonstrate that any witness possessed such documents. He argued that this failure indicated the unreliability of the evidence presented.

The 1<sup>st</sup> appellant also mentioned that PW1 admitted his evidence was hearsay, undermining its credibility. Discrepancies among PW3, PW4, and

PW5 regarding the meeting agenda and announced amount of money further led him to assert that the evidence was not accurate.

In conclusion, the 1<sup>st</sup> appellant prayed for the court to overturn the judgment, leading to their release and reunion with their families.

The 2<sup>nd</sup> Appellant, on his part, prayed that the esteemed court would accept their grounds of appeal and release them, emphasizing the desire to reunite with their families. The Second Appellant pointed out that PW1 admitted his evidence was hearsay, and PW8 also acknowledged receiving the name from the village chairman (First Appellant). Contradicting this, the village chairman had testified that he never knew the Second Appellant and had never had any dealings with him.

The 2<sup>nd</sup> Appellant on his part, highlighted that PW3, while claiming to know both, could not identify him. As a result, he and the 1<sup>st</sup> Appellant prayed for their acquittal.

I have dispassionately **considered the grounds of appeal**, rival submissions, and the lower court's records. My role as the first appellate court is to re-evaluate the evidence tendered in the trial court and come up with my own findings if necessary. See **LEORNARD MWANASHOKA V. REPUBLIC** Crim Appeal No 226 of 2014 CAT.

The main complaint of the appellants which features repeatedly in **the 3rd, 4th, 5th, 6th, 7th, 8th, 10th, and 11th grounds**, is alleged inability of the prosecution to prove the case beyond reasonable doubt. Our criminal justice requires that the prosecution case is proved beyond reasonable doubt. This duty rests on the prosecution. See **WOODMINTON V. DPP**



[1935] AC 462. As meticulously stated by the learned trial Magistrate, the term proof beyond reasonable doubt has not been defined in statutes. In the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993] TLR 219 the CAT held that

*"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strongly against the accused as to leave a remote possibility in his favour which can easily be dismissed."*

I will confine my analysis to this ground as I am convinced that the same is capable of disposing of the entire appeal. After a careful examination of the lower court records, I can say that the whole case is mired with a lot of doubts on the side of the prosecution, which doubts should have been carefully considered by the trial court.


I have tried to imagine a typical Tanzanian Village. How can a chairman call a meeting and assert that he was instructed by the TPDC to sell its infrastructure and members of the village council accept outrightly? That kind of village is inconceivable to me. My understanding is that villagers in Tanzania are extremely well informed of their obligation to protect government property. This is especially the case, I suppose with *mioundombinu ya gesi* as they are known locally. I am also alive to the fact that villages in Tanzania work closely with Ward Administrations and District Councils. I cannot imagine that all prosecution witnesses accepted to assertions of the first appellant without checking with the Ward and District leaders. I cannot envision such an omission.

The 1<sup>st</sup> appellant has been particularly diligent in protesting his innocence. He went as far as claiming that the charges were politically motivated because he was a *veteran* Village Chairman who was aspiring to contest the Ward Councillor's *Udiwani* position in his ward. I cannot make any inference on that unsubstantiated claim though. However, the 1<sup>st</sup> appellant has convincingly argued that witnesses' claims that he called a meeting was false because they all failed to identify the essential elements of a meeting, such as agenda, attendance, and signatures of attendees.

Premised on the above, it is my finding that the prosecution case was not proved to the required standard. Consequently, I allow the appeal. I set aside the sentence and all orders emanating from the judgement of the trial court. Further, I order that the **appellants be released from prison forthwith unless** they are being held for any other lawful cause.

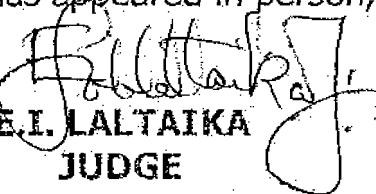


It is so ordered.

  
E.I. LALTAIKA  
JUDGE  
30.10.2023

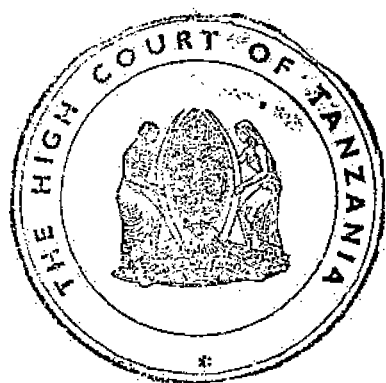
Judgment delivered under my hand and the seal of this Court this 30<sup>th</sup> day of October 2023 in the presence of Mr. Steven Aron Kondoro, learned State Attorney and the appellant who has appeared in person, unrepresented.

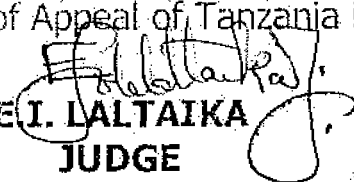


  
E.I. LALTAIKA  
JUDGE  
30.10.2023

## Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.



  
**E.I. LALTAIKA**  
**JUDGE**  
**30.10.2023**