IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO 3663 OF 2024

(Arising from Economic Case No.10 of 2020 in the District Court of Dodoma at Dodoma and delivered by Hon Tungaraja, N.J. SRM)

AZIZA BADRU MWANJE .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date of Last Order: 09/05/2024

Date of Judgment: 23/05/2024

LONGOPA, J.:

The appellant, one **Aziza Badru Mwanje**, is appealing against the conviction and sentence of 20 years imprisonment and payment of **TZS 35,000,000/=** to UCSAF as compensation for the loss suffered for occasioning loss to a specified Authority contrary to Paragraph 10(1) and (4) of the First Schedule to and Section 57(1) and 60(2) both of the Economic and Organised Crime Control Act, Cap 200 R.E. 2022.

The appellant was an employee of the Universal Communication Service Access Fund (UCSAF) in the capacity of the Finance Officer and on

diverse dates between 14th February 2020 and 2nd March 2020 by her wilful act, did cause pecuniary loss to UCSAF amounting to TZS 37,573,274/= (say Tanzanian Shillings Thirty-Seven Million Five Hundred Seventy-Three Thousand Two Hundred and Seventy-Four only. The prosecution called a total of nine (9) witnesses and thirteen Exhibits. However, the appellant did not enter defence and the case proceeded under Sections 226 and 227 of the Criminal Procedure Act, Cap 20 R.E. 2019. The trial court convicted the appellant for having occasioned loss worth TZS 37,573,274/= to the specified authority namely the Universal Communication Service Access Fund.

The appellant being dissatisfied and aggrieved by the decision of the District Court of Dodoma at Dodoma dated 31st January 2024 delivered by Tungaraja, N.J. SRM, appealed against the whole decision on the following grounds, namely:

1. *That, the trial court erred in law and in fact by convicting the appellant without considering that the prosecution failed totally to prove their case beyond reasonable doubt.*
2. *That, the trial court erred in law and fact by convicting the appellant while knowing that they have already executed civil remedy to recover the same amount claimed to be loss to the specified authority.*

3. *That the trial court erred in law by convicting the appellant instead of exhausting civil remedies and administrative measures as provided by the law.*
4. *That the appellant was denied the right to be heard by the trial court without sufficient cause.*
5. *That, the whole proceedings marred by procedural irregularities hence make the whole matter a nullity.*
6. *That, the trial court erred in law and in fact by convicting the appellant by ordering payment of TZS 35,000,000/= without any proof.*
7. *That the alleged sum ordered to be paid already deducted from the appellant monthly salary therefore conviction is double punishment.*

To argue the appeal, the appellant enjoyed the legal services of Mr. Godfrey Wasonga, learned advocate and the respondent was represented by Mr. Francis Mwakifuna, learned State Attorney. On 09/05/2024, the parties appeared before me for viva voce submission on the appeal.

In respect of 6th ground, the appellant argued that the trial court erred in ordering compensation of TZS 35,000,000/= while the charge and evidence on record revealed that loss occasioned was TZS 34,573,274/=.

For the 2nd, 3rd and 7th grounds, the appellant submitted that: one, there was non-compliance to section 4(3) of the Criminal Procedure Act that requires to exercise civil remedy route before preferring criminal procedure. Second, the whole amount has been recovered through deductions of appellant's salaries. Third, the prosecution witnesses did not dispute that appellant requested to repay through deduction of salaries. Fourth, the employer ought to have accorded the appellant request to treat the money lost as personal imprest thus recoverable as imprest under Regulation 103 of the Public Finance Regulations, GN No 132 of 2001.

On the 4th ground, it was argued by the appellant that right to be heard of the appellant was violated. The appellant was prevented by sickness which was sufficient cause for the trial court to allow appellant to defend herself thus the conviction in absentia ought to have been set aside. According to the appellant, the proceedings are nullity.

On the 5th ground on irregularities there are two aspects. First, the evidence PW 6, PW 7, and PW 8 was nullity for non-compliance to section 80 of the Evidence Act regarding banker's book. Thus, that evidence ought to be expunged. Second, the charge was defective for charging the transactions that were unrelated in the same count.

For these grounds, it was submitted that the case against the appellant was not proved to the required standard. It was argued that there was no proof of loss of TZS 3,000,000/=. Also, upon expunging the evidence of PW 6, PW 7 and PW 8 there is no sufficient evidence to prove the offence of occasioning loss to specified authority. It was the appellant's prayer that the remedy is nullification of the proceedings of the trial court and setting aside the sentence against the appellant. Also, this Court should direct that exhaustion of civil or administrative remedies be taken as the appropriate course.

Alternatively, appellant prayed that this Court remit the matter to the trial court for hearing or trial of the defence case to afford the right to be heard to the appellant by allowing her to enter defence.

The respondent objected the appeal and stated that in respect of compensation the order was appropriate as total loss occasioned was more than that amount of compensation order.

Regarding application of section 4(3) of the Criminal Procedure Act, respondent argued that the matter was of criminal nature as it related occasioning loss to the specified authority which is a criminal offence. UCSAF took appropriate action to report the same to the police for criminal investigations to take its course.

On repayment of the used amount through salary deduction and request to pay them through recovery of sums received including the salary, it was submitted no amount has been recovered. The appellant was interdicted, and the law requires that once an employee is interdicted then that person is entitled to half of the salary during pendency of the criminal proceedings or disciplinary action. Interdiction requires immediate reporting to police station about the offence that led the employer to interdict.

On the right to be heard, it was argued that trial court was proper to proceed with the case in absentia against the appellant. The appellant and her sureties absconded from appearing to Court for entering defence without any justifiable reasons. Neither the appellant nor her sureties did appear four times consecutively from July to October 2022 when the matter was adjourned severally to allow appearance of the appellant.

On irregularities, respondent argued that there were no issues with testimonies of PW 6, PW 7 and PW 8 as the same was not banker's book thus it was properly received in the trial court. Also, it was argued that the transactions were of similar character and related thus properly charged in the same charge.

Regarding proof of the case, it was submitted that the prosecution evidence was watertight to warrant conviction of the appellant for the offence of occasioning loss to specified authority that she stood charged.

Having heard submissions by parties in respect of the grounds of appeal, I have dispassionately considered rival submissions, grounds of appeal and record to satisfy myself on the merits of the appeal. I shall address the grounds as presented.

The first ground to be addressed is that on the right to be heard. In respect of the right to be heard, it is settled law that any decision made without affording the parties right to be heard is a nullity. However, there are circumstances that cannot be said there was denial of the right to be heard. This is when a person is afforded the opportunity to adduce defence evidence but decides to remain silent or where he absconds oneself without a reasonable cause at the time such person is called upon to defend oneself.

In the case of **Director of Public Prosecutions vs Rajabu Mjema Ramadhani** (Criminal Appeal No. 223 of 2020) [2023] TZCA 45 (23 February 2023) (TANZLII), at pages 9-10, the Court of Appeal stated that:

> *Time without number, the Court has consistently insisted on the need to guard against contravention of the right to*

*be heard (audi alteram partem) in adjudicating the rights of parties. It is a rule against a person being condemned unheard. Any decision arrived at without a party getting an adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard. [See - J**ohn Morris Mpaki vs The NBC Ltd and Ngalagila Ngonyani,** Civil Appeal No. 95 off 2013 (unreported) and T**abu Ramadhani Mattaka vs Fauzia Haruni Said Mgaya** (supra)]. To show how deep rooted is the principle, the Court, citing with approval the English case of **Ridge v. Baldwin** [1964] AC 40 in the case of **Mbeya - Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251 observed that: "In this country, natural justice is not merely a principle of common law; It has become a fundamental constitutional right Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law, and declares in part: Wakati haki na wajibu wa mtu yoyote vinahitajika kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..."*

Indeed, this position of the law presents a general rule that any person whose rights and obligations are subject of determination that person must be afforded all the opportunity to rebut allegations levelled against him.

In the context of criminal trials, right to be heard is expected to be reflected in the proceedings in different manner. First, the attendance, hear and cross examine the witnesses of the prosecution. Second, right to be afforded right to defend oneself and call witnesses. Third, right to have a say before a sentence is imposed in form of mitigation. Fourth, in case there is change of the trial magistrate while the hearing was ongoing, the accused should be able to say whether hearing should start afresh or proceed from where the previous trial magistrate ended.

In the instant case, there were series of events that lead the appellant not to defend oneself. First, the appellant was granted bail prior to commencement of hearing of the prosecution's case. Second, throughout the hearing of the prosecution's case the appellant attended the court thus prosecution evidence was tendered in her presence. Third, on 22/06/2022 after conclusion of the hearing of prosecution case, trial court ruled that a prima facie case was established against the appellant. The trial court addressed fully the accused person (appellant) on her rights under section 231 of the Criminal Procedure Act, Cap 20 R.E. 2022 and

upon understanding the rights the appellant stated that she would defend herself on oath/affirmation, and that she would call witnesses and exhibits. As such, defence case hearing was scheduled on 25/07/2022 in presence of the appellant and her advocate. Fourth, the appellant did not appear, nor her sureties ever appeared to court for period of four months, at least to inform the court what befell the appellant.

It is on record that on 25/07/2022 the appellant was absent without any notice. The matter was adjourned to 09/08/2022. On that 09/08/2022 both the appellant and her counsel were absence in Court. The matter was adjourned to 16/08/2022. On the material date i.e. 16/08/2022, both the appellant and his counsel were absent.

Moreover, the on 06/09/2022 when the matter was scheduled for hearing for the fourth time, the appellant was not in court while her counsel was present. On this date arrest warrant was to issue and hearing was adjourned to 27/09/2022. It was not a different story on this date as well. Neither the appellant nor her counsel appeared, nor any reasons adduced.

It was until 03/10/2022 when the counsel for the accused did inform the court that appellant herein was allegedly mentally sick. It is on this material date that trial court ruled that the accused person had jumped

bail, and she has not resurfaced in court personally or her sureties to inform the court about the absence. The trial court noted that accused person had not appeared since 25/07/2022, thus the Court ordered the matter to proceed under section 227 of the Criminal Procedure Act.

Moreover, on 28/10/2022, in presence of Counsel for accused the judgment was delivered. Some seven months later, the appellant was arrested, and arraigned in court for sentencing. On 17/05/2023, the trial court addressed the appellant in terms of the provision of section 226(2) of the Criminal Procedure Act. At this juncture, the convict stated that she has been sick but provided no further particulars nor proof of sickness.

In the case of **Shija Ndali @ Matongo vs Republic** (Criminal Appeal No. 52 of 2021) [2023] TZCA 17744 (6 October 2023) (TANZLII), at pages 8-9, the Court of Appeal provided a guidance on cause of action in circumstances. It stated that:

> *There is no doubt that the appellant's situation when he appeared and explained about his absence in the trial court was, in our considered view, better off without conviction than the situation envisaged in the plain meaning of the provision of section 226 (2) of the C.P.A. which plainly envisions one who has already been*

convicted in absentia. We have had dealt with more or less similar situations involving section 226 of the C.P.A. and underlined what the trial court ought to do in the circumstances where an accused person appears in the trial court after being absent and being convicted in absentia. In dealing with such situations, we considered and clarified the right of an accused person whose trial and conviction proceeded under sections 226 and 227 of the C.P.A., and the duty the law imposes on the trial court to ask one who had absented from his trial whether he had any explanation for his absence and a probable defence on the merit. See, ***Marwa s/o Mahende v. Republic*** *[1998] T.L.R. 249;* ***Lemoyo Lenuna and Lekitoni Lenuna v. Republic*** *[1994] T.L.R. 54; and* ***Norbert Komba v. Republic*** *(Criminal Appeal No. 226 of 2008) [2014] TZCA 163;* ***Fweda Mwanajoma and Another v. Republic*** *(Criminal Appeal No. 174 of 2008) [2010] TZCA 96 and* ***Magoiga Magutu @ Wansima v. Republic*** *(Criminal Appeal No. 65 of 2015) [2016] TZCA 608. We gathered from such authorities the principle that an accused person whose trial and/or conviction were conducted in absentia must upon appearing before the trial court, be accorded a right to explain why he had absented*

himself and whether he had a probable defence on the merit before the trial court may determine whether to set aside the conviction and sentence.

Indeed, the trial court did lucidly address the appellant on her rights under the required provision of the law to avail her opportunity to explain herself so that trial court can determine the best course to take. There was nothing to substantiate the claim of sickness. The trial court found that there was no probable defence on the appellant's absenteeism to appear in her defence.

Further, even though the appellant had indicated that she would call witnesses, the counsel for accused found it appropriate not to bring any witnesses to court to testify in support of the defence case while the appellant was allegedly indisposed.

It is from these circumstances that trial court entered sentence on the appellant having satisfied itself that there was no probable justification for the failure by the appellant to appear in court to enter her defence. This exercise of discretionary powers of the court was correct and in accordance with the law.

On the other limb of the right to be heard as I have pointed out, the appellant was afforded the opportunity to cross examine all the

prosecution's witnesses. That is on record that appellant did cross- examine all the prosecution's witnesses on pages 28-29, 31-32, 36-37, 44, 51-52, 55-56, 59 69, and 74-75 of the typed proceedings.

It is lucid from this analysis that the question of the right to be heard was not violated by the trial court. The court acted properly within its mandate to afford opportunity to the appellant to enjoy the right to be heard. Trial court cannot be faulted on this ground. It is lawfully under sections 226 and 227 of the Criminal Procedure Act and section 47(4)(c) of the Economic and Organised Crime Act, Cap 200 R.E. 2022 that affording the right to be heard is fundamental except where the accused is disruptive or absconds. In the instant appeal, there was abscondment of the appellant when required to enter defence without any reasonable justification. Thus, the 4th ground of appeal collapses for being destitute of merits.

The 6th ground is challenging conviction and order for compensation/repayment of TZS 35,000,000/= on basis of lack of proof as the charge had categorically stated that the amount that appellant caused was 34, 573,274/= thus the compensation order of an amount that was not proved is uncalled for. This ground is not difficult to dispose.

It is the law that where there is occasioning loss to a specified authority an order of compensation may be ordered by the court upon conviction of the accused person. However, the amount of compensation should not exceed the loss occasioned. That is the position in Paragraph 10(4) of the First Schedule to the Economic and Organised Crime Act, Cap 200 R.E. 2022. It states that:

> *(4) Where the Court convicts a person of an offence under this paragraph, it shall, in addition to any other penal measure it imposes, order such person to pay to the specified authority compensation of an amount not exceeding the amount of the actual loss incurred by the specified authority and in assessing such compensation the Court shall have regard to any extenuating circumstances it may consider relevant.*

Indeed, there is similar import on the Penal Code. Section 284A (6) of the Penal Code states that:

> *(6) Where the court convicts a person of an offence under this section,* ***the court shall order that person to pay the specified authority compensation of an amount not exceeding the amount of the actual loss incurred by the specified authority*** *and in assessing*

the compensation the court shall have regard to any extenuating circumstance it may consider relevant.

The order of compensation is recognised under the Tanzanian law for the offence of occasioning loss to the specified authority. The order is mandatory order in additional to any other penal sanction imposed on the convict.

The rival submissions are to the effect that charge against the appellant was for 34, 573,274/= and the evidence available on record. That was the submission by the appellant both in chief and in rejoinder. On the other hand, the respondent argued that total amount that appellant occasioned loss is TZS 37, 573,274/= and that the compensation amount as stated lucidly in page 13 of the trial court's judgment was within the permissible range.

It is one record that the charge instituted in Court in 2020 contained amount which was occasioned loss was TZS 34,573,274/=. However, it appears that after the respondent had reviewed all the available records sometimes in September 2021 before hearing of the case commenced did amend the charge to reflect the amount lost to be TZS 37,573,274/=.

This was through the prayer to amend the charge and order of the court that permitted amended charge to be substituted, read over, and explained to the accused person. This was in line with the provisions of section 234 of the Criminal Procedure Act, Cap 20 R.E. 2019.

The duty of the prosecution to amend charge at any stage has been elucidated in the following words of the Court of Appeal in **Francis Fabian @ Emmanuel vs Republic** (Criminal Appeal No. 261 of 2021) [2023] TZCA 17936 (12 December 2023) (TANZLII), at pages 4-5, the Court noted that:

> *Moreover, it is a duty of the prosecution to produce all necessary evidence to each and every allegation made therein. In the case of* ***Abdel Masikiti vs. Republic,*** *Criminal Appeal No. 24 of 2015 (unreported) at page 8 thereof, this Court insisted that,* ***it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates or month, then the charge must be amended in terms of section 234 of the CPA. If this is not done as in this appeal, the preferred charge will remain unproved, and the***

accused shall be entitled to an acquittal. Short of that a failure of justice will occur.

It should not be overemphasized that the prosecution being the initiators of the charge have been empowered by the law to amend the charge at any stage of the trial to address the anomaly on variance between charge and evidence under section 234 of the Criminal Procedure Act, Cap 20 R.E. 2019. Failure to seize such opportunity to amend the charge before the conclusion of the case has only a single effect of failure to prove the charge thus the accused is entitled to acquittal.

This position was reiterated in **Frenk Onesmo vs Republic** (Criminal Appeal No. 476 of 2020) [2024] TZCA 41 (14 February 2024) (TANZLII), the Court of Appeal observed on difference of charge and evidence. At page 11, it stated that:

We propose to decide another issue relating to the evidence being at variance with the charge which was argued by the learned State Attorney. We are in agreement with her that, while the particulars of the offence alleged that the offence of rape was committed between 22nd May, 2017 and 22nd August, 2017, the victim testified that her sexual relationship with the appellant started in April

*2017. T**hus, had the prosecution found this variance, they ought to have amended the charge in terms of section 234 (1) of the CPA. However, the prosecution did not comply with the law and therefore the charge remains unproved.** See also; **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No. 175 of 2018 (unreported).*

That being the case, in the instant appeal things are different. On 15/09/2021, the respondent did amend the charge to reflect the amount that appellant occasioned loss to be TZS 37,573,274/=. In fact, this amount arose out the Special Audit report that revealed that apart from TZS 34,573,274/= that was admitted by the appellant, there was another cheque of TZS 3,000,000/= which was also paid to the appellant and the amount was not used as the same cancellation of activities envisaged befell the person entitled to payment of that amount.

It is this amount that all the respondent's witnesses testified to before the Court. The testimonies of PW 1, PW 2, PW 3, PW 4 and PW 5 had a common theme that total amount which was occasioned loss by the appellant is TZS 37,573,274/=. Exhibits P 1, P2, P3 and PW 4 indicated that total amount that appellant was allowed to withdraw in her name to facilitate the specified authority's planned activities. Exhibit P5 cements it

all. It is an audit report that reveals categorically that from total amounts collected by the appellant under Exhibits P1-P4 inclusive and the amount remained unaccounted for by the appellant is TZS 37,573,274/=. It is on record that Exhibit P5 which is a special audit report was never objected during admission.

The same was corroborated by the evidence of PW 6, PW 7 and PW 8 who testified to have seen and cashed the cheques to the appellant at Bank of Africa (T) Dodoma Branch on diverse dates of February and March 2020.

From the undisputed evidence on record total amount that appellant occasioned loss is TZS 37, 573,274/= and not 34, 573, 274/= as the appellant wished this Court to believe. In fact, the latter is the amount that appellant admitted having used and promised to repay through her salaries. The evidence on record proved the loss of TZS 37, 573, 274/= as per charge that the appellant stood charged.

It was therefore, correct and within the ambits of the law for the trial court to order compensation of TZS 35,000,000/= to the specified authority as the same does not exceed the loss occasioned. The 6th ground of appeal collapses for lack of tangible merits.

The next set of the grounds is on the application of civil remedies and recovery of the amount occasioned loss by the employer thus there was no need for criminal prosecution. It was argued by the appellant that: First, the employer has recovered all the money through deductions in the appellant's salary. Second, that it was wrong in law to prosecute the appellant on the same matter as it would be double jeopardy. Third, that the Criminal Procedure Act allows use of civil remedies instead of criminal charges and the appellant was willing to repay through her salaries as an imprest.

These arguments are not supported by the respondent. They are of the view that: first, the occasioning loss is not a matter of civil nature rather it is a crime. Second, that the appellant being a public servant is governed by the public service law and regulations. Thus, the appellant upon admission to have occasioned loss was interdicted as per Order F.30 of the Standing Orders for Public Service, 2009.

It is on record that the appellant was entrusted with funds that were to be applied towards accomplishment of certain activities of public nature. It is not disputed that such activities were cancelled, and the money was not spent for purposes that the same was withdrawn for.

I do not share the view that this matter is of civil nature. I am of the view that it is criminal in nature. Appellant as Finance officer was duty bound to ensure that all the monies entrusted to her for specific assignments were utilized for that purpose. Diverting the same to unknown use is what brings criminality i.e. occasioning loss to specified authority. It meant that at the time Universal Communication Service Access Fund (UCSAF) needed to use the money the same was not available as the appellant did not deposit them to bank following cancellation of the planned activities. That situation, it was proper to use the criminal processes to address the anomaly.

It needs not to be overemphasized that occasioning loss to specified authority is not only a criminal offence but also considered as economic offence under the Economic and Organised Crime Control Act, Cap 200 R.E. 2022. It is the position of the law that when offence is termed to be economic offence the same is treated as a serious offence.

I concur that the Public Service Act, regulations, and standing orders for public service provide for mechanisms to deal with public servants who commit criminality. Order F. 30 (1) and (2) of the Standing Orders for Public Service, 2009 provides for the manner of dealing with offending employee. It states that:

> *(1) If in any case the disciplinary authority considers that it is in the public interest that a public servant should cease*

forthwith to perform the duties and functions of his office, the disciplinary authority or any delegated disciplinary authority, as the case may be, ***may interdict that public servant from performing the duties and functions****.*

(2) Without prejudice to the provision of paragraph (1), ***a public servant charged with a criminal offence may be interdicted pending a final determination by a court and any appeal thereto.***

Interdiction meant to ensure that offending employee is released from duties pending the hearing of the case. It is a temporary removal of a public servant from exercising the duties of his office.

The effect of interdiction to the remuneration of the employee is categorically provided for in the Standing Orders for the Public Service, 2009. Order F. 30 (4) provides that interdicted public shall received salary that is not less than half of the salary during the interdiction period. It is the law that half of the salary that is deducted salaries remain the property of the interdicted employee until and after the finalization of either criminal proceedings or disciplinary charges.

It is clear from the legal position governing public servants facing criminal charges that half of the salary of the employee is withheld during pendency of such criminal or disciplinary proceedings and the same shall be recovered by the employee upon termination of either criminal charges or disciplinary proceedings. I cannot agree with counsel for appellant that what happened is application of civil remedies by recovery of the amounts through deductions in appellant's salary thus the appellant ought not to have been charged.

Regarding the question of treating the money occasioned loss as a personal imprest to the appellant thus could be recovered under Regulation 103 of the Public Finance Regulations, GN No 132 of 2001 dated 2nd July 2001, it is my settled view that conversion of the use of the money by the appellant being unlawful could not be recovered as if it was personal imprest. Public funds must always be accounted for. That is a reason for that Regulation to provide time limit and means of recovery for lawfully issues person imprests. It requires that any imprest issued and not retired by the end of the financial year must be accounted for and reported to oversight institution including the Accountant-General.

It is on record that appellant's superiors and the Chief Executive Officer of UCSAF refused to allow treatment of the amount occasioned loss by the appellant to be deducted from salaries of the appellant. Thus, a

request that is not approved could not form basis for one to claim as if it was of right to use the proposed recovery measure. It would amount to countenance criminality. I shall therefore at this juncture dismiss the 2nd, 3rd and 7th grounds of appeal.

In respect of irregularities, there are two divergent views on the testimonies of PW 6, PW 7 and PW 8 who are officers from the Bank of Africa (T) Ltd, Dodoma Branch. The second aspect relate to charging the appellant in contravention of section 131 and 132 of the Criminal Procedure Act, Cap 20 R.E. 2022.

The aspect relating to charge, the appellant argued that the offences for s whose loss occasioned TZS 34,573,274/= while that leading to loss of TZS 3,000,000/= happened at a different timing and they were of different character. There ought to have been a separate count thus need for two counts to separate the occasions that were different. According to the respondent, the facts constituting the offence were done in the similar transaction. The provision of section 133 of the Criminal Procedure Act, Cap 20 allows to charge facts founded on the same or similar character of the commission of the offence in the same count.

The relevant provision of the law provides that:

133.-(1) Offences may be charged together in the same charge or information if the offences charged are founded on the same facts or if they form or are a part of, a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

To ably address this aspect of whether the charge was proper, it is important to review the available records. The amended Charge dated 15/09/2021 reveals that the appellant on diverse dates between 14th February 2020 and 2nd March 2020 at the University of Dodoma area within the City and Region of Dodoma, being employee of Universal Communication Service Access Fund in capacity of Finance Officer, by her willful act, did cause her employer to suffer a pecuniary loss of Tanzanian Shillings Thirty Seven Million Five Seventy Three Two Hundred and Seventy Four (TZS 37, 573, 274/=) only by taking the above said amount of money which is the property of employer and used it for her personal gain.

The charge forms the cornerstone of any criminal case in subordinate courts in particular the district and resident magistrates courts. The role of the charge was categorically analysed in the case of **Francis Fabian @**

Emmanuel vs Republic (Criminal Appeal No. 261 of 2021) [2023] TZCA 17936 (12 December 2023) (TANZLII), at page 3, the Court of Appeal reiterated on the crucial role of the charge. It stated that:

> *In the circumstance of this appeal, we want to sound a note on the propriety of proving the contents of the charge sheet. We presuppose, it is an elementary knowledge of criminal justice that, the cornerstone of any criminal trial is the charge sheet.* ***The charge sheet is a heart, brain and blood of criminal justice and fair trial. It plays a duo role of informing the accused person on the nature of his accusation and allow him to prepare his proper defense.*** *Apart from that, the charge sheet notifies the trial court on the subject matter with a view to determining its jurisdiction and prepare the proper procedure to be applied during trial. Therefore, the charge sheet is the most important document in any criminal trial.*

The evidence on record, in particular PW 1, PW 2, PW 3, PW 4 and PW 5 reveals that same exactly amount. Exhibit P. 5 is categorically that the two related transactions were for the same purposes. The money intended to be applied to facilitate trainings that were cancelled. Similarly, Exhibits P1 to P4 inclusive, and Exhibit P8 to P 11 inclusively reveal that the

transactions occurred between 14th February 2020 to 2nd March 2020.Specifically, the Exhibits P 8 and P11 indicate that the cheques were drawn on 14th February 2020 for that worth TZS 3,000,000/= and three remaining cheques were drawn on 21st February 2020.

In the payment vouchers, Exhibits P1 to P 4 inclusively reveal that purpose of payment was to facilitate activities related to training. All testimonies of PW 1 to PW 5 revealed that the money was intended to facilitate training that were planned but cancelled because of COVID 19 outbreak.

Guidance on the question of defectiveness of the charge is found in the case of **Joakim Mwasakasanga vs Daniel Kamali & Others** (Criminal Appeal No. 412 of 2020) [2023] TZCA 55 (24 February 2023) (TANZLII), where it was stated as follows:

> *Normally it is the accused who would raise the complaint of a defect in the charge, be it during trial or on appeal. Courts have dealt with such complaints in two ways depending on the circumstances of each case. One, by sustaining the complaint where they take the view that the accused will be prejudiced by the defect. See the case of* ***Antidius Augustine v. Republic,*** *Criminal Appeal No. 89*

of 2017 (unreported). ***The other way is by treating the defect as curable and inconsequential where they are satisfied that it does not occasion a miscarriage of justice or prejudice the accused. The latter is a more contemporary position of the law, but always depending on the circumstances.*** *See the case of* ***Abubakari Msafiri v. Republic,*** *Criminal Appeal No. 378 of 2017 (unreported).*

As record indicates that the substituted charge was on 15/09/2021 was read over and explained to the appellant who was invited to plead and that all facts of the case were enumerated before the appellant was availed opportunity to admit or otherwise to each of the facts, there was no miscarriage of justice justifying treatment of the charge to be defective. I hold that the charge against the appellant was proper and there was no need of separation of the two incidents into different counts.

On the evidence of PW 6, PW 7 and PW 8 that are not compellable witnesses as there was no court order to summon their appearance in Court, the appellant considers that testimonies of these witnesses as nullity for contravening the provision of section 80 of the Evidence Act. The respondent is of the view that they were both competent and compellable

witnesses. According to the respondent, oral testimony is not restricted except if the same is banker's book.

I have perused the record of the trial court and found that evidence of PW 6 and PW 7 are forming one set of the evidence while PW 8 provided another set of evidence. PW 6 and PW 7 testimonies are to the effect that they are the ones who met the appellant, received the respective cheques in name of the appellant, verified from the cheque list and encashed the money to the value presented in each cheque. This evidence relates to seeing the occurrence of a fact. It is evidence from the persons who saw it.

The evidence of PW 6 and PW 7 is direct evidence under the provisions of Section 62(1)(a) of the Evidence Act. It is evidence from the persons who saw the cheques being presented and effected the encashment of the same.

What is restricted under Section 80 of the Evidence Act is the banker's book where the bank is not party to the case. It provides that:

> *80.* ***A banker or officer of a bank shall not****, in any legal proceedings to which the bank is not a party,* ***be compellable to produce any banker's book the***

contents of which can be proved under this Act, *or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a court made for special cause.*

The testimony of PW 8 seems to fall squarely on this banker's book as PW 8 testified to the effect that she was a Branch Manager of the Bank of Africa (T) Limited. PW 8 did not deal with the appellant in respect of any payments. PW 8 testified as to banker's book and transactions recorded in the banker's book. Thus, testimony of PW 8 including Exhibit P12 were received in contravention of section 80 of the Evidence Act, Cap 6 R.E. 2022. I therefore expunge the testimony of PW 8 from the record.

However, my assessment and evaluation of the remaining evidence on record is still watertight to warrant conviction of the appellant. Thus, it has not impaired the evidence of the prosecution. On this aspect, I shall proceed to dismiss the 5th ground of appeal for lack of merits.

Regarding proof the case beyond reasonable doubt, the opinions are divergent. The appellant argued that there was no proof of the case to the required standard. The respondent argued that testimonies of the prosecution witnesses established the offence of occasioning loss to specified authority.

In the case of **Syridion Michael vs Republic** (Criminal Appeal No. 262 of 2022) [2024] TZCA 365 (15 May 2024) (TANZLII), pages 22, the Court of Appeal reiterated that:

> *Settled, are the principles that reasonable doubts in the prosecution case should be resolved to the benefit of an accused person and also that it is the duty of the prosecution to prove the case against the accused beyond reasonable doubt. The importance for the prosecution to prove the case against an accused person beyond reasonable doubts cannot be overemphasised. As to what is a proof beyond reasonable doubts, the Court in* ***Magendo Paul & Another v. Republic*** *[1993] T.L.R. 219, stated that: " For a case to be taken to have been proved beyond reasonable doubts, its evidence must be strong against the accused person as to leave remote possibility in his favour which can easily be dismissibie".*

The question is whether the evidence on record proved the case to the required standard. The evidence of the prosecution's witnesses demonstrated proof the case beyond reasonable doubt. PW 1 stated that the appellant caused loss to the government to the tune of TZS

37,573,274/=. All the payment vouchers were drawn in the name of the appellant. The appellant did not return the money which were not used as the intended activities were cancelled. Exhibit P 1, P2, P 3 and P 4 being the payment vouchers drawn in the name of the appellant totaling TZS 50, 973,274/= for first three Exhibits P1, P.2 and P.3 while Exhibit P.4 had total of TZS 3,000,000/=. In cross examination, PW 1 reiterated that total loss was TZS 37,573, 274/= was revealed to have been lost in hands of the appellant.

Further, testimonies of PW 2 testified that the monies intended to facilitate trainings, but the same were cancelled. At the time of discovery of loss, total amount lost was TZS 34,573,274/=. Later, it was discovered that there was another cheque of TZS 3,000,00/= on similar transactions as it was drawn at the same period. Thus, according to PW 2 the amount lost was TZS 37,573,274/=.

The evidence of PW 3 cements that the appellant went to Bank of Africa (T) Dodoma Branch to cash the cheques at the counter and total of TZS 37, 573,274/= was not accounted for. The appellant committed herself to have used the money and promised to refund the same through her salary as she admitted using the money. This admission was in writing in Exhibit P.7.

Further, PW 4 an auditor who audited the transactions and found that TZS 37,573,274/= were missing/lost thus appellant has caused loss of that amount. Exhibit P. 5 which is special audit report was prepared and tendered in Court to validate the loss of TZS 37, 573,274/=. The report did not name the person responsible, but it cemented the loss of the amount.

Moreover, PW 5 testified that appellant was an employee of the UCSAF (Fund) since 2019 as Finance Officer thus tendered Exhibit P6. According to PW 5, the fund suffered loss of TZS 37,573,274/= which was entrusted to the appellant. PW 5 tendered Exhibit P.7 that is a letter from the appellant to PW 5 (Chief Executive Officer) admitting having not returned the money to bank thus promised the same to be deducted from her salaries.

Totality of oral testimonies of PW 1, PW 2, PW 3, PW 4 and PW 5 and documentary evidence Exhibits P.1 to P7 inclusive demonstrated that: First, the appellant was employee of UCSAF and Finance Officer as per Exhibit P.6. Second, the appellant was entrusted with UCSAF monies as per Exhibits P 1, P. 2, P.3, P. 4 totaling TZS 53,973,274/= drawn in appellant's name to facilitate training activities of the Fund. Third, the planned activities were cancelled, and the appellant was required to refund the monies to the UCSAF account, but the appellant did not bank the money. Fourth, Exhibit P5 which is Special Audit Report indicates that total amount

lost is TZS 37,573,274/=. Fifth, all testimonies of five witnesses (PW 1, PW 2, PW 3, PW4 and PW 5) indicated that amount lost in hands of appellant was TZS 37,573,274/=. Sixth, the appellant admitted having used TZS 34,573,274/= thus occasioned loss and promised to repay.

The second set of the evidence is that of PW 6 and PW 7. PW 6 testified that on 18/02/2020 as a teller saw the appellant, received a TZS 3,000,000/= cheque, counterchecked from the Cheque list, and paid the appellant the amount. The cheque was in the appellant's name. The cheque worth TZS 3000,000/= was admitted as Exhibits P.8, cheque valued TZS 11, 909,500/= as Exhibit PW 9 and cheque worth TZS 17,400,000/= as Exhibit P10.

Further, PW 7 stated the appellant one Aziza Badru Mwanje as UCSAF employee used to withdraw money at the BOA Dodoma Branch. According to PW 7, on 29/02/2020 the appellant visited the bank, presented a cheque to PW 7 and the same was received valued TZS 21,663,774/= which was counter-checked, and cash paid thereto. This was Exhibit P.11.

In essence, PW 6 and PW 7 confirmed that contents of the Exhibits P.1, P2, P3 and P4 as the amount stated in those payment vouchers and dates are tallying with cheques that were cashed to the appellant thus Exhibits P8 to P11 inclusively are proof that appellant presented them for

encashment. The testimonies of PW 6 and PW 7 is direct evidence. It falls within the ambits of Section 62(1)(a) of the Evidence Act, Cap 6 R.E. 2022 as the appellant was seen by PW 6 and PW 7 respectively and paid the amounts presented in the cheques. Further, Exhibits P.8-P11 inclusive falls within section 64(1) of the Evidence Act as the original cheques that were presented by the appellant in her name to PW 6 and PW 7 were tendered and admitted.

In **Matibya N g'habi vs Republic** (Criminal Appeal No. 651 of 2021) [2024] TZCA 34 (14 February 2024) (TANZLII), at page 8, the Court of Appeal stated that:

> *At the outset, it is instructive to state that, this being a criminal case, the burden lies on the prosecution to establish the guilt of appellant beyond reasonable doubt. In **Woodmington v. DPP** [1935] AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined but case laws have defined it. For instance, in the case of **Magendo Paul & Another v. Republic** [1993] T.L.R. 219 the Court held that: "For a case to be taken to have been proved beyond reasonable doubt its evidence*

must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed." It is noteworthy that, the duty and standard of the prosecution to prove the case beyond reasonable doubt is universal in all criminal trials and the duty never shifts to the accused.

It is on record that the appellant did admit having occasioned loss of TZS 34,573, 274/= as per Exhibit P7. Exhibit p.7 is a letter dated 10th March 2020 written by the appellant to the Chief Executive Officer titled **RE: AMOUNT OF TZS 34,573,274.00 DRAWN FRON BANK OF AFRICA (T) LTD -DODOMA BY AZIZA BADRU MWANJE** provides that an amount of TZS 12,900,000.00 which was to be paid to the beneficiaries was retained by the appellant and therefore it is supposed to be refunded to the Fund. In addition, the amount of TZS 21, 663,774.00 was supposed to be paid to beneficiaries for Opening Ceremony at DIT, UDOM, and MUST but the activities were cancelled. Appellant states that "**...therefore, I admit that the amount was withdrawn from the Bank of Africa(T) Limited Dodoma Branch as analysed and would request to be deducted in whole in case I receive any sum from the Fund. And, subsequently, in my salaries in case of balance."**

It in the case of **Chande Zuber Ngayaga & Another vs Republic** (Criminal Appeal 258 of 2020) [2022] TZCA 122 (18 March 2022) (TANZLII), at pages 13-14, the Court of Appeal stated that:

> *Being guided by the above authorities, it is our considered view, and as rightly found by the trial court,* ***that the appellants' statements provided overwhelming evidence of their participation in the commission of the offence.*** *In the said statements both appellants clearly admitted that they were the ones who transported the trophy on 20th January, 2018 for sale on a hired motorcycle. That, upon seeing the motor vehicle of the game reserve officers, they abandoned the trophy and the motorcycle and ran away.* ***It is settled that an accused person who confesses to a crime is the best witness.***

The appellant willingly and on her own volition wrote a letter to the Chief Executive Officer of UCSAF, the specified authority with contents confessing to have drawn the money from the bank, used it and promised to repay the same.

The confession was on the amount that appellant was required to explain. At that time, the special audit was not completed thus the remaining TZS 3,000,000/= falling within similar transaction on the same months and for similar purposes was not yet been revealed. The latter amount was discovered while the appellant had been interdicted.

As the testimonies of the PW 4 both oral and documentary evidence in form of Exhibit P5 revealed that total of loss occasioned amounted to TZS 37,573,274/= and all the testimonies of PW 1, PW 2, PW 3 and PW 5 is to the effect that that is amount lost in hands of the appellant, I am of the settled view that there evidence was sufficient to warrant the conviction of the appellant. All the evidence points to one and the same direction that it is the appellant who was entrusted with the monies of the Fund and occasioned loss of the same totaling to TZS 37,573, 274/=. I shall therefore dismiss the first ground of appeal for devoid of merits.

Having demonstrated that all the grounds are destitute of merits, this appeal deserves dismissal. It is settled that where the prosecution proves its case beyond reasonable doubt the appellant cannot be heard complaining on the conviction.

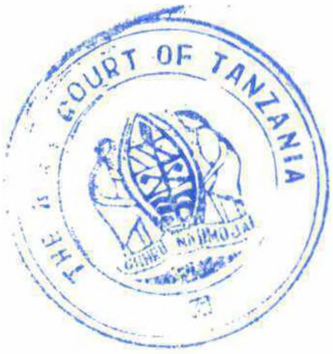
I am of the considered opinion that this appeal should fail for reasons that all the grounds are dismissed for being destitute of merits. Expunging

of testimony of PW 8 has not shaken the evidence of the prosecution against the appellant. All other evidence on record remains intact and I find nothing else to fault the District Court of Dodoma this case.

In the final analysis, I dismiss the appeal for lack of cogent reasons to interfere with findings of the trial court. I therefore uphold both the conviction and sentence as well as compensation order of TZS 35,000,000/= imposed against the appellant for the offence of occasioning pecuniary loss to the specified authority by the District Court of Dodoma in Economic Case No 10 of 2020.

It is so ordered.

DATED at **DODOMA** this 23rd day of May 2024.



E.E. LONGOPA
JUDGE
23/05/2024