THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 192 OF 2023

(Originating from the Court of Resident Magistrates of Mbeya at Mbeya, in Economic Case No. 10 of 2020)

LUGANO KAYUNI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 10/05/2024
Date of Judgment: 30/05/2024

NDUNGURU, J.

The appellant, Lugano Kayuni is challenging the conviction and sentence meted by the Court of Resident Magistrates of Mbeya (the trial court) in Economic Case No. 10 of 2020. In that case, the appellant with another person who is not a subject of this appeal were arraigned to the trial court on four counts relating to two offences namely; interfering with the necessary service contrary to section 57 (1) and 60 (2) read together with paragraph 12 to the first schedule of the Economic and Organised Crimes Control Act, Cap. 200 R.E 2019, and occasioning loss

to a specified authority contrary to section 57 (1) and 60 (2) read together with paragraph 10 (1) and (4) of the first schedule to the same law.

It was stated in the particulars of the charge in relation to the two counts of the first offence that on unknown dates and month in 2020 at Kalobe area within the District and Region of Mbeya the appellant together with that another person wilfully and unlawfully interfered with the necessary service by opening the electricity meters with Nos. 24210791240 and 22124344718 the properties of the Tanzania Electric Supply Company Limited (TANESCO) and connected the wire directly without the said meter being read.

As to the third and fourth counts it was stated that after committing the first offence at same place, they used the electricity without meter being read and thereby caused loss amounting to Tshs. 562,256.05 and 939,928.45 to the said TANESCO.

When the charge was read to them, they denied to have involved in the commission of the offences. The case went to a full trial, at the end, only the appellant was convicted for two counts and finally sentenced to served the sentence of 20 years imprisonment for each count the term to be served concurrently.

Dissatisfied, the appellant has preferred the instant appeal with 6 grounds of grievances. The grounds, however, for the reasons to be apparent will not be reproduced.

At the hearing of the appeal, the appellant was unrepresented while the respondent/Republic appeared through Mr. Bashome learned State Attorney. The parties, having submitted for and against the appeal, the matter was scheduled for judgment on 30th April 2024. But when this Court was composing the judgment, it noted some issues taken to be irregularities committed before the trial court. It thus, invited the parties to address it on the following:

a. Whether the consent and certificate conferring jurisdiction to the trial court to try the case issued by one officer but signed by another officer was legally proper.

b. Whether the charge against the appellant was appropriate and conformity with the law.

In addressing the court on the foresaid issues, Mr. Salmin, learned State Attorney appeared for the respondent and as usual the appellant appeared in person, unrepresented. The appellant thus, had nothing to address the court.

On the other side, Mr. Salmin only submitted in respect to the first issue in so far as the legality of the consent and certificate. He readily said that they are both defective for being issued by one officer but signed and certified by another officer. As to the remedy for the flaw, he prayed this court to nullify the proceedings and order for retrial of the appellant.

Mr. Salmin did not state anything in relation to the 2nd issue which was about whether the charge against the appellant was proper and conformity with the law.

On my part, in so far as to the 1st issue, it is common ground that as a general rule, when a person is charged with the economic offence it is this Court, Corruption and Economic Crimes Division of the Registry and sub-registries which is vested with jurisdiction to try the matter; see section 3 of EOCCA. However, the Director of Public Prosecutions or any State Attorney duly authorised by him, may, in each case in which he deems it necessary or appropriate in the public interest, by certificate under his hand, order that any case involving an offence be tried by subordinate courts.

Also, the economic offences are triable in this Court and the subordinate courts only under the consent of the Director of Public

Prosecutions (DPP) or an officer conferred with the powers to issue the same. This is under section 26 (1) and (2) of the EOCCA.

In the case of **Dilipkumar Magambai Patel vs Republic** (Criminal Appeal No. 270 of 2019) [2022] TZCA 477 (25 July 2022) (Tanzlii) the appellant like in this case was charged with an offence, tried and convicted by the subordinate court without it being clothed with jurisdiction to try the economic crime case and without the certificate and consent of the DPP to prosecute him. It was held that:

> *"In the absence of the DPP's consent and a certificate of transfer, the trial District Court had no jurisdiction to try the offences and it rendered the proceedings a nullity."*

In this matter one Saraji R. Iboru the Region Prosecution Officer certified and consented the trial of the appellant to the trial subordinate court. But the same certificate and consent were signed by one Rhoda Ngole a Prosecution Attorney in charge. This was quite in contravention of the law as it was not understood who certified and consented between the issuer and the signatory. Under the circumstances, therefore, the trial court was not clothed with jurisdiction to try the appellant. Thus, the proceedings and the decision thereof were a nullity.

As to the remedy thereof, it was Mr. Salmin's view that the case be remitted to the trial court for retrial of the appellant. Probably, he was of the view that appropriate certificate of transfer and consent be re-issued. However, I am reluctant to concur with him for the reason that, when this Court raised the issue as to whether the charge against the appellant was appropriate and in conformity with law was of the view that the appellant was charged in the 1st and 2nd counts relating to the offence of interfering with the necessary service contrary to section 57 (1) and 60 (2) read together with paragraph 12 of the First Schedule to the EOCCA in which these sections and the paragraph in the Schedule do not in themselves create offence. However, they refer to other law in which the offence is created. For example, paragraph 12 under consideration provides that:

> *"12. A person commits an offence under this paragraph who damages, hinders, interferes with or does any act which is likely to damage, hinder or interfere with, or the carrying on of a necessary service* ***contrary to section 3 (d) of the National Security Act.****"*

It is clear therefore that the offence is established under section 3 (d) of the National Security Act, Cap. 47 R.E 2002 of which was not included in the charge against the appellant.

Again, when looking at the provision of the Act establishing the offence in relation with the particulars of the offence in the counts under consideration, in my view, they are not connected. This is because the statement of the offence of the charge against the appellant talks about interference with the necessary service whereas the particulars of the offence are about tempering with the meter and stealing power/electricity, that is using electricity without the meter being ready.

It is that, section 3 (d) of the National Security Act provides that:

> *"3. Any person who,* ***for any purpose prejudicial to the safety or interests of the United Republic–***
>
> *(d) without lawful excuse, damages, hinders or interferes with, or does any act which is likely to damage, hinder or interfere with, any necessary service or the carrying on thereof,"*

Reading that provision, it appears in my view that, for a person to be charged with the offence, the act alleged to be committed or omitted

should be done or omitted for the purpose prejudicial to the safety or interest of the United Republic of Tanzania.

Nonetheless, for the offence like the one, the appellant was charged with there are specific law and regulations establishing the offence of tempering with meter, electricity theft and the penalties thereto. These are the Electricity Act, 2008 and the Electricity (General) Regulations, 2011 G.N. 63 of 2011.

Owing to the above observation, it is my considered view that, an order for retrial of the appellant to the trial court may not be in the interest of justice thus, prejudicial to the appellant.

In the end, under the revisional powers of this Court conferred under section 373 (1) of the Criminal Procedures Act, Cap. 20 R.E 2022, I hereby nullify the proceedings, quash the judgment and set aside the sentence of the trial court. Also, I order the appellant, Lugano Kayuni be release from custody unless lawfully withheld for another purpose.

Ordered accordingly,

D.B. NDUNGURU

JUDGE

30/05/2024