

IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES DIVISION
AT DAR ES SALAAM
ECONOMIC CASE NO. 09 OF 2021

THE REPUBLIC

VERSUS

- 1. EMILIAN JOHANES MLOWE**
- 2. BASHIRU ATHUMANI NGELLA**
- 3. SHAKIRA BASHIRU NGELLA**
- 4. MKAMA LAURANCE MAIRA**
- 5. YARED JONAS**

JUDGMENT

16/08/2022 & 26/10/2022

E.B. Luvanda, J

The accused persons namely Bashiru Athumani Ngella (second accused), Shakira Bashiru Ngella (third accused), Mkama Laurance Maira (fourth accused) and Yared Jonas (fifth accused) are jointly indicted with a total of four hundred and one counts, its breakdown being; conspiracy to commit an offence for all accused persons; stealing for all accused persons; fraudulent accounting by clerk

for the fifth accused person; money laundering for all accused persons; occasioning loss to a specified authority for all accused persons.

A plea of not guilty was entered in respect of all accused persons for each count, following their denial.

The first accused person Emilian Johanes Mlowe on 24/08/2021 he entered an agreement for plea bargain to settle of Tsh. 549 million.

The prosecuting officers were Mr. Christopher Msigwa learned Senior State Attorney, Ms. Eliainenyi Njiro learned Senior State Attorney, at later stage Mr. Clemence Kato learned State Attorney and Mr. Timothy Mmari learned State Attorney chipped in. Mr. Jamhuri Johnson learned Counsel was representing the second, third and fourth accused; Mr. Adolf Runyoro learned Counsel took a docket brief for fifth accused.

In a nutshell, facts leading to the indictment of the accused persons were as follows: The second accused procured a tender for vending electricity via Ms Barba Enterprises servicing Kinondoni North TANESCO Region from 2012 to 2015 on her five vending stations namely; Kwa Mwalimu Nyerere, Msasani Tirdo, Kijitonyama Shule, Sea Cliff and Oysterbay, as per the contract agreement exhibit P6, where the second accused executed it under a capacity of managing director. The process of purchasing units of electricity was done on the system

of LUKU. However accounts section invented a form styled LUKU advance payments confirmation forms for vendors stations exhibit P8 to P13 inclusive, which were attached with their respective bank cash deposit slip. These LUKU advance payments confirmation forms exhibit P8 to P13, inclusive, were used parallel to the LUKU system generated electronically. In other words the manual hard copy forms supplemented the LUKU system. It was alleged that in the course of making confirmation in the system, the first and fifth accused persons who were credit control used servers of TANSMS33 and TANMAST to make double entry to double confirmation infavour of stations owned by the second accused. It is alleged that some transactions of double confirmation were done through a computer operated by the third accused who is the daughter of the second accused and office automation assistant at TANESCO. The fourth accused is implicated by virtue of his position as Senior Revenue Accountant was supposed to verify, tally and confirm if the amount credited in the bank account is the same issued to the agent.

Essentially the alleged double entry, double confirmation or dubious and problem information transactions were all committed through the system of LUKU. In other words a crime scene here was a system and information retrieved from servers and database of TANESCO LUKU system. I am saying the crime

scene was a system of LUKU because on paper work and hard copy, everything was in order. There was no dubious transactions in the LUKU advance payments confirmation forms for vendors' exhibit P8, P9, P10, P11, P12 and P13 as they all tally with corresponding attachment of bank cash deposit slip. In other words the deposits in exhibit P8 to P13, inclusive, are genuine and were credited or deposited in the bank account of TANESCO. PW8 tendered a deposit confirmation for the fifth accused, exhibit P19 to illustrate confirmation of money deposited at the bank, but double in the system to enable the agent to sell more electricity, which PW8 termed was done due to incorrect use of the system. That money deposited by agent was confirmed twice which enabled the agent to sell excessive electricity, over and above his actual amount deposited in the bank account of TANESCO.

According to PW8, exhibit P19 was a computer generated, he extracted from the system. However on defence the fifth accused (DW4) stated that there is no uniformity in the said report, in that there is a variation in terms of number of columns, one page has eight columns and the other page which is in continuation to page one, has got less columns, that is seven columns, one columns was deleted or omitted. DW4 explained on a page with eight columns, shows the first and second transaction were done in two different locations

within twenty five minutes on 24/12/2014 at 4:58:12 read at headquarter and at 4:33:33 location LCT 3 which is a different location with headquarters. That is other pages, columns showing stations were hidden, as such transactions does not show stations. The prosecution did not bother to cross examine DW4 on his veracity regarding the facts above, which suggest concession on their part. Indeed exhibit P19, poses challenges on it is authenticity, including reliability of a gadget and computer which was used to generate it. It actually creates doubts to the system of LUKU where it was trailed, retrieved and printed. On the first front page (sheet), name of stations are missing (sheet), on the next page stations are reflected. In the following subsequent page (sheet) three, four and five again names of stations are missing. On the second page where names of stations are disclosed, the first entry is dated 24/12/2014 at 4:58:12 pm done at HQH, the second entry is also dated 24/12/2014 at 4:33:33 pm done at LCT3. When it was tendered, PW8 did not clarify on these indifferences and missing locations.

Another anomaly, exhibit P19, on its front page (sheet) a title is missing, on top reflect a sections, or box of operator by the name Yared Jonas, second box is database (is blank), next third box is a title "Financial Audit Log Records, with additional feature of computer (that is File, Edit, Run (F5), General, Source and

below there is a box for information depicting the operator Yared Jonas, database and station. On the subsequent sheet number three, four and five, on the top reflect a total different information that is one box is for Occurrence Time Stamp, and it log importance, audit log group, and it log type and the last sheet also bears a title "Financial Audit Log Records". However, this title is missing in all previous pages (sheet). This create a huge and serious doubts if at all exhibit P19 is a system generated report. As stated by DW4, as system generated report is not expected to have such variation and discrepancies on its form, format and contents. This suggests possible tempering, twisting information, deleting or omitting some details to suit the circumstances and implicate someone. Another doubt is based on a fact that some prosecution witnesses including PW4 stated that when the system was dysfunctional, it allowed manual application. The testimony of PW4 was not elaborate or specific as to who were allowed to operate manually and did not state if there was any serious audit on the footage of records entered manually. Exhibit P14 deposit confirmation and total sales batch report in respect of stations, is more worse. PW8 said is a system generated report, but there is no any element suggesting or supporting the proposition by PW8. On the contrary P14 depict vividly being an excel. While on the first column, suggest deposit reference number are running serially, but in actual sense, some were skipped example on page 1 for

a stations KN55 after entry 301, the next entry is 303, after 304 the next entry is 306, after 306, the next entry is 308, after 314 the next entry is 317 after entry 318, the next entry is 320, after 320 the next entry is 322, entries in between are all missing. There was no any explanation by PW8 as to the skipped entries in a series or sequence depicted above.

It is common knowledge that, before a piece of evidence generated by electronic means is acted upon, authenticity of an electronic records system and reliability of the manner in which the data message subject for assessment, was stored and generated must be considered. Above all, evidence on how the originality of a data system was maintained must be established. Section 18(2) of the Electronic Transaction Act, Cap 442 R.E. 2022, provide, I quote,

'I determining admissibility and evidential weight of a data message, the following shall be considered-

- (a) The reliability of the manner in which the data message was generated, stored or communicated;*
- (b) The reliability of the manner in which the integrity of the data message was maintained;*
- (c) The manner in which its originator was identified; and*
- (d) Any other factor that may be relevant in assessing the weight of evidence'*

Herein the reliability and authenticity of database and servers of TANESCO LUKU system where exhibit P19 and 14 were stored and generated is at stake, and therefore I accord no weight to the said exhibit P19 and P14.

As I have said above, the second accused was implicated because he signed as a managing director in the agreement of Ms. Barba Enterprise and TANESCO, exhibit P6, alleged owner of vending stations subject and which were accused for double confirmation. Also it was stated that the second accused was making follow up if stations were registered, including whether its staff were trained, making follow up at headquarter or even dialing direct phone call to the manager. However, PW4 said no password was given to the second accused. PW4 was unable to recall even a single staff of the second accused who was trained, registered and given password to access the system of LUKU. The evidence of PW9 was to the effect that Ms. Barba Enterprise was registered by BRELA as business name, sole proprietorship by Barnabas Massaly (deceased alleged passed away in remand awaiting trial for economic offences) with objective to deal with a business of stationaries as per exhibit P21. According to PW9 MS Barba Enterprise, if was engaging doing other business was ultravires. This fact benumbed prosecution evidence that the second accused signed as managing director, while Ms. Barba Enterprises was not a company, meaning

there was no title of a director. Also its scope and objectives was limited to supply of stationaries. Therefore vending electricity was ultravires.

DW1 stated that he was a mere advisor of the proprietor of Ms Barba Enterprises, but this fact was not cross examined to any of the prosecution witness who buttressed that the second accused signed under the capacity of a managing director, a title invented and baptized at their own convenient and pleasure. Therefore the alleged advisory role or mandate, is an afterthought. The second accused was somehow making concession that he promised to refund money in case the loss sustained is investigated by physical visitations to the vending stations subject for double confirmation. But on re-examination he changed a ball post, this time distancing himself by saying he meant he could play his noble role of advisor to advice the owner of those stations to confirm with expert of IT and revenue personnel of TANESCO.

The evidence connecting the 3rd accused to these accusation was too remote and scattered. A mere fact that her computer was used by the first and fifth accused to commit the alleged double confirmation, is unsatisfactory. Because all prosecution witnesses who are staff of TANESCO said it is permissible and possible for one staff to use a computer of another staff. Meaning that there was no wrong for her computer to be used by other staffs. The situation could

be different, if prosecution witnesses could say all the dubious transaction were detected to have been done on the same computer of the third accused. But still in absence of a solid and tangible evidence to prove that the alleged computer was dispatched to the third accused in personam, then the allegations of misuse cannot be upheld. Indeed it was not stated if it was a desktop, laptop, let alone its unique serial number, was not mentioned.

The fourth accused is implicated because he was supposed to verify, tally and confirm if the amount credited in the bank account is the same issued to the agent. But in those advanced vendors confirmation forms (P8 to P13) do not reveal double confirmation. They are clean. PW4 said accountant could not see double confirmation in the system. There was a fact that all accountants were given password of the same level and equal mandate, that is all had resembling credentials on access to the system (as put by PW5). Above all, both in the audit report exhibit P7 and logs system generate report (exhibit P19), the name of the fourth accused is missing. As such the accusations against him were not proved on the standard.

More importantly, even the amended information which was presented in court on 24/08/2021, was crafted under a wrong title indicating it was in the Resident Magistrate Court of Dar es Salaam Region at Kisutu, which is a serious omission.

I wonder as to what happened and how it escaped our minds. Presumably this eventuality was occasioned by a fact that the substituted or amended information was presented in court on the spot at the verge and busy session for a procedure of registration of plea agreement in respect of the first accused on 24/8/2021.

Having faulted exhibit P19 and P14 which were the corner stone and basis of initiating an inquiry against the accused persons for being incredible, and unreliable. There is no any tangible evidence to sustain conviction against any of the four accused persons or at all.

Appreciation to the learned Prosecuting Officers and learned defence Counsel for their valuable representation and laboured submissions.

That said, all four hundred and one counts succumb and are dismissed on it's entirety. The second, third, fourth and fifth accused persons are all acquitted.



E.B. Luvanda
Judge
26/10/2022