

**IN THE HIGH COURT OF TANZANIA
CORRUPTION AND ECONOMIC CRIMES
DIVISION
AT DAR ES SALAAM**

ECONOMIC CASE NO. 10 OF 2022

REPUBLIC

VERSUS

- 1. ROBERT SIMON KISENA**
- 2. CHARLES SELEMAN NEWE**
- 3. JOHN NHWALA SAMANGU**
- 4. TUMAINI DEUSEDIT KULWA @ TUMAINI KULWA**

JUDGMENT

29/09/2023 to 22/12/2023

E.B. LUVANDA, J

Robert Simon Kisenka (First Accused), Charles Seleman Newe (Second Accused), John Nhwala Samangu (Third Accused) and Tumaini Deusdedit Kulwa @ Tumanini Kulwa (Fourth Accused) are indicted as follows: leading organised crime contrary to paragraph 4(1)(a) of the Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002 (count number one for all four accused persons); forgery contrary to sections 333, 335(a) and 338 of the Penal Code, Cap 16 R.E. 2002 (being count number two for the First, Second and Fourth Accused; count number four for the First Accused); uttering false documents contrary to sections 342 and 337 Cap 16 (supra) (being count number three for the

Fourth Accused; count number five for the First Accused); money laundering contrary to sections 12(b) and 13(1)(a) of the Anti-Money Laundering Act, No. 12 of 2006 (being count number six for the First and Second Accused; count number seven for the First Accused; count number eight for the First and Second Accused; count number nine for the First and Third Accused; count number ten for the First Accused; count number eleven for the First and Second Accused; count number twelve for the First and Second Accused; count number thirteen for the First, Second and Fourth Accused; count number fourteen for the First, Second and Fourth Accused); Occasioning loss to a specified authority contrary to paragraph 10(1) of the First Schedule to, and sections 57(1) and 60(2) of Cap 200 (supra) (being count number fifteen for all four accused persons).

It was alleged that the four accused persons on diverse dates between 25/05/2016 and 10/07/2016 at various places within Dar es Salaam Region, intentionally organized a criminal racket to wit fraudulently obtained Tsh 750,000,000 from UDA Rapid Transit Limited bank account No. 20110017639 NMB Bank House, by using false document to wit fund transfer request for a sum of Tsh 750,000,000 and extract resolution dated 11/06/2015 which were uttering to NMB by the First, Second and Fourth Accused, and transferred that fund into the account of Ms. Longway

Engineering Ltd, thereafter a sum of Tsh 260,000,000 was transferred to the account of Universal Cargo Trans-shipment Holdings Limited; Tsh 204,000,000 transferred to the First and Third Accused; Tsh 36,000,000 transferred to Tao Kang (who is at large); Tsh 79,780,000 transferred to the Fourth Accused; Tsh 6,500,000 and then Tsh 3,035,000 withdrawn from the account of Universal Cargo Trans-shipment Holding Limited in furtherance of disguising the illicit origin of the money, thereby willful caused UDA Rapid Transit Limited to suffer pecuniary loss of Tsh 750,000,000/=.

All four accused persons dispelled the information.

It was the testimony of John Joseph (PW1) who is an Investigating Officer at the Prevention and Combating of Corruption Bureau (PCCB), that on 8/06/2016 a sum of Tsh 750,000,000 was transferred via a fund transfer request exhibit P1, from account No. 20110017639 of UDA Rapid Transit Limited at NMB to account No. 3300800838 (for Tsh) of Longway Engineering Company Limited at KCB as reflected in the bank statement of UDA Rapid Transit Limited exhibit P4 also a bank statement of Longway Engineering Company Limited exhibit P17 (which its authenticity and its reliability was verified by Lucas Yohana Malua (PW3), who is Customer Insurance Manager at National Microfinance Bank (NMB), for payment details alleged construction of fence for terminal for Rapid Bus Transport

(BRT). A breakdown of the above said sum was as follows: Kimara Tsh 211,687,600.00; Ferry (Kivukoni) Tsh 62,732,340.00; Ubungo Station Tsh. 269,893,140.00; Morocco Station Tsh 203,007,200.00 as per quotations part of exhibit P1.

It was the evidence of PW1 that the First and Second Accused were signatories in account No. 20110017639 of UDA Rapid Transit Limited at NMB as per mandate file exhibit P6, while Tao Kan and Chen Shi were signatories in account No. 3300800838 (for Tsh) of Longway Engineering Company Limited at KCB, as per mandate file exhibit P19. However, a list of shareholders in exhibit P19, indicate that the First Accused and Ms. Simon Group are shareholders, owning an aggregate of 50% of all shares of Longway Engineering Company Limited.

According to exhibit P17, on 9/06/2016 a sum of Tsh 250,000,000.00 was withdrawn by Tao Kang vide cheque; on 10/06/2016 a sum of Tsh 260,000,000.00 was transferred to Universal Holding Limited via cheque part of exhibit P20 as also reflected in the bank statement of Universal Holding Limited exhibit P5 specifically entry dated 10/06/2016; on 10/06/2016 a sum of 204,000,000.00 was transferred by cheque (part of exhibit P20) to Zenon Oil and Gas Limited as per advice credit exhibit P15 also reflected on entry dated 11/06/2016 in a bank statement exhibit P12 (which its authenticity

and its reliability was verified by Pridesh Vinod Bakrkina (PW11), head of IT at International Commercial Bank (ICB); on 10/06/2016 a sum of Tsh 36,000,000 was withdrawn by Tao Kang vide cheque.

According to exhibit P12 on the same date to wit 11/06/2016 a sum of Tsh 204,000,000 was transferred to Maxicom Tanzania by cheque exhibit P6 which was signed by the First Accused as per comparison with the mandate file of Zenon Oil and Gas Limited exhibit P13.

PW1 stated that Zenon Oil and Gas where a sum of Tsh 204,000,000 was transferred, the First Accused is a director, signatory and shareholder owning 100,000 shares and Simon Energy Group Limited own 900,000 shares, as per a report from the Registrar of Companies exhibit P32.

According to exhibit P5 where a sum of Tsh 260,000,000 was credited, a sum of Tsh. 13,000,000 was paid to Ally Rashid Ali; Tsh 10,000,000 was paid to Metal Company; Tsh 11,000,000 was paid to Paza Bureau DE change; Tsh 11,050,000 was paid to Lucas Nerest; Tsh 105,121,000 was paid to Kamaka Company; while a sum of Tsh 79,780,000, Tsh. 17,650,000, Tsh 6,500,000, Tsh 8,650,000, Tsh 6,969,000 was paid to the Fourth Accused vide cheque exhibit P10 which were approved by the First and Second Accused as per a

comparison with the mandate file of Universal Cargo Trans-shipment Holdings Limited exhibit P7.

PW1 asserted that the First and Second Accused who are signatory in account exhibit P7 which transferred money to the Fourth Accused, were signatory in the account of UDART exhibit P4 and P6.

PW1 asserted that money from UDART account exhibit P4 where the First and Second Accused are signatory was transferred to Longway Engineering Ltd, then a sum of Tsh 260,000,000 was transferred to Universal Cargo Trans-shipment Holding at NMB where the First and Second Accused are signatory.

PW1 asserted that the Fourth Accused was a cashier at UDART but also was paid money from Universal Cargo Trans-shipment Holding, and the source of Tsh 260,000,000 was from Longway Engineering who received money from UDART.

In reflection to the above, PW1 visited at the sites mentioned in the quotations part of exhibit P1, at Ubungo where he revealed no construction was done, at Morocco construction was underway, at Kivukoni fence was constructed, at Kimara saw two types of fence which according to PW1 the first one had started to fall down and people were crossing and making

shortcut on it, another fence was durable in good condition, people unable to cross on it.

PW1 asserted that there was no any contract between UDART and Longway Engineering, apart from bill of quantity which is part of exhibit P1.

PW1 stated that a work at Morocco, Kivukoni and a durable fence at Kimara Station its construction was executed by Lucas Construction Co Ltd, as per the contract between Dar Rapid Transit Agency (DART) and Lucas Construction exhibit P21 including defect liability certificate exhibit P29(a) and inspection report exhibit P29(b), which initially was for construction of Stations at Ubungo, Morocco and Kivukoni. However, the construction at Ubungo was interrupted by the main project of flyover or interchange bridge by Ms. Chinese Civil Engineering Construction Corporation (C.C.E.C.C), where internal arrangements were made, agreed the money for construction at Ubungo to be used to construct a fence at Kimara Station by Lucas Construction Co. Ltd, as put by Sedekia Juma Riziki (PW13) Engineer at DART. This was after seeing that Longwang had abandoned a site at Kimara and construction thereat was incomplete.

PW1 put that DART had sought and procured permit from TANROADS to allow UDART to construct a fence to DART terminals via Longway

Engineering, as per a letter of DART dated 21/06/2016 exhibit P33 and a response (permit) by TANROADS dated 23/06/2016 exhibit P34 which prescribed standard and specification by the Ministry of Works and detailed drawings by Ms. Smec, which fact was supported by Engineer Ronald Muberwa Rwakatare (PW17) the Chief Executive Officer DART. But later Longway Engineering was suspended after inspection was done and revealed the latter was not abiding to standard required by DART, as per exhibit P35 specifically a fourth letter to an attachment number 29. It was asserted that joint meeting was convened between DART and UDART, where it was agreed the former to withdraw a stop order issued to UDART and the latter was given go ahead to proceed with construction by abiding to standards as per bill of quantity (BOQ), material, size required by Ms. Smec, as per exhibit P35 specifically a sixth letter in roman eight of attachment number 29, also exhibit P35 a second letter in roman eight on attachment number 29 which is a notice issued to UDART for resuming work at Kimara to continue with construction. Thereafter, Longway Engineering abandoned site, never resumed to proceed work, hence DART engaged Lucas Construction to complete Kimara Station as stated above. According to Kletus Optatis Shayo (PW9) who is the Supervisor and Company Manager at Ms. Lucas Construction Co. Ltd, they executed work of construction to its

completion at Morocco, Kivukoni and later at Kimara after being stopped at Ubungo, as per the agreement exhibit P21, defects liability certificate and inspection report, exhibit P29(a) and (b) respectively, for a total contract amount of Tsh 274,189,685.20

Leonard Petro Lucas (PW10) Assistant Registrar at Contractors Registration Board (CRB) explained that Lucas Construction Co. Ltd was registered building class two and civil work class six (including construction of road, water dam, irrigation scheme) as per CRB report exhibit P27, while Longway Engineering Company Limited incorporated on 5/07/2011 (as per certificate of incorporation exhibit P30) was registered to execute work of building only, as per CRB report exhibit P27. This fact was supported by PW1 who asserted to had visited at Contractors Registration Board (CRB).

According to Salehe Kassim Sanda (PW20) who is the External Auditor at National Audit Office, they conducted special audit at UDART and revealed a total loss of Tsh 508,512,400 for ghost construction of DART terminals, which amount they recommended to be returned, as per special audit report exhibit P35. PW20 explained to have reached that figure after computing the fund approved for constructions of terminals a sum of Tsh 750,000,000 subtracted with a sum of Tsh 241,687,600 which was for Kimara. However, Elimiliki Fredrick Kihundwa (PW12), Principal Investigator at PCCB and

registered Quantity Surveyor (QS) attached to Euro Consult Quantity Surveying Unit, opined that the actual value of what was constructed at Kimara old fence was Tsh. 146,744,113.42, as per quantity surveyor technical evaluation report exhibit P28.

In view of that, PW1 stated that the actual loss incurred for the ghost constructions of three terminals at Ubungo, Morocco and Kivukoni was a grand total of Tsh 603,255,886.58 (inclusive a loss of Tsh 94,943,486.58 being a balance for Kimara, as computed by PW12).

According to Peter Patrick Lwagilo (PW18) who is currently a peasant at the age of 57 years, holding Masters of Business Administration, Finance and Banking graduated in 2002 from Mzumbe University, formerly worked at the office of Treasury Registrar and Ministry of Finance between 2004 and 2020, asserted that UDA had a total of 15,000,000 shares, a breakdown 7,120,000 allotted and 7,880,000 unallotted shares, which were whole owned by the Government 100%, also supported by PW1.

PW1 stated that in 1997 the Central Government via the Treasury Registrar allotted 51% of its shares to Dar es Salaam City Council, free of charge.

PW18 stated that in the allotted shares, the Treasury Registrar owned 49% and Dar es Salaam City Council 51%. It was asserted that in 2011 the office

of Treasury Registrar got information that the 7,880,000 unallotted shares of UDA were sold by the lopsided board of directors of Dar es Salaam City Council to Simon Group. PW18 asserted that after a query from the Treasury Registrar that the sale was unprocedural for want of consent or assent from and without involvement of the co-shareholder, thereby Simon Group returned back the unallotted shares. Meanwhile Dar es Salaam City Council decided to sell its 51% share to Simon Group Limited, as put by PW18.

PW1 explained that the current shareholding structure of UDART that is UDA Rapid Transit Limited, shareholders are: UDA own 14,850 shares equal to 99% and Simon Group Limited own 150 shares equal to 1%, as per memorandum and articles of association of UDART exhibit P23. PW1 stated that when UDA owned UDART by 99% shares, UDA was owned by two shareholders the Government 49% shares via Treasury Registrar and Simon Group Limited 51% shares, also supported by Lawrence Nyasebwa Mafuru (PW19), formerly Treasury Registrar from 2015 to 2016.

Lupakisyo Abinel Mwambinga (PW8) Legal Officer at BRELA stated that UDA Rapid Transit Limited was incorporated on 19/12/2014 as private company, in terms of certificate of incorporation exhibit P25, where the shareholders were Shirika la Usafiri Dar es Salaam 14,850 shares and Simon Group Limited 150 shares, as per memorandum and articles of association exhibit

P23. Thereafter on 8/12/2015 UDA Rapid Transit Limited was changed to be a company limited by shares called UDA Rapid Transit Public Limited Company, as per a certificate of change of name exhibit P26, where the shareholders and share structure remained the same to wit Shirika la Usafiri Dar es Salaam 14,850 shares and Simon Group Limited 150 shares, as per memorandum and articles of association exhibit P24, as also clarified in a letter by the Registrar of Companies exhibit P22.

PW1 stated that the assets and fund of UDART are owned by shareholders. Apart from a fact that UDART and Longway Engineering had no formal contract for construction of DART terminals as per evidence of PW1, non-compliance to standard and specification, abandoning site and incomplete work at Kimara station (a fact as to abandonment of site and incomplete work was asserted also by Kletus Optatis Shayo (PW9) Company Manager and Supervisor at Ms. Lucas Construction Co. Ltd); unexecuted work at Ubungo, Morocco and Kivukoni/Ferry (as put by Halid Juma Myaule (PW7) Head of PMU at Dar es Salaam Transit Agency (DART); attempting to execute civil work (road construction) while not being registered to do it as per exhibit P27; David Otullo Nyarara (PW15) Principal Land Officer, formerly Registry Officer at Registrar of Companies (BRELA) asserted that Ms. Longway Engineering Company Limited was incorporated by BRELA on

5/07/2011 (as per a certificate of incorporation exhibit P30), dealing with construction, but is no longer there, because it changed name on 1/08/2014 to become Simon Construction and Engineering Company Limited, which fact was supported by Gabriel Gilagai (PW16), who is a Senior Registry Officer BRELA.

On defence, Robert Simon Kisenia (DW1) who is a business man dealing with diversified business and owner of group of companies, who fended on behalf of his co-accused that is Charles Seleman Newe (DW2), John Nhwala Samangu (DW3) and Tumaini Deusdedit Kulwa @ Tumaini Kulwa (DW4), explained that companies under Simon Group are established by a style of vertical integrations for production or provisions of services depending on each other, example Simon Motors supply spare parts to UDA and UDART; Zenon Oil and Gas supply petroleum products to UDA and UDART; Longway Engineering provide construction services; UDA Management Agency Limited (UDAMA) provide staffs services with a view of maximizing utilization of production resources like finance, human capital, human resources and various services as above.

DW1 explained on a requirement of remote bankruptcy status or entity in respect of UDART, citing a letter exhibit D2, where alleged it was a condition precedent by the financier that is the World Bank and consultant invited by

the government for Interim Provision of Services (alleged this was envisaged in a letter exhibit D3) where it was obliged not to transact with third parties except sister company under Simon Group (including Zenon Oil and Gas, Simon Motors, Longway Engineering, UDA Management Agency Limited (UDAMA) or parent company of UDART like UDA and Simon Group.

DW1 explained to have encountered a challenge of loss of income because terminals were not fenced, where it was agreed for UDART to construct a fence at Kimara, Ubungo and Ferry at her own costs where a fence ought to accommodate commercial advertisement like metal chipboard, aluminum board, paper board for rebranding. According to DW1 they engaged Longway Engineering being a sister company for purpose of meeting the requirement of bankruptcy status. DW1 alleged that DART issued a stop order to UDART to stop construction without good cause.

DW1 stated that exhibit P2 no alteration was made therein, rather it was signed by lawful officers with mandate to sign and present to the bank. DW1 explained that he has a mandate to sign exhibit P1, arguing that the Fourth Accused was a lawful cashier recognized by UDART and NMB, the Second Accused had full mandate conferred to him by the law and memorandum and articles of association of UDART. DW1 explained that a fund of Tsh 750,000,000 was lawful payment from UDART to Longway Engineering for

purpose of construction of fence in DART terminals at a standard or quality to accommodate commercial advertisement, arguing Longway Engineering was paid according to those requirements of fence. DW1 stated that it was not explained by prosecution regarding the standard, quality of fence constructed by Lucas Construction, neither explained its size, length, width nor stated if it resemble that one constructed by Longway Engineering.

DW1 stated that there is no inflation of costs and no forgery which was committed by him or his co-accused. For count number three, DW1 stated that fund transfer was not forged, is a lawful document, payment were lawful for commercial transaction as per Yohana Lucas Malua. For Count four, DW1 stated that it is lawful, proper, no alteration and no stakeholder who complained on it be UDART its directors or NMB. Count number five, DW1 stated that signatures are genuine, no forgery on a board of resolution. Count number six, DW1 explained that no forgery on fund request form, board resolution, for reason that the fund was lawful paid under lawful agreement between UDART and Longway Engineering, they did not forge or utter forged document. Count number seven, DW1 said he is not a signatory on account No. 3300800838 (for Tsh) of Longway Engineering Company Limited Kenya Commercial Bank (KCB), as per exhibit P19. Count number eight, DW1 explained that intercompany loan or landing is a common

phenomenal, alleging Longway Engineering was landing to Universal Cargo Trans-shipment Holding as a sister company of Simon Group. Count number nine, DW1 stated that landing is a common phenomenal, argued that he and the Second Accused are not signatory to account No. 3300800838 (for Tsh) of Longway Engineering Company Limited at KCB. Count number ten, DW1 stated that they are not signatory for account No. 3300800838 (for Tsh) of Longway Engineering Company Limited at KCB, they did not commit forgery and money withdrawn was for lawful expenditure. Count number eleven and twelve, DW1 stated that he did not commit forgery, and money was lawful withdrawn for the expenditure of Universal Cargo Trans-shipment Holding. Count number thirteen, DW1 stated that the Second and Fourth Accused did not commit forgery, money was withdrawn for lawful purpose of expenditure of Universal Cargo Trans-shipment Holding and not for personal use. Count number fourteen, DW1 stated that he and the Second Accused did not forge, money withdrawn was for expenditure of Universal Cargo Trans-shipment Holding not for personal use. Count number fifteen, DW1 stated that UDART is not a public entity or parastatal corporation, or government agency rather a private company, established under the Companies Act, arguing it's his family company. DW1 stated that UDART is owned by two shareholders UDA 14,850 shares being 99% of all shares of UDART and Simon Group Limited

150 shares being 1% of all shares of UDART. According to DW1, UDA is owned by two shareholders being Simon Group Limited 76% and Treasury Registrar 23% of all shares of UDART. DW1 stated that Simon Group is a majority shareholder in UDA, arguing it is his private company and for his family. DW1 explained on a share subscription agreement dated 11/2/2011 (part of attachment in a letter exhibit D1) pertaining to 7,880,303 shares of UDA sold to Simon Group Limited and an agreement on sale of shares between Dar es Salaam City Council and Simon Group Limited dated 25/09/2013 (in exhibit D1) for a total of 3,631,046 shares. DW1 asserted that the majority shareholder of UDA is Simon Group Limited owning 76.74% of all shares of UDA. DW1 alleged that the Treasury Registrar participated fully on sales of shares of Dar es Salaam City Council to Simon Group Limited and was cooperative regarding updating records of ownership of UDA, citing a letter exhibit D5.

DW1 stated that UDART was under obligation to pay the Government Tsh 243 million per month. DW1 stated that Kimara construction increased income for over 40%, arguing that Tsh 750,000,000 was not a loss, rather a profit, therefore UDART did not incur a loss of Tsh 603,255,886.58. He stated that Longway Engineering completed construction at Kimara and was stopped to continue to other stations. He stated that in exhibit P35, UDART

and Longway Engineering were not involved, arguing UDART is a private company with own procedure of appointing her auditor, and not for the Permanent Secretary for Ministry of Finance to appoint on her behalf as it was done in exhibit P35.

Count number one, DW1 stated that he and co-accused are patriot, honest, obedient, submissive, they did everything in good faith for their nation, they served their government in good faith. DW1 said it is discouraging, painful, disappointing, to be told to have formed a criminal gang or racket, while he used his family asset, money to invest including borrowing loans for purchasing seventy buses. DW1 said he could not sabotage UDART, arguing in case UDART fails it is his family who will suffer for investment done.

The question for determination is whether the prosecution proved the information to the required standard.

As it transpired above, in the course of defence by DW1, there is no dispute that exhibit P1 (fund transfer request form) which is the corner stone for the whole saga, was signed and endorsed by the First and Second Accused. On defence, DW1 stated that a sum of 750 million was lawful payment from UDART to Longway Engineering, for purpose of fence construction in DART

terminals at a standard or quality which could accommodate commercial advertisement for rebranding.

But as it turned out during trial, there was no any formal contract between UDART and Longway Engineering for construction of DART terminals, as in exhibit P1 there is an attachment of a quotation only for proposed construction of fence for Rapid Bus Transport (BRT) for Kimara Station, Ferry Station, Ubungo Station and Morocco Station. On cross examination, DW1 was suggesting that quotation attached in exhibit P1 could be enough to save as a contract for purpose of companies under a theory of group of companies working under vertical integration and the so called remote bankruptcy concept, where alleged UDART was debarred to transact with third parties. But to my view, that idea was a misconception. For all purpose and intend, a quotation is not a contract. DW1 was unable to cite any binding term and conditions in the alleged quotation. In that way, it is taken that quotation attached to a fund transfer request form exhibit P1 was none other than to meet the minimum threshold of banking transactions requirement to aid transfer of a sum of money mentioned therein without an objection from the bank effecting transfer and facilitate smooth transfer of fund in question. This is evidenced by the testimony of Lucas Yohana Malua (PW4) who is the

bank officer at NMB, that without quotation part of fund transfer request, exhibit P1, the bank would not transfer the amount therein.

In the premises, a defence by DW1 that a sum of Tsh 750 million was transferred for lawful payment to Longway Engineering, is wanting. This is because a mere quotation could not substantiate a fact that indeed it was transferred for a lawful consideration of construction.

Secondly, assuming the fund was transferred for lawful consideration, which fact has been negated above, still Ms. Longway Engineering Limited was accused of non-compliance to standard and specification designed by Ms. Smec. PW1 stated that a portion of incomplete fence at Kimara, the wall had fallen down and people were crossing on it. Therefore, a defence by DW1 that a fence constructed by Longway Engineering was of quality and standard to accommodate commercial advertisement, is a mere illusion. Because how come a fence which cannot support on itself can technically be said to meant to accommodate sizeable metal clipboard, aluminum board, paper board, for rebranding. Above all, a fence at Kimara which Longway Engineering quoted at 241,687,600.00 as per attachment in exhibit P1, and failed to complete it, the same fence was executed to its completeness by Ms. Lucas Construction Co. Ltd at a cheap price of only Tsh. 75,377.200 (which sum was transferred from Ubungo Station as per bill of quantity

attachment in a contract between Dar Rapid Transit Agency and Ms. Lucas Construction CO. Ltd, exhibit P21). Meanwhile in the quotation exhibit P1, Ubungo Station was quoted at inflated rate of exorbitant and unjustifiable amount of Tsh 269,893,140.00. Therefore, a defence by DW1 that there was no inflation in a quotation by Longway Engineering Limited in exhibit P1, is totally misleading. Equally a defence by DW1 that it was not explained the standard and quality of a fence done by Ms. Lucas Construction CO. Ltd, in terms of size, length, width or else that it was not stated if it resembles to one built by Ms. Longway Engineering Limited. To my view, this defence is a misconception. This is because the standard of work executed by Ms. Lucas Construction Co. Ltd vis-à-vis semi-finished work by Ms. Longway Engineering Limited at Kimara, was well explained by PW1, who said the two fences were physically unlike. PW1 visited at Kimara saw two types of fences, the first one (constructed by Longway Engineering) had started to fall down and people were crossing on it as a shortcut, PW1 said another fence was durable, in good condition, people unable to cross on it. To my opinion, the evidence of PW1 presented the actual picture of the standard of work between Longway Engineering and Lucas Construction CO. Ltd. Above all, drawings and specification for the work executed by Ms. Lucas Construction CO. Ltd are found on attachment E and F in exhibit P21. There

is no evidence showing that Ms. Lucas Construction CO Ltd had deviated from those specifications on the drawings forming part and parcel of their contract exhibit P21.

Number three, Ms. Longway Engineering was accused of abandoning site and incomplete work at Kimara station. On defence, DW1 stated that after completing work at Kimara, DART issued a stop order restraining them to proceed to other stations without sufficient cause. Actually, DW1 was prevaricating for nothing. There was ample evidence that Kimara Station was incomplete work and Longeway Engineering abandoned the site. PW1 explained at length on procurement of permit from TANROADS, non-compliance to standard and specifications entailing suspension and abandonment of site, as hereunder recapped.

According to PW1, DART had sought and procured permit from TANROADS to allow UDART to construct a fence to DART terminals via Longway Engineering, as per a letter of DART dated 21/06/2016 exhibit P33 and a response (permit) by TANROADS dated 23/06/2016 exhibit P34 which prescribed standard and specification by the Ministry of Works and detailed drawings by Ms Smec, which fact was supported by Engineer Ronald Muberwa Rwakatare (PW17) the Chief Executive Officer DART. But later Longway Engineering was suspended following the inspection which was

done and revealed the latter was not abiding to standard required by DART, as per exhibit P35 specifically a fourth letter to an attachment number 29. Thereafter a joint meeting was convened between DART and UDART, where it was agreed the former to withdraw the stop order issued to UDART and allow the latter to resume work and proceed with construction by abiding to standards as depicted in the bill of quantity (BOQ), material, size required by Ms. Smec, as per exhibit P35 specifically a sixth document (which is a minute of joint site inspection on fence construction at Kimara Terminal dated 20/08/2016, at item 4.0.) in roman eight of attachment number 29, also exhibit P35 a second letter Ref. DART/B.2/15/1/10 dated 21/06/2016 in roman eight on attachment number 29 being a notice to resume work at Kimara terminal issued to DART. Thereafter, Longway Engineering abandoned site, never resumed to proceed with work, hence DART engaged Lucas Construction to complete Kimara Station as stated above.

In view of the above explanation, a defence by DW1 that a work at Kimara Station was complete or that DART issued a stop order restraining them to proceed to other stations, is a concoct.

Number four, a work at Ubungo, Morocco and Kivukoni/Ferry was totality unexecuted by Ms Longway Engineering Limited. A defence by DW1 that

Longway Engineering was debarred to proceed to other stations, I have already deliberated when arriving to a conclusion in number three above.

Number five, there was an argument that Ms. Longway Engineering was attempting to execute civil work (road construction) while not being registered to do it as per exhibit P27. On defence, DW1 took cover on a permit which was issued by TANROADS dated 23/06/2016 exhibit P34, allowing a request by DART for Longway Engineering to execute that work. In a letter exhibit P33 which was drafted by DART addressed to TANROADS, it was a mere request for a permit to enable Ms. Longway Engineering to commence the work. Nowhere DART asked TANROADS to indulge into vetting Longway Engineering if is eligible and or having/possessing prerequisite credentials to execute that work. As such it is wrong to say a permit by TANROADS exhibit P34 had the effect of conferring Longway Engineering for a work of civil.

It is common ground that conferring a particular contractor with a class or category of work for which it can execute, is an exclusive domain of Contractors Registration Board (CRB). Suffices to say, Ms. Longway Engineering Co. Ltd was wrongly assigned to execute a civil work which was not registered for as per a letter of CRB exhibit P27. No wonder Longway Engineering Co. Ltd failed miserably to execute that work, because it was

out of her scope. DW1 on defence, made an interesting argument that a fence was by implication a building work even if it was built along the road and not civil work per se. I am unable to agree with this proposition. If it was a building work, why DART sought a permit from TANROADS and not Tanzania Building Agency, the latter being a renowned Government agency dealing with buildings. To my view, the two agencies are mutually exclusive. To my opinion, a fact that DART sought a permit from TANROADS suggests the work had elements of civil work. That is why DART engaged Lucas Construction Co. Ltd, who possess both qualification of building and civil work, as per exhibit P27. Suffices to say Ms. Longway Engineering had no credentials to enable her execute civil work as per the requirement.

Number six, it was the evidence of PW15 who asserted that Ms. Longway Engineering Company Limited was incorporated by BREALA on 5/07/2011 (as per a certificate of incorporation exhibit P30), dealing with construction. According to PW15 Ms. Longway Engineering Company Limited is no longer existing, following change of her name on 1/08/2014 to become Simon Construction and Engineering Company Limited, which fact was supported by PW16. It would appear this fact escaped the mind of DW1 who asserted to own group of companies. In the entire defence by DW1, there was no mention of Ms. Simon Construction and Engineering Company Limited. This

suggest that everything done by Ms. Longway Engineering was problematic and flawed the law and procedures.

In view of the above, a general defence by DW1 to offences pertaining to forgery and uttering false document to wit count number two and three where DW1 defended that a fund transfer, fund request form, cheque, were not forged, or that they are lawful documents, payment were lawful for commercial transaction, documentations are lawful, proper, no alteration and no stakeholder who complained on, signatures are genuine, the fund was lawful paid under lawful agreement between UDART and Longway Engineering, they did not utter forged document, is of little assistance and cannot exonerate him and his allies.

This is because a definition of forgery is not limited or narrowed to actual forgery of signatures or alteration, rather encompasses a situation where one is making false document with intent to defraud or deceive.

In the persuasive case of **Re London and Globe Finance Corporation** [1903] 1 CH 728, cited by the learned Senior State Attorney, it was stated,

'To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believe to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to

his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action'

In the case of **Raymond Adolf Louis and Two Others vs R**, Criminal Appeal No. 120/2019 CAT, also cited by the Senior State Attorney, the Court of Appeal propounded that,

'In the first place under section 335(a), a person makes a false document when he makes a document which is false or which he has reason to believe is untrue. The document is, therefore, made purporting to be what in fact it is not'

Herein, the First, Second and Fourth Accused were charged for forgery under sections 333 and 335(a) of Cap 16 (supra), I quote them,

Section 333, provides that,

'Forgery is the making of a false document with intent to defraud or to deceive'

Section 335(a), it provides that,

'Any person makes a false document who-

(a) makes a document which is false or which he has reason to believe is untrue'

Therefore, as per my adumbration in number one to six above, indeed the First and Second Accused committed forgery, in respect of exhibit P1. On similar vein the Fourth Accused is guilty for uttering exhibit P1 to the NMB.

Also DW1 defended on offences in respect of money laundering to wit count number six, eight, eleven, twelve, thirteen and fourteen, on explanation that intercompany loan or landing is a common phenomenal, Longway Engineering was landing to Universal Cargo Trans-shipment Holding as a sister company of Simon Group, money was withdrawn for lawful purpose of expenditure in respect of Universal Cargo Trans-shipment Holding and not for personal use. However, this defence of intercompany loan or landing does not tally with the explanation by DW1 who was suggesting that during initial implementation of ISP and PPP as the case may be, that is from 15/10/2015 to 6/5/2016 UDART embarked on testing where they were directed by the government to provide services free of charge, whereby they were obliged to borrow and use their family assets to run the project. In other words, DW1 was suggesting loss which maybe he meant this fund was intended to mitigate the loss or refund. If it is the case, it was therefore expected for the transaction to reflect it was for payment or refund of intercompany loan, unlike this transaction in exhibit P5 which portray Universal Cargo Holding Limited received a sum of 260,000,000 from

Longway Engineering. There is no indication that it was for purpose of refund or payment of previous debts.

According to a bank statement of Longway Engineering exhibit P17, on 10/06/2016 a sum of Tsh 260,000,000.00 was transferred to Universal Holding Limited via cheque (part of exhibit P20), as also reflected in the bank statement of Universal Holding Limited exhibit P5 specifically entry dated 10/06/2016 showing it was intercompany loan; on 10/06/2016 a sum of 204,000,000.00 was transferred by cheque (part of exhibit P20) to Zenon Oil and Gas Limited as per advice credit exhibit P15, also reflected on entry dated 11/06/2016 in a bank statement exhibit P12 showing it was a house cheque debit.

According to exhibit P12 on the same date to wit 11/06/2016 a sum of Tsh 204,000,000 was transferred to Maxicom Tanzania by cheque exhibit P6 which was signed by the First Accused, as per comparison with the Mandate file of Zenon Oil and Gas Limited exhibit P13. There was no further illustration as to why that amount was transferred to Maxicom Tanzania.

PW1 stated that Zenon Oil and Gas where a sum of Tsh 204,000,000 was transferred, the First Accused is a director, signatory and shareholder owning

100,000 shares and Simon Energy Group Limited own 900,000 shares, as per a report from the Registrar of Companies exhibit P32.

According to exhibit P5 where a sum of Tsh 260,000,000 was credited, a sum of Tsh. 13,000,000 was paid to Ally Rashid Ali; Tsh 10,000,000 was paid to Metal Company; Tsh 11,000,000 was paid to Paza Bureau DE change; Tsh 11,050,000 was paid to Lucas Nerest; Tsh 105,121,000 was paid to Kamaka Company; meanwhile a sum of Tsh 79,780,000, Tsh. 17,650,000, Tsh 6,500,000, Tsh 8,650,000, Tsh 6,969,000 was paid to the Fourth Accused vide a cheque exhibit P10 approved by the First and Second Accused as per a comparison with the mandate file of Universal Cargo Trans-Shipments Holdings Limited exhibit P7.

PW1 asserted that the First and Second Accused who are signatory in account exhibit P7 which transferred money to the Fourth Accused, were signatory in the account of UDART exhibit P4 and P6.

PW1 asserted that money from UDART account exhibit P4 where the First and Second Accused are signatory was transferred to Longway Engineering Ltd, then a sum of Tsh 260,000,000 was transferred to Universal Cargo Trans-Shipments Holding at NMB where the First and Second Accused are signatory.

PW1 asserted that the Fourth Accused was a cashier at UDART but also was paid money from Universal Cargo Trans-Shipment Holding, and the source of Tsh 260,000,000 was from Longway Engineering who received money from UDART.

In view of the above cycle and haste transactions of transfer, which entailed total withdrawal of deposited amount, indeed majority done on the same date and final withdrawal were done hardly within a month from when exhibit P1 was executed on 30/05/2016 to when the last cheque was signed on 29/06/2016 in exhibit P10 and within ten days up to 9/06/2016 when a cheque exhibit P16 was signed, all these acts suggest that the transactions were intended to launder the money a sum of Tsh 750,000,000.00 transferred from the account of UDART vide exhibit P1.

In the case of **DPP vs Justice Lumina Katiti**, Criminal Appeal No. 15/2018 CAT cited by the learned State Attorney, the apex Court ruled, I quote,

'In our consideration of the evidence, we have no hesitation to hold that the money that was transferred into the bank account of EAPS was subsequently dealt with by transferring it to other bank accounts, almost immediately after being received. Some of the money was transferred by the 3^d respondent into another bank account owned by the 3^d respondent himself. This unexplained transfer of funds

alone, would not require nostrils of a trained detective to smell foul play, so we conclude that the transfers were intended to conceal the origin of that money as charged'

When defending against count number one, DW1 stated that he and co-accused are patriot, honest, obedient, submissive, they did everything in good faith for their nation, they served their government in good faith. DW1 said it is discouraging, painful, disappointing, to be told to have formed a criminal gang or racket, while he used his family asset, money to invest including borrowing loans for purchasing seventy buses.

However, for what I have demonstrated above, I am unable to second to the view and testimony of DW1. This is because the evidence adduced by prosecution suggest the contrary. And in fact, there is no any element of good faith in transferring money from the account of UDART vide exhibit P1 thereafter laundered in the manner I have demonstrated above. Therefore, the First, Second and Third Accused cannot escape liability for an offence leading organized crime.

When defending for count number fifteen DW1 said he could not sabotage UDART, arguing in case UDART fails it is his family who will suffer for the investment done, arguing he used his family asset and money to invest including borrowing loans for purchasing seventy buses. Also, DW1 defended

that UDART is not a public entity or parastatal corporation, or government agency rather is a private company, established under the Companies Act, arguing it's his family company and went far beyond saying it is family based owned private company. DW1 stated that UDART is owned by two shareholders that is UDA 14,850 shares being 99% of all shares of UDART and Simon Group Limited 150 shares being 1% of all shares of UDART. According to DW1, UDA is owned by two shareholders Simon Group Limited 76% and Treasury Registrar 23% of all shares of UDART. DW1 stated that Simon Group is a majority shareholder in UDA, and it is his private company and for his family. This story is contrary to what was established by PW1 who explained that the current shareholding structure of UDART that is UDA Rapid Transit Limited, shareholders are UDA own 14,850 shares equal to 99% and Simon Group Limited own 150 shares equal to 1%, as per memorandum and articles of association of UDART exhibit P23. PW1 stated that when UDA owned UDART by 99% shares, UDA was owned by two shareholders the Government 49% shares via Treasury Registrar and Simon Group Limited 51% shares, also supported by Lawrence Nyasebwa Mafuru (PW19), formerly Treasury Registrar 2015 to 2016.

However, at certain point DW1 stated that UDART is a government project incorporated on 19/9/2014 between UDA, Simon Group Limited and the

Government under Public Private Partnership (PPP), which DW1 bragged to be the first one to be successful implemented. On the other hand, PW1 stated that the assets and fund of UDART are owned by shareholders.

As alluded by the leading defence Counsel, Mr. Ndurumah Keya Majembe learned Counsel, this Court sitting as criminal division is not a proper forum which can conclusively determine the question regarding shareholding between Ms. Simon Group Limited and the Treasury Registrar. However, I am unable to ascribe to the proposition by the learned Counsel for defence that the charges leveled to the accused persons are attributed to a shareholding dispute, arguing to have been instituted prematurely without recourse to civil or administrative remedies.

To my view, the question of shareholding structure is relevant to this case for purpose of establishing as to whether the Government has any share therein. In my respective view, shareholding structure has nothing to do with criminality committed. Seemingly the learned defence Counsel staged that argument for bringing in and taking cover under the doctrine laid down in **Salomon vs Salomon & Co. Ltd** [1897] A.C. 22. However, this position was made clear in the persuasive case of **Littlewoods Mail Order Stores Ltd vs Inland Revenue Commissioners** [1969]1 WLR 1241, cited by the learned State Attorney,

'The doctrine laid down in Solomon v Solomon Co. Ltd has to be watched very carefully. It has often been supposed to cast veil over the personality of a limited liability company through which the court cannot see. But that is not true. The court can and often do draw aside the veil. They can and often do, pull off the mask. They look to see what really lies behind'

Also, in the case of **Bank of India (Tanzania) Limited vs Fomcom International Ltd and Two Others**, Commercial Case No. 19/2018 this Court propounded that,

'A company becomes separate entity from its shareholder, directors who own and/or act for the company. However, the principle as nonetheless its exceptions, and the court when called upon to act in actual fact intervene by piercing or lifting of corporate veil. And in so doing, the court will consider among other things, where the person(s) controlling a company have acted fraudulent, the company is considered as sham or where a company is used to avoid an existing legal duty, before lifting the cooperate veil'

In view of that and without prejudice as to who own what or how many shares or percentage or who is the majority shareholder in UDA or UDART. To me, I take a position that the Treasury Registrar is a shareholder in

UDART vide UDA. As such whatever loss incurred by UDART automatically the government incur loss.

But the question is whether UDART is specified authority within the meaning ascribed to the penal statute. This pertinent question was posed by the learned defence Counsel in his closing submission, arguing that the prosecution failed to prove that UDART is a specified authority.

According to section 2(1) of the Economic and Organised Crime Control Act, Cap 200 R.E. 2019, which is the interpretation section define a phrase specified authority as follows:

'Specified authority means any department of the Government of the United Republic of Tanzania, a co-operative society, a local government authority or a parastatal organisation'

Unfortunate there is no definition of what amount to a parastatal organization. However, section 2 of the Parastatal Pensions (Amendment) Act No. 25 of 2001, define parastatal organization to mean, I bold a portion of my interest,

- (a) any body corporate established by or under any written law including-
 - (i) the East Africa Community;

- (ii) any corporation within the east African Community;
- (iii) any company registered under the Companies Ordinance upon registration and becoming a member,

(b) any company registered under the Companies Ordinance of which the Government or any parastatal organization has shares

According to the evidence tendered by Lupakisyo Abinel Mwambinga (PW8) who is a legal officer at BRELA, stated that memorandum and articles of association of UDART exhibit P24 depict UDART in 2015 shareholders were UDA 14,850 shares and Simon Group Limited 150 shares. On his defence, DW1 acknowledged a fact that UDA is owned by two shareholders being Simon Group Limited 76% and Treasury Registrar 23% of all shares of UDART, this according to the defence of DW1. Meaning that the Government is a shareholder in UDART as well.

Therefore, I cannot ascribe to the proposition of the learned defence Counsel, that the prosecution failed to prove that UDART is a specified authority.

I therefore held the First, Second and Fourth Accused liable to have occasioned loss of total of Tsh 603,255,886.58.

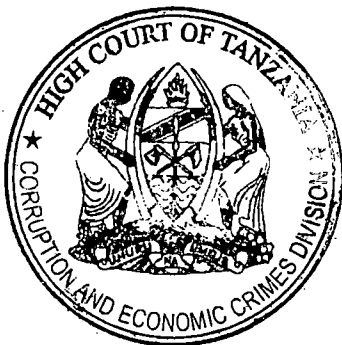
Regarding count number four for the First Accused, the same was not proved on the required standard because the alleged William Masanja Mlenge and Sabri Mabrouk Ayedh were not summoned to vindicate the particular of the alleged forgery in the extract resolution for UDA Rapid Transit Limited dated 11/06/2015 part of exhibit P6, where the duo indicate are among directors who attended and appended signatures in the minutes of the board of directors, alleged to have passed a resolution appointing the First and Second Accused as signatories to operate the Company's bank account in the name of UDA Rapid Transit Limited with NMB Bank PLC, Bank House Branch. In similar vein, count number five for uttering the said extract resolution, is taken as having not been proved as well.

In reference to count number seven, eight, nine and ten were also not proved. This is in view of a defence by DW1 that he and the Second Accused are not signatory to account No. 3300800838 (for Tsh) of Longway Engineering Company Limited at KCB. Indeed, cheque exhibit P20 indicate were signed by Tao Kang (who is at large). Although, a list of shareholders in exhibit P19, reflect that the First Accused and Ms. Simon Group are shareholders, owning an aggregate of 50% of all shares of Longway Engineering Company Limited. But to my opinion there was still no tangible

evidence to substantiate that the First, Second and Third Accused authorized withdrawal of that sum of money in exhibit P20.

In view of the above, the Third Accused is exonerated in respect of count number one and fifteen as well. Because there is nothing in record to prove that he took part in the said criminal racket or did any willful act to cause UDA Rapid Transit Limited to suffer any loss. Therefore, the Third Accused is acquitted.

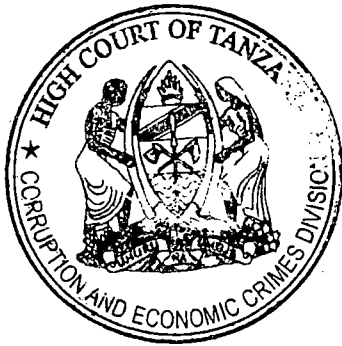
That said, the First Accused person is convicted for count number one, two, six, eleven, twelve, thirteen, fourteen, fifteen; the Second Accused is convicted for counts number one, two, six, eleven, twelve, thirteen, fourteen and fifteen; the Fourth Accused is convicted for counts number one, three, thirteen, fourteen and fifteen.



E.B. LUVANDA
Judge
22/12/2023

Judgement delivered in the presence of Mr. Nickson Shayo learned Prosecuting Officer-PCCB and Ms. Blandina Mnung'a learned State

Attorney for the Republic; Mr. Nduruma Majembe learned Counsel, Mr. Deusdedit Luteja learned Counsel, Ms. Doreen Karugila learned Counsel and Mr. Habibu Kassimu learned Counsel for the First, Second, Third and Fourth Accused who are all present.



E.B. LUVANDA
Judge
22/12/2023

SENTENCE

Considering a fact that the accused persons are first offenders and in view of mitigation by the learned defence Counsel, the First, Second and Fourth Accused are sentenced as follows:

Count number one: The First and Second Accused each sentenced to serve a term of three years imprisonment.

Count number two: The First and Second Accused are sentenced to serve a term of three years.

Count number three: The Fourth Accused is sentenced to serve a term of three years imprisonment.

Count number six, eleven and twelve: The First and Second Accused are sentenced to pay a fine of Tshs 100,000,000/= each or to serve a term of five years in prison.

Count number thirteen and fourteen: the First, Second and Fourth Accused are sentenced to pay a fine of Tshs 100,000,000/= each or to serve a term of five years in prison.

Count number fifteen: the First, Second and Fourth Accused each sentenced to serve a term of three years in prison.

The sentence is to run concurrently, save for the option of fine in count number six, eleven, twelve, thirteen, and fourteen, will be served consecutively.



E.B. LUVANDA
Judge
22/12/2023