IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM.

CRIMINAL APPEAL NO. 56 OF 2010

AMATUS JOACHIMU LIYUMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Court of Resident Magistrates' of Dar es Salaam, at Kisutu, by Hons. L.M. Mlacha, PRM and B.B. Mwingwa, SRM, delivered on the 24th day May, 2010 in Criminal case No, 105 of 2009).

JUDGMENT

MUSHI, J

The Appellant was charged with two (2) offences under the **Penal Code** (Cap 16 R.E. 2002), before the Court of the Resident Magistrate, Kisutu, Dar es Salaam, in Criminal case No. 105 of 2009. The particulars of the two counts on the charge sheet were as follows:-

Count 1: **Statement of the offence: Abuse of office**, contrary to section 96 (1) of the Penal Code.

Particulars of the offence:

That on diverse dates, between the year 2001 and 2006, within the city and region of Dar es Salaam, the Appellant, being a person employed in the public service, serving in his official capacity as the Director of Administration and Personnel (DAP), in the Bank of Tanzania (B.O.T), did abuse the authority of his office by arbitrarily undertaking major decisions in the construction project of the B.O.T., named the **10 Mirambo Office Extension** and implementing the same,

an act which was prejudicial to the rights of the **Board of Directors** of the Bank of Tanzania.

Count II: Statement of the offence:

Occasioning loss to a specified authority, contrary section 284 (A) (1) of the Penal Code.

Particulars of the offence

That on diverse dates, between the year 2001 and 2006, within the city and region of Dar es Salaam, the Appellant, being the Director of Administration and Personnel (DAP), of the Bank of Tanzania (B.O.T), did willfully vary the terms of the contract of B.O.T. regarding **10 Mirambo office Extension Project** and escalated the sum of the said contract without the prior approval of the Board of Directors of the B.O.T., an act which caused the Government of Tanzania (G.O.T) to suffer loss of **USD 153,077,715.71**, or an equivalent to **Tsh. 221,197,299.95/=.**

The trial court consisted of a panel of three Resident Magistrates; Honourables **L.M. Mlacha (PRM), B.B. Mwingwa (SRM) and E.J. Mkasimongwa (SRM).** Certainly, the appellant refuted all the allegations. The prosecution summoned a total of nine (9) witnesses in order to prove the charges. At the close of the prosecution case, the trial court found that the Appellant had **no case to answer** in respect of **count no 2.** Accordingly, the appellant was called upon to defend himself in respect of the allegations in **count no.1.** At the close of the defence case, the trial court found itself delivering two different judgements. **The majority decision** (which is the subject matter of this appeal), was made and delivered by their Honourable Mlacha (PRM), and Mwingwa (SRM). Both Magistrates were satisfied that the appellant was guilty of the offence of **abuse of office.** Accordingly, they **convicted** him and he was

sentenced to serve a two (2) years imprisonment term, without an alternative of a fine sentence.

Honourable Mkasimongwa (SRM), however, found himself unable to agree with the decision of his two learned brothers; therefore, he made and delivered a **dissenting** judgment. Mkasimongwa (SRM), **acquitted** the Appellant. In the course of his dissenting judgement. Mkasimongwa, SRM, argued that, considering the totality of the evidence adduced by the prosecution, the case against the Appellant was **not proved** beyond all the reasonable doubt.

The Appellant, being, aggrieved by the majority decision, lodged this appeal. The Appellant contended that the majority trial magistrates misdirected themselves, both in law and in fact, in convicting and sentencing him, therefore, he prayed this court to **affirm** the reasoning and the **dissenting** judgement of Mkasimongwa, SRM.

The Appellant, has sought to impugn the majority decision on the following twelve (12) grounds, namely:-

1. That the honourable learned Magistrates erred in law and in fact for failure to evaluate the evidence on record properly and as a result arrived at a wrong conclusion.

2. That the honourable learned Magistrates erred in law and in fact for failure to accept the fact that the changes in the scope of work were made after being discussed in a committee of Experts at the project level who were under the supervisions of the Project Manager and that the Appellant was not a member in that committee.

3. That the Honourable learned Magistrates erred in law and in fact for failure to accept the fact that the Project Manager worked as an independent person and that he was directly answerable to the Governor and not to the Appellant.

4. That the Honourable learned Magistrates erred in law and in fact for ignoring and throwing away the evidence of the defence side merely on the grounds that DW 1 and DW2 were formerly employees of the Bank and that all wee at Keko Prison as suspects of similar offences.

5. That the Honourable learned Magistrates erred in law and in fact in holding that the testimonies of DW1 and DW2 were cooked story and that they had common interest to serve.

6. That the Honourable learned Magistrates erred in law and in fact in holding that payments were initiated by the Project Manager and being approved by the DPA (Appellant)

7. That the Honourable learned Magistrates erred in law and in fact in holding that the Board of Directors had lost control of affairs and that it was being bulldozed by the Appellant and the late Governor.

8. That the Honourable learned Magistrates erred in law and in fact on holding that **retrospective** approvals of the Board of Directors were not approvals at all on the eyes of the Law.

9. That the Honourable learned Magistrates erred in law and in fact in holding that the Appellant had no authority the sign letters (Exh. P5 to P12) and that he did so contrary to the BOT Act, BOT Regulations,

Public practice and procedures which is an abuse of the authority of his office.

10. That the Honourable learned Magistrates erred in law and in fact in holding that the added expenditure had adverse effect to the Board of Directors and in the operations of the Bank and the nation as whole.

11. That the Honourable learned Magistrates erred in law and in fact in holding that the prosecution proved their case against the Appellant beyond all reasonable doubt.

12. That the Honourable learned Magistrates erred in law and in fact for failure to observe the legal principles when imposed a custodial sentence against the Appellant.

In order to appreciate the nature of this appeal, I think it would be prudent to briefly give some factual background information, as follows: In 1984, we still remember too vividly, the Bank of Tanzania (B.O.T) headquarters had a fire! The damage caused was quite devastating. Practically, the entire B.O.T. headquarter premises went up in the raging merciless inferno. The B.O.T. Management decided to rehabilitate the scrotched premises. Before doing so, the B.O.T Management engaged the services of **M/S Design and Services Ltd.** (Ironically, the same architectural firm which designed the former B.O.T Buildings), to examine the fire damaged buildings and advice whether they could be renovated or not! The firm gave the opinion that the scrotched buildings could be renovated and that the renovation could go hand in hand with the construction of other new buildings and facilities, in order to cope with the increasing activities of B.O.T. Hence, a construction project was hatched. It was given a name, **The 10 Mirambo Office Extension (The Project).**

The B.O.T commissioned M/S Design and services Ltd, (in collaboration with other consultants), to prepare the Projects architectural drawings. Other consulting firms included, **M/S TAN-Consult** (Structural Engineers), **M/S INTER-CONSULT** (Service engineers), while **WEB-URUNO AND PARTNERS**, were the quantity surveyors. The drawings (which, by the way, included the famous **TWIN-TOWERS**), were approved by the B.O.T's Board of Directors (**The Board**). M/S Design and Services Ltd. were then required to prepare the necessary Bill of Quantities (**B.O.Qs**) and Tender Documents. Bids were invited, and out of ten bidders, **M/S Group Five Building East (PTY) Ltd**, won the Tender. Terms were made. On 25/06/2002, and a **construction contract** was entered into between B.O.T and the M/S Group Five Building East (PTY) Ltd (**Construction company**). The B.O.T.'s Board of Directors approved the contract and works commenced on 26/06/2002. M/S Design and Services Ltd., was appointed to be the Lead consultant.

Both the B.O.Qs and the construction contract indicated the **scope of works** to be executed by the **construction company**. For easy reference, the works included the following:-

1. The construction of the **North Tower** to a 14 storeys building, of total 10,500 square meters, at the cost of USD, 26,929,953.00
2. The construction of the **South Tower to a 14 storeys** building, of total 9780 square meters, at the cost of **USD 29, 851,431.00.**
3. The construction of a **conference centre**, of 4,360 square meters, at the cost of **USD 10,595,176.00**
4. The construction of a **car park**, of 7,990 square meters, at the cost of **USD 4,313,420.00**
5. The completion of the **External works,** at the cost of **USD 1,890,019.00.**

6. The **component of currency escalation** during the construction period was considered, and the same was covered by the provision of USD 3,760,440.00

The **construction contract** stipulated that the value of the Project was **USD 73,600,000.00.** The construction was supposed to be carried out for a period of **three** (3) years, that is to say, **by June, 2005**, the construction of the **Project** was supposed to have been completed.

The funding of the Project was to be done by the B.O.T itself, through the so-called **Capital Expenditures system**, which were funds set aside only for **development projects** of B.O.T. According to the B.O.T's policy and internal financial Regulations, any expenditure from this account required **prior approval** by B.O.Ts Board of Directors.

The implementation and administration of the Project was put under the auspice of the **Directorate of Administration and Personnel.** It would appear that at the material time, B.O.T development projects were being administered by this Directorate. The appellant, at the material time, was the Director of the Directorate of Administration and Personnel (**DAP**).

The Appellant, certainly, is a **professional Manager and administrator**, who had worked for B.O.T for a period of twenty five (25) years. He was appointed by B.O.T in 1973, as a first Assistant in the Economic Department. In October, 1999, he was appointed as DAP. He maintained that position, until his Statutory compulsory retirement, having reached the age of 60 years, in December, 2008. As DAP, his main duties included the **"facilitation and administration of B.O.T's Estate and Personnel matters"**. In his daily activities, the Appellant was directly **answerable** to the **Governor** of Bank of Tanzania. The **Management** of the Project was under a Project Manager, one **Mr. Kweka.** His

duties included advising the Governor on technical issues pertaining the Project. However, the Project Manager **reported** to DAP.

From the preceeding paragraphs, it is quite obvious that the Appellant was a **central figure** in the administration and management of the Project. Under his capacity, as DAP, he was responsible for **administering and overseeing the overall implementation of the Project.** He was mandated to coordinate the key players to the Project, that is to say, the B.O.T (**the client**), the **consultants** (including the lead consultants, M/S Designed services Ltd) and the other three consulting engineers, the **construction contractor**, the **Project Manager** and lastly, the B.O.T **Management** itself.

In the course of the execution of the Project, some **whistle blowers** informed the Prevention and combating of corruption Bureau (**P.C.C.B**) something to the effect that the implementation of the Project did not follow the agreed scheme of work, and that most of the expenditures and payments did not abide by the B.O.T's policy and financial Regulations. Gratefully, the P.C.C.B received the information. They began to probe into the activities of the Project. The P.C.C.B inspected the construction works. They scrutinized documents pertaining the Project. The PCCB questioned several individuals and the officials responsible with the implemention of the project, including the appellant, requiring them to account for the variations made in the project and the consequent expenditures and payments.

At the end of their investigations, the P.C.C.B were satisfied that **gross mismanagement** of the Project, associated with some **possible misappropriation** of the Project's funds, had occurred. The P.C.C.B were also convinced that they **had collected cogent evidence** that would stand up in court against the appellant. They handed over the matter to the Director of Public Prosecution (DPP), for the appropriate arraignment and eventually, the

prosecution of the Appellant. Accordingly, the Appellant was charged with the offence of **abuse of office** and that of **causing pecuniary loss** to a specified authority, namely the B.O.T.

In the subordinate court, the prosecution stated their case: Briefly, the Prosecution alleged that, in the administration of the Project, the **Appellant** and the late **Governor, Dr. Daudi Balali**, without the prior approval of the B.O.T's Board of Directors, made a **complete change** to the scope of work of the Project. That, the alterations were neither envisaged in the contract document signed on 25.06.2002, nor in the initial scope of work described in the B.O.Q's. That, the variations needed **prior** sanctioning of the B.O.T's Board of Directors. The Prosecution claimed that the changes, **arbitrarily made**, included the following:

1. Increase of numbers of floors, **from 14 to 18**, for both North and South Twin Towers.
2. The constructions of a **Helicopter Pads** and **penthouses** on top of both Twin Towers.
3. Change of the **finishing materials** for the external and internal solid block walls from plastered and painted to granite finishing; and change of floor finishers from terrazzo and ceramic tile to granite and carpet finishers, which caused improper and costly spending of B.O.T money.
4. The **creation of a double basement** for, and addition of four (4) half floors in the car park.
5. The **introduction** in the conference facility the Barrisol roof, **specialist stone acoustic** curtains and glass façade finishes.
6. The **Addition of North Block** and **Energy farm**, a completely extra structure and work in the Project.
7. A complete **replacement** of **storm water system** and provision of storm water outlet in the external works component.

The Prosecution further alleged that the **unauthorized changes** to the scope of work were more than **48% increase** to the original scope of work. The prosecution contended that these alteration were **made** and **approved** by the late Governor Balali, and the appellant, who purported to be the **sole decision makers** on the Project. In that respect, the appellant and the late Governor, **assumed** and **usurped** the **powers** and the **role** of the B.O.T's Board of Directors, regarding the Project.

The Prosecution further claimed that, at all time the changes were made without the prior approval of the B.O.T's Board of Directors. That the appellant and the late Governor, Dr. Balali used to seek **retrospective approvals** after alterations to the scope of work **had been executed** by the two. That, the Board of Directors **rebuked** them for their failure to observe the laid down policy and procedures of the B.O.T, but to no avail. The prosecution, bitterly asserted that the Board of Directors was turned into a mere **rubber stamp**, for making **retrospective approvals,** under the disguise of **"avoiding extra costs"** that would accrue in terms if "interest and damages", if the execution of the project was further delayed. The Prosecution further alleged that the Board of Directors was **denied the knowledge** of the source of the funds that financed the Project, despite the Board's persistent demands. In that respect, the Prosecution maintained that the **unbecoming conduct** of the appellant and the late Governor, Dr. Balali, **grossly interfered** with the mandate and the powers of the Board of Directors over the affairs of the Contract.

The Prosecution concluded their case contending that, the changes to the scope of work, by adding new extra works not covered in the Projects' B.O.Qs and the contract document, led to the costs of the Project to severely **shoot up**, from the original contractual sum of USD 73,000,000.00 to USD 357,675,568.00, as of May, 2008, as a result, therefore, the Government of

Tanzania suffered a pecuniary loss of **USD 153,077,715.75,** which was equivalent to **Tsh. 221,197,299.95/=.**

The prosecution's case was supported by the testimony of nine (9) witnesses. PW 1 (**Seif Kasanga Mohamed**), a P.C.C.B field Officer, holding a masters degree in **science and civil engineering** (Siles University, Poland, 1992), with an experience of **eleven** (11) years of investigation of fraud and corrupt transaction cases, informed the trial court how, after a period of four years of intensive investigation, he managed to uncover the astounding evidence of gross mismanagement and misappropriation of the funds of the Project; by the Appellant and the late Governor, Dr. Balali. PW1 testified that the original scope of work agreed upon between the B.O.T and the construction company was completely changed, to the extent of 48%. PW 1 further testified that the alterations were not sanctioned by the B.O.T's Board of Directors.

PW 1 also claimed that the construction costs shoot up, and that most of the **expenditures were not approved** by the B.O.T's Board of Directors. PW 1 concluded his testimony, by informing the trial court that the expenditures were approved by the appellant. PW 1 also contended that, in order to justify the unlawful alterations and payments, what the appellant and the Late Governor Balali used to do was to request **retro-spective approvals** from the Board, which was **against** the B.O.T's policy and financial Regulations.

PW 6 (**ANASE SHAYO**), who by any standard, is a highly qualified and very experienced **Civil engineer** (University of London, 1961), and an **employee** of the Lead Consultants, **Design and Services Ltd**, since 1988, testified, and his testimony confirmed that the original scope of work that had been agreed upon by the B.O.T and the construction company had been altered substantially. PW 6 produced in court the construction contract, between the B.O.T and the construction company. It was admitted into evidence and

marked as **exhibit 1.** PW 6 also produced the Projects' B.O.Qs (in six volumes), which were admitted into evidence, and marked exhibits **P 4A – P 4 F.**

PW 6 further testified that during the entire period of the Project, **correspondences** and **instructions between his firm and the B.O.T** were made through the Director of Personnel and Administrations, the Appellant. PW 6 further testified that correspondences were made **in writing** especially those which **involved finance.** PW 6, produced in court a total of eight (8) **letters, written and signed** by the Appellant, which gave the firm specific **instructions** to **make certain changes** in the scope of work. The letters were admitted into evidence and marked **Exhibits, P5 to P12.**

PW 7 (**Harold Herber Webb**), another highly qualified and experienced **quantity surveyor** from The WEBB URONU and PARTNERS LTD testified, that he used to prepare **periodic financial reports** for the project. The final account of the Project clearly established an **increase in the cost,** and that, after the **variations** in the scope of work, the total cost of the project was **USD 367,675,568.00**, as against the original construct sum of USD 73,600,000.00.

The Prosecution produced the Deputy Governor, **Mr. Juma Hassani Reli**, to testify as their PW 8. **Deputy Governor** Juma Reli, is, definitely, a highly qualified **accountant** and **experienced financial expert.** He holds a Masters degree from the University of Barmingham UK. He has been the Deputy Governor since February, 2005.

PW 8's testimony was to the effect that changes of scope of work were made by the **Management** of the B.O.T. The variations together with the

payments were **simply reported** to the Board of Directors, which normally gave its restospectival approval. PW 8 further testified that, **DAP was the official who used to prepare documents** for the Board's, approval. PW 8 also informed the Court that the funding of the Project was under the **Capital Expenditures**, whose payments required **prior approval** of the Board of Director.

The Prosecution's witness, PW 3 (**Julius Ruta Angelo**), testified that, at the material time, he was the **Finance Director** of B.O.T, since January, 2008. Before then, however, from June, 1991, he was the B.O.Ts Principal Accountant. In 1995 – 1997, he was B.O.T's Deputy Director Domestic Accounts, where as in October, 2007 he was appointed Associated Director, Finance up to January, 2008, when he rose to position of Directorship as a Finance Director. PW 3's main duties included preparation of B.O.T's Accounts and Budget, including the preparation of B.O.T's Revenues and Expenditure Reports. In his capacity as a Finance Director, PW 3 was also part of B.O.T's **Management committee.** He also used to attend Board of Directors' meetings.

PW 3 informed the trial court that the Management used to submit **progress reports** of the Project, to the **Board's Extra – ordinary meetings.** PW 3 further testified that during these progress reports, the Management would almost invariably put in a request for retro-spective approvals; **the practice which was not approved by the Board.** PW 3 also informed the court that, the **coordinator** of the Project was the DAP, where as the Project Manager was Deogratious Kweka, who **reported** to DAP. It was the testimony of PW 3 that the **Project Manager, initiated payments**, which were **approved** by DAP, who **forwarded** them to the late Governor.

The **Manager** for B.O.T's Board Matters, **Yusto Eseko Tongwa,** testified for the prosecution as **PW 2**. Mr. Tongwa, is a **lawyer by profession**, holding a master's degree in Law (University of Bulgaria). PW 2 was employed by B.O.T, first as a Public Relations Officer, in April, 1988. He was transferred to the Legal Department in 1994, only to be appointed the Board's Matters Manager, in 2007. Amongst PW 2's duties included the preparation the Board and Management meetings, maintenance of Board's records and overseeing the implementation of Board's and Management decisions and instructions.

PW 2 informed the trial court that as at 2006, the B.O.Ts Board of Directors included the Governor (Chairman), Deputy Governor (Deputy Chairman), Principal Secretary Treasury (United Republic of Tanzania), Principal Secretary Treasury (Zanzibar) and Six (6) other members appointed by the Minister of Finance. PW 2 informed the Court that the **Management** committee of the B.O.T., consisted of about 17 members. At least all the Directors of different Directorates (including the Appellant), formed part of the **Management Committee.** The Management committee was headed by the Governor himself or his Deputy, in case of the Governor's absence.

According to PW 2, the B.O.T's Management Committee has two faces:
One of such face is the **"Governor himself"**. In that capacity, the Governor, may give **"management decisions"**. The other face, is the composition of the whole 17 members. PW 2 further testified that when the Governor **gives management instructions** or **decisions**, he does so by **issuing a written minute** (in Kiswahili, **dokezo**).

PW 2 further informed the trial court that some of the powers and functions of the Board of Directors is to provide matters of policy and approval of B.O.T's budgets. It was the testimony of PW 2 that within B.O.T there are **two types of expenditures.** The Recurrent expenditure, which carter for

the day to day running costs of B.O.T activities. The other type of expenditure being **Capital Expenditures**, which are expenditures for Development Projects. PW2 further testified that according to B.O.T's policy and internal financial regulations, all **payments from the Capital Expenditures** must obtain the **prior approval** of the Board. PW 2 emphasized that the Management is required to **apply** to the Board for **approval,** any intended payment from the Capital Expenditure.

As for the **types of Board Meetings,** PW 2 informed the trial court that there were the **ordinary meetings,** which were held every after two months, whereas **extra-ordinary meetings,** which were held on **ad hoc** basis, depending on the matters to be discussed. PW 2 testified further that **all the matters pertaining the Project** were used to be discussed in the **extra ordinary meetings** of the Board. PW 2 testified that, as a matter of fact, in these meetings, what was being discussed was the **progress reports** of the Project, as tabled by the Management. In this regard, PW 2 further testified to the effect that, when these reports were being submitted, the Management would also apply for the approval of the Board, of the matters which the Management had already decided and executed. PW 2 testified that approvals for the changes of the original scope of work and payments were always being made restrospectively. That is to say, the Board of Directors was only asked to **"bless"** the changes and the payments already made. PW 2 further testified that the project was never discussed in the Management meetings. It was also the testimony of PW 2 that the Board of Directors was **not satisfied** with the procedures and style adopted by the Management which sought for approval of the changes and payments after the alterations had been implemented.

Two outgoing **Board members** were produced as prosecution witness, to establish the fact that the Board of Directors **was not requested to give its**

consent prior to the alterations being made in the scope of work by the Management. PW 4, **Michael Shirima,** was a Board member between June, 2002 and June, 2006. He produced his letter of appointment to the Board, which was admitted into evidence and marked Exhibit P2. PW 4 testified that the **10 Mirambo Office Extension Project** was normally being discussed in the **extra – ordinary meetings** of the Board. PW 4 testified that, as regards the affairs of the Project, what was usually tabled before the Board was the **over expenditures** and the **works already done**. The Board was merely requested to approve the already spent amount of money as authorized by the Management. PW 4 further testified that, himself, and the Board at large, was not **satisfied with the over expenditures committed by the management,** and when he complained to the Minister of Finance, then, PW 4 was given a **"Brush – off"**. When he contemplated of resigning from the Board, he was advised to stay on, to await his end of tenure of office. PW 4's membership to the Board was not renewed.

The testimony of PW 5, **Natu Mwamba,** another Board Member, since August, 2004, is that, according to the B.O.T's policy, the Board of Directors was required to issue approval for the changes to the scope of work **before the changes were done**. But that was never the case. PW 5 also testified that the Board always expressed its **dissatisfaction** by the act of Management of **committing payments prior the approval by the Board**. PW 5 also testified that, at the expiry of the Board's tenure of office, **handing over notes** to the new Board of Directors were prepared and singed by all outgoing Board members. In the handing over note (admitted into evidence and marked **exhibit P.3**), the outgoing Board members openly expressed their **misgivings** over the management's un-becoming conduct of the **mishandling** of the Project and its **rogue** character of **ignoring** the powers and the role of the Board over the affairs of the Project; despite the

Board's constant complaints and demands to the Management requiring it to abide by the B.O.T's policy, rules procedures and financial regulations.

Having produced the nine (9) witnesses, the prosecution were satisfied that they had made out their case against the appellant. They rested their case. We have seen that there was a submission for a **"no case to answer"**, and the Appellant was **acquitted** in respect of **count no.2.**

The appellant defended himself, in respect of **count no.1**, giving his evidence on oath. His defence was simple and straight forward. He admitted that the Project was under his directorate for the purposes of **administration** only. He contended that his role was to give **administrative support**, i.e giving personnel to the project, taking care of Project's staff welfare and general estate management. The appellant maintained that for the purposes of implementation, the Project was under the **Project Manager** (Deogratious Kweka), who was an **Independent person**, answerable directly to the Management. The appellant claimed that since the Project Manager was not an employee of B.O.T, the Governor **verbally** gave him the role of **signing letters** and other correspondences regarding the Project. The appellant maintained that he used to sign those letters **after seeing approval** of the governor. The Appellant claimed that when he spoke of the **"Management"**, he meant the **Governor**, who usually had the final say.

The appellant conceded that there were some changes in the scope of work. However, the appellant insisted that those changes were discussed in the **"Committee of Experts"** at project level, under the Project Manager. The committee of experts was composed of the consultants (M/S design and services Ltd, Webb Uronu and Partners Ltd; Inter consult Ltd. and Tanconsult). The appellant maintained that whenever the Governor needed

some advice, the Governor would give directions to the technical committee under the Project Manager, which advised the Governor accordingly. And that once the Governor has made his decision, the Governor would **instruct** the Appellant **verbally**, to **convey** the decision to the Project Manager or the consultants, as the case may be.

The Appellant further asserted that the changes to the scope of work were later submitted to the Board of Directors in their extra-ordinary meetings, and in these meetings, the **Management** would submit progress reports on the Project. And that when these reports were being submitted, the **Management** also applied for approval of the Board for matters it had to approve, such as the changes in the scope of work. And that, approval for scope of work and payments were made **re-trospectively.** In cross-examination the appellant conceded that it was the Board of Directors **which had the mandate** to **authorize any changes** in the scope of work, as well as **payments from the capital expenditures account.** The Appellant admitted that the **Board's approval had to be obtained first** before the changes and expenditures were effected. Of course, the Appellant insisted, that but the **Management had the ultimate decision.**

At the conclusion of his defence, the Appellant simply could not comprehend as to why he was being prosecuted! He contended that he had done nothing wrong, because what he did was simply to **discharge** his duties, in his capacity as the **administrator** and the **coordinator** of the Project, and that of **implementing** the decisions of the Governor,

However, the trial court held differently. The majority of the trial magistrates (**Mlacha**, PRM and **Mwingwa** SRM), rejected the appellant's defence that he was simply implementing the Governor's verbal instructions, who was the ultimate decision maker. The trial court held that the **Governor's decisions**

were **unlawful**, in the light of the provisions of **section 14 (1),** read together with **section 14(2)** of the **Bank of Tanzania Act,** 1995 (Cap. 197 R 2002), on the ground that, the changes in the scope of work and the consequent payments from the Capital Expenditures account **were not approved by the Board of Directors.** Accordingly the court convicted the appellant of the offence of **abuse of office**, C/S 96 (1) of the **Penal Code.** Certainly, the appellant was aggrieved by the majority decision of the trial court, hence this appeal.

In this appeal (as it was in the trial court), the Appellant was represented by a very senior learned defence counsel, **Mr. Mkatte**, who was assisted by Messrs **Mr. Magafu, Ndusyepo** and **Kyauke**, learned counsels. On the other hand, the Respondent (The Republic) was equally represented by a contingent of senior and experienced State Attorneys, led by **Mr. Osward**, assisted by **Mr. Ramadhani** and **Mr. Prosper.**

The appeal was argued by way of written submission. Admittedly, learned counsels for both sides presented powerful and contentious legal arguments, supporting them with several court decisions. Let me take this occasion to thank the learned counsels and the state attorneys for citing all those judicial authorities. Let me promise them that in the course of this judgment I will **endeavor to make reference to some of them**, if not all!.

Learned Counsels for the Appellant argued, at length, the 1st and 11th grounds together. In my opinion, the main complaint in this appeal is that, the prosecution did not prove their case against the Appellant (ground no.11), for the reasons stated in grounds no.1, no.2, no.3, no.6, no. 8, and no. 9. For the sake of convenience, I will discuss those grounds together, giving my reasons for my decision thereon.

In brief, in grounds no.1 and 11, learned counsels for the Appellant contended that the Honourable learned Resident Magistrates who made the majority decision failed to **evaluate the evidence** on record according to the established principles of **burden of proof**, and as a result they arrived at a wrong conclusion that the prosecution proved the case against the appellant beyond all reasonable doubt. Counsels maintained that in criminal cases, the burden of proof is always on the prosecution side to establish their case beyond all reasonable doubt. An accused person ought to be convicted on the strength of the prosecution evidence and not on the weakness of the defence. Counsels asserted that, the fact that the accused has told lies, thereby rendering his defence weak, does not absolve the trial court from ascertaining from the whole evidence whether the offence with which he is charged has been proved beyond reasonable doubt.

Learned counsels for the Appellant further argued that, it is a settled principal of criminal justice that in a criminal charge, when an accused person makes an **assertion** it is the duty of the prosecution to **disprove** it and establish the guilt of the accused and not for the accused to establish his innocence by calling witnesses (counsels cited the case of **Longinus Komba versus R. (1973) LRT No. 39**).

Learned Counsels further held that it is always the duty of the court to **evaluate** and/or **analyse** the evidence brought to court by both parties before giving its decisions. (the case of **Amin Mohamed V.R [1994] TLR 138** was reffered to). Counsels for the appellant claimed that the trial **magistrates did not properly evaluate** the evidence on record as a result they made a wrong conclusion contrary to the principles stated above.
Learned learned counsels for the ~~prosecutions~~ appellant then submitted at length, practically reviewing and challenging what they viewed as being the weaknesses in the prosecution evidence, in the attempt to establish the fact

that the trial court failed to evaluate the evidence produced in court, hence, arrival at a wrong conclusion.

In brief, learned counsels for the appellant submitted that the evidence on record clearly revealed, among other facts, that:-

(i) The appellant was simply the coordinator of the Project, that is to say, linking up between the Management and the lead consultant. That this was done through the **letters** shown as exhibits **P5 to P12**. Counsels contended that in doing so the appellant was **not making decisions on the Project.**

(ii) Learned counsels further claimed that the **changes** in the scope of work were made by the **Management** (meaning the Governor), having received technical professional advice from the committee of experts, headed by the **Project Manager.**

(iii) It was argued that according to PW 3, **payments** from the Capital expenditure were **initiated by the Project Manager,** and "approved" by the appellant and then sent to the Governor after they have been verified by the Auditor. Counsels maintained that according to the testimony of PW 4, the appellant was not involved in the authorizations or approval of payments.

(iv) Learned counsels submitted further that although **retrospective approvals** were given by the Board, the reports were those of the **Management** and not the appellant.

(v) It was further asserted that, according to the evidence of PW 8, it was not possible for the appellant to make decisions without the knowledge of the Governor and the Board to approve such decisions.

(vi) Lastly, counsels argued that the prosecution **failed to produce letters** written by M/S Design and Services Ltd., to the B.O.T and the B.O.T's **working files** to **rebut** the appellant's defence that he wrote and signed the letters after receiving approval from the Governor. That

failure to produce the letters written by M/S Design and Services Ltd., and the B.O.T.s relevant working files was very **fatal** to a just and fair decision.

Responding to the submissions made by learned **defence** cou nsels for the appellant, the Respondent's learned state attorneys categorically disputed the assertions that the trial court **failed to evaluate** the evidence on record and that the prosecution's case was not proved beyond reasonable doubt. The learned state attorneys submitted that: first, they declined to identify themselves with the learned counsel's observations that it is the duty of the prosecution to prove all the **assertions** raised by the accused based on the cited authority of **Longinus Komba V.R (Supra)**. They conceded that, it is true that the prosecution has a duty to establish the charge against the accused, however, this obligation does not extended to the standard of **disproving** every **assertion** made by the accused even if they do not **cast reasonable doubt** on the prosecutions case. The state attorneys claimed that, only those assertions which **cast reasonable doubt** which the prosecution has to disprove in order to establish a criminal charge. They maintained that, **doubt** about the **guilt** of an accused person can **count** only if such a **doubt is reasonable**. Otherwise, a doubt must not be **fanciful**. The learned state attorneys refered the decision of the Court of Appeal, in the case of **Magendo Paulo and Shabani Benjamin V.R Criminal Appeal No. 19 0f 1999** (un reported). Learned attorneys submitted that the evidence adduced by the prosecution **left no reasonable doubt** in favour of the appellant.

The learned state attorneys went ahead pointing out how the **evidence on record established** a **case against the appellant** in respect of the offence of **abuse of office.** It was argued that the two Residents Magistrates extensively evaluated the prosecution evidence and they were satisfied that the prosecution did prove their case beyond reasonable doubt, on the following grounds:-

(i) That, there was no dispute from the evidence of both sides that **there were changes** in the scope of work in the project. Both the prosecution and the defence witnesses testified to the effect that there were changes in the Project works.

(ii) It was argued that **it was the appellant who instructed** the consultants to implement the changes, **through the letters** he wrote and signed.

(iii) It was further argued that the letters authorizing the changes in the scope of work were **not authorized** by the Board of Directors.

(iv) The learned State attorney vehemently asserted that the letters authorizing changes **were not written** by the appellant **on verbal instructions from the Governor.** The Respondent disputed the appellant's claims, arguing that the letters **raised** some doubt.

(v) It was further argued by the state attorneys that, whether or not the appellant authorized the changes through the advice of the Governor, is of little avail because the **Governor could not authorize the changes** in the scope of work **without the prior approval** of the Board of Directors.

(vi) The state attorneys still argued that the trial court carefully considered and rejected the appellant's defence that the **Management** of B.O.T **meant the Governor**, and that the Governor was the **final decision maker**, according to **section 14(1)** of the B.O.T Act, in as far as the Project was concerned.

(vii) It was a further argued that the evidence or record clearly indicated that the prosecution's case was not only supported by the letters (Exhibit P5 – P12) written by the appellant alone, but also by the cogent prosecution evidence adduced by PW 1, PW 2, PW 4, PW 5, PW 7, and PW 8.

(viii) The learned state attorneys submitted that **it is not the law** that the prosecution has a **duty to produce in court all exhibits** collected

during the investigation, even though they are not of vital significance in the proof of the case. The state attorneys argued that, the prosecution has the **discretion to choose from the evidence** collected, the exhibits which are **relevant in the proof of its case,** and that is why there is **no obligation** to draw on **adverse inference** every time when there is **non disclosure.** To bring the point home, the learned state attorneys cited the decision of the court of appeal, in the case of **Chandrahant Patel V.R,** of criminal application No. 8 of 2002 (unreported), where it was held that the court would be under no obligation to draw an adverse inference for non disclosure of evidence unless its disclosure would probably have affected the outcome of the trial

(ix) It was submitted that in the instant case, the **correspondence files and the B.O.T working files were not material evidence in the proof of the prosecution case.** It was further asserted that even if these documents were tendered, they could not have affected the outcome of the trial as they **could not have casted doubt on the evidence** that the appellant gave directives to change the scope of work without the approval of the Board of Directors. The State attorneys insisted that at best those correspondences and the files would have indicated that the **appellant acted on Governor's** instructions, and this could **not have helped the appellant** as the Governor **had no power to** approve the changes in the scope of work in issue.

(x) The learned state attorney contended that, assuming for the sake of argument that the Governor gave approval, the same **approval was illegal** as rightly found by the trial court. It was submitted that the appellant had no **protection in law for acting on illegal**

instruction. To bring the point home, the decision in the case of **Kaniki and Kashoro** (1971) HCD No. 186 was cited. In that case, the court held that the **defense of superior order is not a defence in law.**

(xi) The learned state attorneys further submitted that the proposition by the appellant that the prosecution **failed to call some vital witness** (one of them being the **Permanent Secretary to the Treasury**), was fatal to the prosecution case and that an adverse inference should be drawn on the prosecution case, should be rejected since the proposition was not supported by law. To drive the point home, the decision in the case of **Aziz Abdallah V.R** [1991] TLR 71, was cited. In that case, it was held that, it is a wrong idea to hold that the prosecution is under the obligation to call and examine all the witnesses who are acquainted with the facts of the case, but rather only those **witness whom the can prove their case.**

(xii) Lastly, the learned state attorneys submitted that in the light of the foregoing analysis, **the trial court properly evaluated the evidence** on record and arrived at a right decision that the evidence on record established the case against the accused beyond the reasonable doubt.

In my humble opinion, the whole of the appellant's appeal against his **conviction**, as I have said, is based on the grievances that the evidence adduced by the prosecution was not adequate to prove the case against the Appellant. I believe, once this objections are resolved, then the appeal would be determined. Let us begin this way. The appellant was convicted of the offence of **abuse of office**, C/S 96 (1) of the Penal Code (Cap. 16 R.E 2002), which state that:-

"any person who being employed in public service does or directs to be done in abuse of the authority of his offence, any arbitrary act prejudicial to the rights of another is guilty of an offence.."

Quite properly, learned counsels for both sides, together with the trial court, were in agreement that the **ingredients of the offence** include the following:-

(i) The accused must be employed in the public service,

(ii) The accused must have done or directed to be done an act in abuse of the authority of his office, and

(iii) The act done must be arbitrary and prejudicial to the rights of another.

Again, learned counsels of both sides, together with the trial courts, quite rightly, agreed with the definitions of what is meant by **"abuse of authority"**, meaning that **" A statutory authority is liable if he does not conform to the procedure prescribed by law"** (adopted from S.L. Salwan and N. Narag legal Dictionary, 18th Edition, 2008). In simple words, therefore, a person is said to **abuse authority** of his office, **if he does or omits to do an act contrary to the law or prescribed procedures and regulations.**

It was not in dispute that the appellant was employed in the public service (B.O.T), during the material time in which the offence is alleged to have taken place. Therefore, the first element of the offence was not in issue.

There is no dispute either, that the Project was being coordinated by the Directorate of Personnel and Administration of the B.O.T. The Directorate was under the Appellant, who was the Director (DAP). It is a fact that during the

material time B.O.T developments projects were being coordinated by the administration Directorate.

It was not disputed, that the Project's funding fell under the **Capital Expenditures of the budget of the B.O.T**, whereby the **Board of Directors** was the **only organ vested with powers to approve expenditures** from this account.

It was not in dispute either that in the course of implementation of the Project the scope of work **changed substantially**, to the extent of **48%** from what it was agreed originally. Indeed, both the prosecution and the defence testified to that effect. The changes in the scope of work also changed the contractual sum, from **USD 73,600,000.00 to USD 357,675,568.00** (a difference of **USD 153,077,715.71**).

It is a fact that the changes where brought about by the **client**, the B.O.T. **The client communicated the changes** to the lead consultants, M/S Design and Services Ltd., **in writing**, as evidenced by the **letters, exhibits P5 – P12, written** and **signed** by the appellant.

The main issue for decision is, **whether the appellant committed or directed on act to be done** in abuse of the authority of his office! In order to answer that question, we have to decide first, **whether the appellant was responsible for the changes** in question.

The prosecution relied on letters written and signed by the appellant **(Exhibit P5- P12)** and sent to the lead consultant authorizing the changes in the Project. It was the respondent's case at the trial, and it is the argument in this appeal that these letters authorizing changes in the scope of work **were not authorized by the B.O.T.s Board of Directors.**

The appellant does not deny writing the letters in question, It was the appellant's evidence at the trial, and it is the an argument in this appeal that the letters authorizing changes were written by him on the **verbal instructions from the Governor**, who according to **section 14 (1)** of the Bank of Tanzania Act (Cap. 197 R.E 2002), the overall management of the B.O.T is vested in him. The appellant contended that all the changes in the Project were discussed by the **committee of experts** of the Project. This committee advised the Governor accordingly through the **Project Manager**. It was the appellants case that changes in the scope of work fell under the powers of the **Management** of the B.O.T, which means the **Governor**. The appellant, further claimed that he signed the letters after getting authority of the **Governor**, who was the "Management", as such he did nothing wrong.

The respondent on the other hand, submitted that the **provisions of Section 14 (1)** of the B.O.T. Act, should not be read alone. Under **section 14(1), the powers of the Governor are restricted to the day to day operations of the B.O.T,** but these powers are controlled by **Section 14 (2)** of the B.O.T Act, and the **overall control of the B.O.T. Board of Directors.**

Having gone through the relevant provisions of the B.O.T Act, together with the **B.O.T's Financial Regulations**, the trial court was satisfied and held that, according to **section 14(1), read together with section 14(2),** "the powers of the Governor are **not absolute**. They are limited to the day to day activities of the Bank and are subject to the control of the Board of Directors."

The trial Magistrates, after referring to section 14(1) of the B.O.T Act, 1995, made the following observations:-

"... Having read the cited law carefully, we concur with the Republic that Section 14(1) has to be read together with section 14(2). The powers of the governor are not absolute. They are limited to the day to day activities of the Bank and are subjected to the control of the Board. He is rather given powers to control the management structures which is provided under the Regulations. Even the defence in their submission acknowledges that the management structure is provided for under the B.O.T Financial Regulations, 2002. Under the Regulations, as pointed out by the defence, Management means the Governor, Deputy Governor, Directors, Deputy Directors and such other officers as appointed by the Governor...

"... From the above, we have the following findings, that the cited laws does not indicate that the Governor is the Management himself. There was a management team which was under him as testified by the prosecution witnesses. It is also our view that the interpretation that management meant are person, with respect, is misleading and practically impossible..."

The main issues to decide, is whether the **"Management"** of the B.O.T. consists of the **Governor alone**. The provisions of **Section 14 (1)** and **Section 14(2)** of the B.O.T Act provide that:-

14. The Governor and Deputy Governor

(1) Subject to the provisions of this Act, the management of the Bank and the direction of its business and affairs shall be vested in the Governor

and the Governor shall, in the exercise of those functions of management and directions, conform with the policy determined by the Board.

(2) The Governor shall have power to exercise and perform all the functions, powers and duties of the Bank, other than any function specifically conferred on the Board, and to authorize expenditure within the budget approved by the Board. [Emphasis supplied]

The trial magistrates were convinced that the **Management** of B.O.T is not confined to the Governor **alone** and that Management of the B.O.T is **subject to control by the Board of Directors**, under S, 14 (2). In his **dissenting** opinion the honourable trial magistrate, Mkasimonga (SRM), held that the **Governor**, according to S. 14 (1), alone constitutes the **Management of the B.O.T.**

Well, what is clear to me from those sections is that, the Governor of the Bank of Tanzania is vested with the **Management of the Bank and shall exercise functions of Management and Direction.** Of course, no one is possessed with powers to exercise functions of management **if he himself is not management.** Since the Governor of the B.O.T is empowered to exercise functions of management, he is **management.** However, in the performance of those functions he has to **observe** both the **policy** as determined by the Board and the **budget** as approved by the Board. It is, of course, **incorrect,** according to the Bank of Tanzania Act, to say that the Governor **is not part of the Management** of the B.O.T. But it also incorrect to say that the Governor **is the only Management** of the B.O.T.

The Governor is **only part of the Management** of the B.O.T. One of the principles of statutory interpretation is to construe a statute as whole. **Section 14(1),** which has been relied on, is not absolute. The opening phrase of the section reads that:-

> **" Subject to the provisions of this Act:...."**

Therefore, the provision (section 14(1) is **controlled by other provisions** of the B.O.T. Act. This brings us to **Section 8** of the B.O.T Act. The provision establishes the **Board of Directors,** as a body to **determine the policy** and **approve the budget** of the Bank of Tanzania. The provision reads:-

> **"... There shall be a Board of Directors of the Bank and subject to this Act, the Board shall be responsible for determining the policy of the Bank, for the approval of its budget and for such other functions as are specifically conferred or imposed upon the Board by this or any written law..." (emphasis supplied)**

By virtue of **Section 14(1) and (2) of the BOT Act,** the implementation of the functions of management and directions of BOT are conferred to the Governor **subject to the policy determined** and the **budget authorized** by the Board of Directors. It is, therefore, correct to observe that the **management of the B.O.T is vested on both the Board of Directors** and the **Governor.** However, the Governor **cannot** act **alone** on **matters which are under the sphere of the Board of Directors.** Having said that, I am satisfied that the trial magistrates were correct in holding that the **powers of the Governor** are not **"absolute".** They are limited and controlled by the **Board of Directors, in certain matters.**

PW 6, **Anase Shayo,** from M/S Design and services Ltd, stated at the trial court that the changes to the work were brought by the client, the B.O.T. A batch of

eight letters, written and signed by the appellant, instructing the Lead consultant to effect some changes in the project were produced as exhibits, P 5 – P12.. For easy reference, some of the letters are hereby reproduced.

Exhibit P5 reads as follows:

"

18th November, 2002

Ref No, 3105

Designs and Services,

P.O. Box 236,

Dar es Salaam.

Dear,

RE: CONTRACT 464/04/4

ADDITIONAL STRONG ROOMS

This has reference to your letter 464/04/696 dates 31/10/2002.

After due consideration of alternatives given in your above referred letter for location of Bullion and additional strong rooms, provisional approval is hereby given to revise the design of car park and conference facility basement to allow for creation of double basement.

Final proposal of this will be given after the current proposed visit to South Africa with view to crystallise the idea further.

I remain,

BANK OF TANZANIA

Signed.

A.J. Liyumba

DIRECTOR, PERSONNEL AND ADMINISTRATION"

Signed .

A.J. Liyumba

DIRECTOR, PERSONNEL AND ADMINISTRATION"

Exhibit P8 reads in part

" 10th November, 2004

RE: ADDITIONAL 4 NO. HALF FLOORS IN THE CAR PARK

..... Approval is hereby given for construction of additional 4 No hall floors in the car park so as to increase the number of parking places to around 530 No...

Signed.

A.J. Liyumba

DIRECTOR, PERSONNEL AND ADMINISTRATION"

Exhibit P 9 reads in part as follows,

" 30th November, 2004

RE: NOTH BLOCK

... Management of the Bank gives its approval to construct North Block now up to the second floor as designed.

Signed.

A.J. Liyumba

DIRECTOR, PERSONNEL AND ADMINISTRATION"

Exhibit P6 reads in part:

" 2nd September, 2003

RE: 10 MIRAMBO EXTENSION PROJECT
SECURITY REINFORCEMENT OF STRONG ROOMS
IN THE CAR PARK AND CONFERENCE FACILITY AREA

... Bank Management has considered your views as contained in the above letters and approved the following:-

(1) Spirals be used as against tang bars to security reinforce the strong rooms.
(2) Spiral security reinforcement be placed on walls and roof slab,
(3) The raft slab should only be normally reinforced as against security reinforcement.

A.J. Liyumba

DIRECTOR, PERSONNEL AND ADMINISTRATION"

Exhibit P 7 reads in part:

"

27th July, 2004

RE: **10 MIRAMBO EXTENSION PROJECT**
ADDITIONAL FLOORS ON THE TOWERS

... Bank Management accepts to increase the number of floors as recommended by you through the above referenced letter.

However, please expedite the submission of the estimated costs for our guidance.

A.J. Liyumba

DIRECTOR, PERSONNEL AND ADMINISTRATION.

The Appellant claimed at the trial court, and still, it is an argument in this appeal that he wrote those letters after being instructed, **verbally**, by the Governor. He further argued that the implementation of the Project was under the **Project Manager**, one Mr. Kweka, who directly reported to the Governor. He further contended all **decisions in** respect of **changes** to the scope of work and **payments**, were **initiated by the Project Manager**, and he (DAP) forwarded to the Governor. Otherwise, it was further contended, the Appellant, **DAP had no final say on the Project.**

The trial court considered, critically, the role of the Project Manager. The Magistrates rejected the Appellant's defence, on the ground that they were satisfied that the prosecution's evidence was more credible.

On this issue, the trial court observed that:-

> **"... We reject the evidence. The prosecution witnesses on the other hand were straight, and we have no reason to doubt them on the question of relationship between the Project Manager and the accused. PW 3 said clearly that the Project Manager usually initiated payments which were being approved by the**

DPA, the accused. Other prosecution witnesses said clearly as seen above..."

The trial court also considered the Appellants evidence that he wrote those letters **upon the Governor's verbal instructions.** The trial court believed **PW 2's evidence** that the Governor's instructions are given **in writing**, by way of a minute (**dokezo**).

In rejecting the appellant's defence, the trial court reasoned that:-

> "... but suppose for the sake of argument, one assumes that the Governor did instruct the accused to sign those letters, which in our view was the authority which effected the change of scope of work, the situation to us would remain the same because those directives were illegal. They were illegal on two faces: First, they lacked the approval of the Board. The Governor had no mandate to change the scope of work and the approval of the Capital Expenditures without involving the Board.
>
> And secondly, the changes... were being effected without a supplementary agreement. It is our considered view that in order for changes of the scope and additional expenditure to be legal, they were first to be sanctioned by the Board, and then to be supported by a supplementary contract.
>
> This as they appear to us, there was none of these and that could make all directives and payments made to be illegal, whether sanctioned by the Governor or not...?

The evidence before the trial court was that the letters authorizing changes were written by the appellant on the **verbal instructions** from the Governor. Admittedly, this claim **raises some doubt**; if the Governor could receive an

advice from the **committee of experts directing changes on the project**, and then act from that information to direct the appellant, **verbally, instructing him** to write the said letters! It could have been a difference if it was only one or two letters which were written! But we have eight (8) letters tendered in court and the Appellant is claiming that he was given **verbal instructions** to write them on different dates! It is also difficult to believe that the **Governor** could **seek retrospective approval** from the Board of Directors, **of the matters which he had authorized,** if he was the so-called **"final decision maker!**

At any rate, whether or not the appellant authorized the changes through the instructions of the Governor, is of little avail because **the Governor could not have authorized the changes** in the work **without the prior approval** of the Board of Directors.

Further more, the Appellant's defence that he acted on the order of the Governor, his boss with **ultimate decision** for B.O.T., unfortunately cannot stand, for the order itself must be lawful (**See D.P.P.V. Leonas Silayo Ngalai,** criminal Appeal No. 109 of 1990, Court of Appeal, at Arusha, (unreported).

It is an established principle that an accused person has **no protection in law for acting on illegal instructions of the boss**! In the case of **Mhona Kaniki & Kashoro (1971) HCD no. 186**, the court held that the **defence of superior order is not a defence in law.**

And in case of **C. 7874 D/CPL Juma Msiwa and another V.R**, Criminal Appeal No. 8 of 1998, Court of Appeal, at Arusha (unreported), in a charge of murder where one of the appellants argued that he was ordered by his team leader to get out of the vehicle to pursue the suspect motor vehicle and as a

result shot the deceased. The appellant argued that his action of shooting the deceased was, therefore, lawful.

The Court of Appeal rejected his defence, stating that:-

> **"... If indeed the first accused ordered the other accused persons to get out and fire into the air, he did not order them to shoot and kill the deceased. If in fact if he had done so, that would have been unlawful order which the appellants were not obliged to obey or could obey only at their own peril..."**

Here is a situation of violation of the policy and Financial Regulations of the B.O.T. The Appellant, in law, was not bound to obey the verbal instructions. Otherwise he did so on his **own peril**!

During his cross-examination at the trial court the appellant alleged that there were **some letters which the prosecution did not produce in court.** The point was taken further by the Honourable Magistrate in his **dissenting** opinion. In his dissenting opinion, the Honourable Magistrate held that, **"there were some letters which the prosecution did not produce before the Court and that this raises some doubt on the prosecution case...".** The appellant in this appeal still contended that the prosecution failed to produce letters written by M/S Design and Services Ltd. and **other B.O.T's working files to rebut** the appellants' defence that he wrote and signed the letters after receiving approval from the Governor.

The Appellant's learned attorneys further argued that failure by the Prosecution to produce **some vital witnesses** in court, including the **Permanent Secretary to the Treasury,** still weakened the case for the prosecution.

But we all know that it is now an established principle that the prosecution is **not bound to produce all evidence in its possession.** The court of appeal has had the occasion to consider this rule in the leading case of **Aziz Abdallah V.R** TLR 71.(Supra). Indeed, more recently, the court of Appeal in **Abdul – Abdul Timim V. SMZ**, criminal No. 185 of 2005, Court of Appeal at Zanzibar (unreported), where it was contended that the trial court **ought to have drawn an adverse inference because of non-production of the X-ray report,** the Court of Appeal held:-

> **"... the prosecution does not have to produce all the evidence in their possession unless non-disclosure would operate injustice to the accused person..."**

In the case of **Kennedy Peter alias Mtupile V.R**, Criminal Appeal No. 116 of 1992, High Court of Tanzania (unreported), the appellant was charged with robbery with violence as a result of the police search in the appellant's house. At the trial, the complaint testified that the articles discovered from the appellant's house belonged to her and were stolen from her by a gang on the material date. The appellant contended at the trial that those articles belonged to his mistress, but he did not call the mistress to testify. The trial magistrate dismissed the appellant's story as a lie and found that the articles in questions belonged to the complaint. On appeal, the appellant contended that the magistrate was wrong in finding that there was no compelling evidence to support the finding that the articles in question belonged to his mistress. The Honourable Judge (Rtd) Mapigaro dismissed the appeal and found that the **accused had failed to cast doubt in the prosecution case.** His Lordship approved the following statement of law as stated in **Monir's Principles and Digest of the Law of Evidence**, 4th edition, Vol II, at pages 689 – 690:-

> **"... When the prosecution has called all its available evidence, and has made out a complete case against the accused, and**

that the case discloses that there is evidence which could be produced by the accused for the purpose of negativating the charge against him, then if such evidence be not produced, the Court may presume that it would, if produced, be unfavaourable to the accused who with holds it... where the accused does not attempt to get a certain witness examined, it may fairly be assumed that the evidence of such witness will not be helpful to the accused."

Indeed, the principle has been **re-stated** more clearly by the Court of Appeal in the case of **Speratus Theonest VR**, Criminal Appeal No. 138 of 2005, Court of Appeal at Mwanza (2007) (unreported), where it was held that **where the defence knows that there is evidence which is favourable to the accused** but such evidence has not been provided, **it should call such evidence from prosecution.**

Rutakangwa, JA, observed that:-

"... It is also our firm view that if the defence honestly believe that those (witnesses)... were very essential for a just decision of the case, it ought to have asked the prosecution to offer them for purpose of cross examination or even call them as defence witnesses..." (emphasis supplied)

The point which has been stated in relation to **non – production of witness** applies **equally in cases of documents.** In that regard, the prosecution was not bound to produce the alleged letters written by M/S Design and Services Ltd; or the B.O.T.s working files. If the defence was so keen to have those letters and the working B.O.T. correspondences, then the defence should have made on application to the court for their production!

Counsels for the appellant (in ground no. 8), challenged the findings of the trial court on the powers of the Governor, on the ground that the trial Magistrates overlooked the provisions of **Section 11 (3) proviso (b) and (c), and Regulations 5.9. and 5.10 of the B.O.T Financial Regulations, 2002,** which according to Counsels, give the Governor powers to seek **retro-spective** approvals.

The relevant part of Section 11 (3) provides:-

> " (3) The quorum at the meetings of the Board shall be six members provided that:-
>
> (a) There shall be no quorum unless either the Governor or the Deputy Governor is present at the meeting;
>
> (b) Where in the opinion of the Governor, or in his absence, the Deputy Governor, any matter or business of an urgent nature which cannot await the convening of a meeting consisting of such quorum, such opinion to be recorded in the minutes of the Board, the matter may be decided at the meeting of the Governor, or in his absence the Deputy Governor, and the Permanent Secretary to the Treasury of the United Republic of Tanzania which decision shall be as valid and binding on the Bank as if it were a decision of a meeting consisting of such quorum and every such decision shall be reported to the Board at its next regular meetings;
>
> (c) A decision reached at a meeting convened under paragraph (b) of this section shall be reported to the Board at its next regular meeting..."

The learned State Attorneys for the Respondent, submitted that these provisions **were not applicable for retro-spective approvals,** but rather, the section makes provisions for **decisions making of a matter** or business of an **urgent nature** which cannot await the convening of the full members of the Board. The learned State attorneys maintained that the provisions of section 11 (3) (b) **was not applicable in this case** as the construction of the Project (**Twin Towers**) was not a matter of **"unusually urgent nature".**

I am inclined to agree with the learned State attorneys. I am satisfied that reference to the provisions of **Section 11 (3), proviso (b) and (c),** is out of place. The provision talks of **decision making in the Board meeting** where there is a matter of **unusually urgent nature,** which cannot await the convening of a meeting of a quorum of the Board. The provision applies where there is an **emergency** and the statutory quorum of the Board cannot be met. In any case, the evidence on record (PW 2, PW 4, PW 5 and PW 8) clearly indicate that the **Governor did not act under this provision,** since what was being presented to the **"extra ordinary meetings"** of the Board, **was not a report of the decision made under section 11 (3),** but rather **"Progress reports"** of the Project, whereby the Management also applied for retrospective approval.

The learned state attorneys submitted, that there were changes in the Project, **prior the approval of the Board of Directors,** either through its **regular** or **extra – ordinary meetings.** Even if it were proved that the Governor used to convene extra-ordinary meetings under section 11 (3) (a), (b) and (c), **the issue of restrospective approvals would not have arisen.** This is because decision under the said section, **is deemed to be the decision of the Board,** save that it has to be reported to the next regular meeting of the Board. Even assuming the Governor did so act, there

is no evidence that there was **"any matter or business"** which was of **"unusually urgent nature"**, which **"could not await"** the convening of the regular Board meeting. Certainly, the **construction of the Twin Towers** was not a matter of **unusually urgent nature.**

The changes in issues, **were implemented before the approval of the Board of Directors,** which had the mandate to approve the changes and budget of the B.O.T. According to B.O.T law, since the changes which were implemented before the prior approval of the Board, therefore, they were **illegal.** It was from this fact that retrospéctive approvals were sought from the Board of Directors. If the Governor was the **sole** "management" and the **final decision maker** of the B.O.T., **there would have been no need to seek for approvals,** would it! It was also from this **illegality** that the Board of Directors expressed its **disapproval** to the tendency of the Governor and those under him, **including the appellant,** to implement budgetary changes before the prior approval of the Board.

To hold that **retrospective approvals** in issue were **valid** would be **defeating** the **objective and purpose of having prior approval** of the Board of Directors, because one of the reasons of having the Board of Directors is to **control** and **facilitate** the smooth operations of the B.O.T.

Counsels for the Appellant argued grounds No. 4 and No. 5 together. The gist of their complaints is that the Honourable trial Magistrates erred in law for **ignoring** and **throwing away the defence evidence** without putting defence evidence in the same assessment with the evidence brought forward by the prosecution. The learned counsels' contentions are that the trial magistrates **rejected** the evidence of the defence on the ground that DW 1 and DW 2 were formally employees of Bank and that they were at **Keko remand prison** with the appellant, as suspects of similar offences. It was

further complained that the trial magistrates erred in holding that the testimonies of DW 1 and DW 2 were **cooked up stories** since they had **common interests to serve.** The learned counsel's contended that **assessment of evidence is not the same as weighing the credibility of witnesses.** They maintained that the trial magistratres simply did throw away and or ignored the defence evidence **without giving cogent reasons.** The learned, counsels, in support of their contentions, refered to a number of authorities, including the case of **Hussein Idd & Another V.R,** (1986) T.L.R 166, and **Moshi d/o Rajabu V.R.** (1997) HCD No. 384, and **Amiri Mohamed V.R** (1994) T.L.R 138.

The court of appeal in the referred case of **Amiri Mohamed V.R** (1994) held that, every Magistrate or judge has got his or her own style of composing a judgment, and what vitally matters is that the essential ingredients should be there and these include critical analysis of both the prosecution and the defence evidence.

Responding to this argument, the learned state attorneys submitted that the trial court critically analysed both the prosecution and the defence evidence, **including the assessment of the credibility of witnesses** and reached their decision. The state attorneys insisted that the trial court did not base its decision after refusing to accept the defence evidence as being truthful **(Moshi d/o Rajabu (1967),** but rather, on the totality of the evidence, both by the prosecution and the defence. The state attorneys relied on a number of decisions, including the case of **Godfrey Machange V.R,** (1977) LTR 31, and **Shabani Daudi V.R.,** Criminal Appeal No. 28 of 2000, Court of Appeal of Tanzania (unreported).

I am inclined to agree with the state attorneys' submission, that it is not true that the trial magistrates "did throw away and or ignored the evidence given

by the defence without cogent reasons", as asserted by the counsels for **the appellant. The majority decision of the trial court clearly indicates that the trial magistrate evaluated the evidence of both the prosecution and the defence witnesses, and thereafter arrived at their decision,** which ended up in convicting the appellant. It is also a fact that in **evaluating** the evidence on record, one of the **components** used by the trial magistrates was to determine the **credibility** of the witnesses.

The learned counsels are quite aware of the fact that in evaluating evidence on record, courts do employ a combination of factors, one of them being **credibility** of witnesses, both for the prosecution and the defence. If, for example, the court makes a finding that the credibility of a witness is **questionable,** then of course, **less weight** is given to that witnesses' testimony, when arriving at the final decision of the court.

Let me state also that it is not quite proper to assert that the trial magistrates' basis of convicting the appellant was the result of "refusal to accept the defence evidence as truthful". Not all, for the majority decision of the trial court clearly demonstrates the fact that some other evidence (on record) was also considered. The majority decision also indicates that in reaching their final finding, the trial magistrates took into consideration **"the essential ingredients of the offence,"** as we have seen at the beginning of this judgment (**Amiri Mohamed V.R.** (supra).

Briefly, let us first discuss the issue of **credibility** of witnesses! The trial court, when assessing the credibility of both the prosecution (PW 3) and the defence (DW 1 and DW 2), observed that:-

> "... The defence have told us that he (the Project Manager) was an independent person operating under the Governor. We

doubt and could not believe the evidence of DW 1 and DW 2. that the Project Manager worked as an independent person. Both DW 1 and DW 2 were formerly employed in the Bank and are now living together in Keko Remand Prison as suspects of offences which are very mush similar. We see that what they said is merely a cooked story and we could not believe them because they appeared as having a common interest to serve. Indeed of the two, the demeanor of DW 2 was even worse. We reject their evidence. The prosecution witnesses on the other hand were straight and we had no reason to doubt them on the question of the relationship between the Project Manager and the accused. PW 3 said clearly that the Project Manager usually initiated payments which were being approved by DPA, the accused. Other prosecution witnesses said clearly as seen above..."

The trial court's judgment clearly indicates that, the court assessed the credibility of both the prosecution and defence witnesses, and made a finding that **the testimony of DW 1 and DW2 was not credible!**

As quite rightly put by the state attorneys, the assessment of credibility is a **prerogative** of the trial court, which is in a better position to determine the credibility of a witness after **seeing, hearing and listening** to the witness in the witness box. In the refered case of **Godfrey Machange V.R.,** this court, after referring to the case of **R.V. Betrand** (1967) L.R.T. at page 520, the court observed that, the question of credibility depends on the **demeanour** in the box, the **manner** in which the witness answered and by **how he seems to be affected** by the questions put to him. It is only the demeanour of a witness which is the monopoly of the trial court as

it has the advantage to **see** and **hear** the witness testifying which the appellant court does not have.

The Court of Appeal of Tanzania, has, on several occasions, insisted on abiding by the aforesaid principle. In the refered case of **Shabani Daudi V.R.**, the court re-stated the guidance on the determination of the credibility of a witness, The Court held that:-

> **":... may be we may start by acknowledging that credibility is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: one, when assessing the coherence of the testimony of that witnesses. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second court when examining the finding of the first appellate court..."**

It is an established principle and practice that the **trial court's finding as to credibility is usually binding on appellate court**, unless there are circumstances on the record which call for re-assessment of their credibility, (That decision was held in the case of **Omari Ahmed V.R** [1993] TLR 52, by the court of Appeal).

The learned state attorneys submitted that, the trial court, having assessed the credibility of both the prosecution and the defence witnesses, made a finding that the evidence of DW 1 and was **not credible.** The court also considered the **demeanour** of DW 1 and DW 2, which they also found to be **doubtful.** On the other hand, the court was satisfied that the evidence of the prosecution witnesses, **including PW 3,** was held to be **credible.** I am inclined to agreed with the learned state attorneys, that trial magistrates did not reject the

evidence of DW 1 and DW 2, by the fact that DW 1 and DW 2 were former employees of the Bank and were together with the appellant at **Keko Remind prison** as suspects of similar offences; not at all! But rather the trial magistrates found the evidence of DW 1 and DW 2 to be **incredible,** in the light of **other evidence** (on record) that had been adduced by the Prosecution, including PW 3.

The learned State Attorneys pointed out, for instance, some **apparent contradictions** in the **defence evidence,** which, as properly held by the state attorneys and the trial magistrates, **dented** its credibility. For example, there was a contradiction on who had powers to change the scope of work. DW 1 testified that (pg 163 of proceedings), the Project was under the capital expenditures account, and that, any changes on the scope of work or amount of money to be spent should have been done by the Board Directors. But upon cross – examination, DW 1 changed his testimony (Pg. 164 – 165), and testified that the Governor had the mandate to change the scope of work.

The record of the court also indicates some contradictions in the testimony of DW 2. when testifying, DW 2 first agreed that the project was under the Directorate of Administration and Personnel (pg 167), however, DW 2 later changed his story (pg. 168), He disagreed that the DAP (appellant) was not involved in the Project.

It Is a fact that DW 1 and DW 2 were former employees with the B.O.T., and **at the material time they were together with the appellant of Keko remind prison,** as they were facing some charge's, more or less, similar to the ones facing the appellant of the course. This **fact made** DW 1 and DW 2 **interested parties** (as they were sailing in the same boat). I fully agree with the state attorneys, that in receiving any evidence from DW 1 and DW 2, the court was bound to be **extra cautious,** as it required corroboration, as it was

held in the case of **Abrahamu Saigwan V.R** (1981) TLR 265, where this court, when considering the evidence of interested party, held that:-

> **"... Evidence of a person with an interest of his own must be approached with care and should not be acted upon unless corroborated by some other independent evidence..."** .

The learned counsels for the appellants claimed that the trial magistrates must have been **prejudicial** by the testimony of DW 1 and DW 2! With respect, this was not the case! When courts receives testimony of a witness, with **extra care,** it does not necessarily mean that the court is being prejudicial with that witness. The court simply becomes **"extra careful",** considering the **special relationship** that might exist between the witness and the accused or plaintiff or respondent, for that matter

Having said that, since findings of credibility of witnesses by trial courts are usually binding on an appellate court unless there are circumstances on record which call for reassessment of their credibility, **I am satisfied that the trial magistrates properly assessed the credibility** of both the prosecution and defence witnesses and made their finding. I find no reason to default that finding. I am also satisfied that the trial magistrates employed the principle of **credibility of witness** only as one of the mechanism for evaluating of evidence produced in court.

Learned counsels for the appellant contended that there is **no difference between the evidence of DW 2** (Bosco Ndimbo Kimela), who was a secretary to the Board of Directors (and who dealt directly dealt with the documents of the Board), **and that of PW 3,** (whose evidence has been received as credible). With respect to the counsels, If I may remind them, the difference is this: the **credibility of PW 2** has been declared **credible** (that is, PW 2 was telling the truth), whereas **credibility and demeanour** of **DW 2** was put to **question,** meaning that, it **carried less weight** (when it came to evaluating the totality of

evidence produced in court. Accordingly, I find no merit in grounds of appeal No. 4 and No.5.

The learned attorneys for the appellant submitted (in ground no. 7) that the trial magistrates erred in law and in fact in holding that the Board of Directors had **lost control** of the affairs of the Project, and that it was being **bulldozed** by the appellant and the late Governor. The learned counsels further contended that, **"the Directors, if the case was so, were of weak management fibre to be bulldozed by a person who was below them in status. Board of Directors to be bulldozed by DAP, who was not a member of the Board at all, is incredible.."**

Responding to this assertion, the learned state attorneys defended the finding of the trial magistrates, that according to evidence on record, the Board of Directors completely lost control over the affairs of the Project.

I am inclined to agree with the finding of the trial court that, the B.O.T Board of Directors was completely **powerless** in as far as the affairs of the Project were concerned. The trial magistrates' finding on this issue, was put this way:-

> **"... From the above summary of evidence, it is clear to our minds that the Board of Directors had lost control of affairs and it was merely being bulldozed by the accused and the late Governor, Dr. Daud Balali... The accused appeared to have been very powerful in the B.O.T, otherwise he could not manage to sign (the letters) Exhibits P5 – P12. We find and hold that the so called retrospective approvals were not approvals at all in the eyes of the law..."**

The evidence of PW 2, PW 4 and PW 5 and PW 8, clearly showed that the Board of Directors was **not satisfied with the conduct and procedure adopted by the Management,** which constantly sought for approval of changes and the consequent payments, **after had been implemented.** The extent of the

Board's **frustration** and **"powerlessness"** over the affairs of the Project was demonstrated by the evidence of PW 4, who openly expressed his serious dissatisfaction with what was going on inside the Board. PW 4 **bitterly lamented** to the Board, but to no avail. PW 4 **confronted** the Minister of Finance at the material time, but he was simply **"brushed off".** Indeed, he reached a stage he wanted to resign, but he was seriously warned of the consequences of doing so. He was advised to await the end of his tenure, and **cowardly,** he did so! PW4's membership to the Board was not renewed.

Indeed, the tone of PW4's testimony, prescribed the weakness of the Board; take for example, this piece of his testimony (PW 4):-

> **"... As a Board member, I was not satisfied with the over expenditures. The Management answered us that if we would not approve the already done expenditures, there would be great loss resulting from the contract..."**

The testimony of PW 4 continues, that

> **"... Reasons for over expenditures were many, including those of taxes, inflations etc.. we did not find the as being reasonable, but the situation dictated.."**

The feelings of **dissatisfaction** and **frustration** and the **powerlessness** of the Board, was jointly expressed by outgoing members of the Board as depicted on the handing over notes **(exhibits P.3).** The "Handing over notes to the in coming Board of Directors of the B.O.T.," partly reads that:-

> **"... on several occasions, the Board questioned the frequent request for additional budget approvals and expressed concern that it was being asked to retrospectively approve the increased concern at the violation of the Bank's existing internal financial regulations and procedures... work is still in**

progress, including the completion of the conference centre, which may attract further costs. We argue the Management of the B.O.T to closely follow the B.O.T's internal Financial Regulations and procedures should there be potential cost escalations..."

Of course, the Management did not pay attention to the Board's warning and advice. I am satisfied that in the course of implementing the project, the B.O.T's Board of Directors completely lost **its powers of control over the affairs of the Project**. The Board was **manipulated** and **coerced** by the Management to **approve retrospectively changes** in the scope of work and **payments under the pretext that if payments were not approved, the Bank would suffer more damage for non compliance with the contract.** What baffles me is that, the composition of the Board at the material time included highly qualified and experienced members. But despite of their Shiny credentials, they proved to be completely **"helpless"** before the powerful management. I do concur with the observations made by the learned counsels of the appellant, that the Board members were of **"very weak management fibre."** And the management took advantages of the Board's timidity.

However, be that as it may, I am satisfied that the **lamentations** put forth in ground no. 7, to be of no merit. They are accordingly dismissed.

Learned counsels for the Appellant submitted, in ground No. 10, that the Honourable trial magistrates erred in law and in fact in holding that the added **expenditures had an adverse effect to the Board of Directors**, as there was no evidence to that effect. It was argued that, if the alleged added expenditures had any adverse effect to the Board of Directors and in the operation of the Bank and the nation as a whole, t**hen the Board itself was to blame**, but not the appellant.

The evidence on record PW 4 and PW 5, shows that the members of the Board of Directors were **not satisfied** with the acts of **committing payments** prior **to the approval of the Board.** The outgoing members of the Board also expressed their concern in the **Handing over note** (Exhibit P.3), to the incoming Board of Directors. **The added expenditures, of course, had adverse effect**, not only to the Board of Directors, but also to the smooth operations of the Bank and the whole economy of the Nation. The Board members were concerned with over expenditures, since the **added new works** were not covered in the original B.O.Q's and the construction contract.

PW 7 testified that as at May, 2008, the budgeted cost for the Project shoot up from **USD 73,600,000.00** to **USD 357,675,586.00** (See Exhibit P.13), an **extra cost of USD 153,077,715.75.** Certainly, this unbudgeted for money was paid by the Government of Tanzania. The extra cost was not **envisaged** and **planned** by the Government in its **revenues** and **budget** for the period in question. It means that the Government **suffered loss** of USD 153,077,715.75.

Learned Counsels submitted that the Board of Directors was itself to be blamed, and not the appellant. But If the appellant and the late Governor Balali **had abided** by the policy and the Financial Regulations of the B.O.T., certainly **these added expenditures would not have arisen!** But they did not care less, instead they **coerced** and **bulldozed** the Board to re-trospectively approve them, which was **contrary to the policy** and **Financial Regulations** of B.O.T. A person who acts under **coercion** is usually not blamed, but the blame goes to the one who **caused** the act complained of. In the instant case, **both the appellant and the late Governor Balali were responsible for the extra uncalled for expenditures**, and not the Board of Directors. I am satisfied the trial court was correct in holding that the added expenditures had adverse effect to the Board of Directors, and the smooth operation of the B.O.T. and the nation as whole. In this regard, I have no choice but to reject ground no. 10.

Let me round up this long discussion by making these observations. The fact is, the Director of Administration and Personnel (DAP), was the real **operator** behind the Project. The Project Manager and the consulting engineers, having, proposed some changes in the Project, **they would discuss them over with DAP. If DAP was satisfied with the proposed alterations,** he would **positively** advice the late Governor, Dr. Balali, who normally, simply gave a **"go-ahead"** Then the DAP would **instruct** the contractors to effect the proposed charges. Later on, the Board of Directors would simply be informed, **by the way**, of the action taken.

The fact is, both DAP and the late Governor, **were aware of the B.O.T's policy, rules and financial regulations.** They well knew that they were required to obtain the Board's prior approval before instructing the contractors to effect the changes. However, the fact is, they simply **ignored** the laid down procedures and the **role** of the Board of Directors over the affairs of the Project. The fact is, both, the late Governor and DAP simply **endorsed** the **changes** and the **payments,** and they later sought a re-trospective approval from the Board. And in order to obtain the re-trospective approvals, the request would be **coached with a threat,** that if the Board declined its approval, the B.O.T. **would incur some substantial financial loss,** due to lapse of time. And the Board of Directors, **out of fear of being held responsible,** would simply grant the requested approval.

The Directors of Administration and Personnel (the Appellant), cannot simply claim that he was **simply implementing** the **ultimate decisions** of the late Governor Balali. Indeed, in advancing such as **naive** kind of defence, he is pleading some **ineptitude** of his profession. As a professional manager and administrator, one of his duties was to **advise the late Governor on the requirement to abide by the policy, rules and the financial regulations of the B.O.T.,** and not to **encourage** the Governor in ignoring them, thereby simply **snubbing** the role of the Board.

Now, we all know, don't we? that both the late Governor Balali and the DAP were **allys** in **deliberately breaching** the laid down B.O.T. procedures. The D.A.P. (appellant) **cannot distance himself** from the so called **"ultimate decisions"** of the Governor. The fact is, he was the **coordinator** of the Project, he was the **advisor** of the late Governor and he was the Chief **executor** of the Governor's so called **verbal instructions.** These facts make him **equally responsible** for the **unlawful decisions** and the **actions** of the late Governor, Dr. Daudi Balali, pertaining to the implementation of the Project.

I am satisfied that, just like the trial court was, that the prosecution's evidence on record was and is **adequate to prove the case against the Appellant beyond the reasonable doubt.** In that respect, I reject the complaints and assertions in grounds of appeal no. 1,2,3,6,8,9 and 11.

In ground no. 12, the learned counsels for the Appellant complained that the Honourable trial magistrates erred in law and in fact for failure to observe the **legal principles** when imposing on the Appellant a two years **custodial sentence** instead of a **fine.** They maintained that since the Appellant was sentenced under **Section 35** of the **Penal Code**, which provides an option for a fine, the trial court was bound to impose **a fine** first and in case of default, a custodial sentence.

The learned counsels for the Appellant cited a number of authorities to support their submission, including the famous case of **Tabu Fikwa V.R** [1988] T.L.R 48, which, definitely, outlines the basic principles or factors to be taken into account when sentencing an offender. Counsels vehemently argued that a fine sentence can have the same or even better effective **deference** effect than a custodial sentence.

The learned counsels for the Appellants argued at length that the trial court **violated** the principles of sentencing propaunded by the superior courts in

Tanzania. They cited the decision of the Court of Appeal, in the case of **Silvanus Leonard Ngurume V.R** [1981] T.L.R. 66, and the case of **Idd Fundi VR**[1987] T.L.R 86 (High Court), and the case of **Yassin Maulid & 2 others VR** [1987] TLR 183 (High Court] and that of **R.V. Edward Ginki** [1986] TLR 165 (High Court), and several others.

Responding to these contentions, the learned State Attorney replied, briefly, that **it is not the law** that in every case where the law provides an option for a fine the court in imposing sentence should **start with a fine.** Likewise, the learned State Attorneys cited a series of court decisions in their endeavour to counter the arguments raised by the Appellant's counsels. Amongst the cases cited include that of **Mwatabele V.R** (1970) 1 E A 659, and the case of **Juma Mrisho VR** (1969) No. 61 (High Court), and the case of **Sylvanus Leonard Nguruwe V.R** (1981) T.L.R "(Court of Appeal), and the case of **Bernadeta Paul V.R** (1992) TLR 97 (Court of Appeal), and the case of **Hatibu Gadhi V.R** (1969) TLR 12 (Court of Appeal, and several other cases.

Let me begin discussions under this ground of complaint, by saying that, first, it is a fact that as **Section 96(1)** of the **Penal Code,** under which the appellant was charged, does not provide for punishment. Quite properly, the trial magistrates resorted to **section 35** of the **Penal Code**, which provides for the general punishment for offences where the penalty is not prescribed. The provision provides for **imprisonment, fine** or **both punishments.** The maximum term of **imprisonment is 2 years.** The provision of **Section 35** of **Penal Code** provides:-

> **"... when in this code no punishment is expressly provided for any offence, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both..."**

The trial magistrates had **discretion** to impose a **lower term of imprisonment** or **a fine**, but they sentenced the appellant to the maximum

term of two (2) years imprisonment. The learned magistrates, in imposing a custodial sentence rather than a fine, were satisfied there were **aggravating circumstances** in the Country calling for a much serious sentence.

When considering the type of sentence to impose, the trial court held that:-

> **"... we have considered the submissions of the Republic and the defence. We have gone through the cases and the provisions of the law (under the Penal Code)...**
>
> **Having done so, we are of the considered view that this is not a fit case to impose a fine. The current situation in the country calls for a much serious sentence. The nation is going through an era where public institutions are swindled and corruption is on the higher levels. We think the proper sentence is custodial sentence to make a lesson to other public officials who abuse their officer..." (emphasis supplied).**

From the reasons advanced by the trial magistrates, they exercised their **discretion** under the provision of **section 35 of the Penal Code**, and imposed a **custodial sentence**, rather than a fine. It is not quite proper to suggest that, according to **section 35,** the trial **court was bound to impose a fine first and in case of default, they could impose a custodial sentence.** Indeed, to the contrary! The trial magistrates were **bound** to think of imposing a custodial sentence first, in the alternative, a fine, or both sentences. The language of the provision is quite clear. It reads:- "..., it **shall** be punishable with **imprisonment...**" (emphasis supplied). The word, **shall**, makes it **mandatory** for the court to think of imposing a custodial sentence! first.

Secondly, let me say this, that it is not the **law** that in every case where the law provides an option for a fine the court in imposing sentence **should start with a fine.** In the case of **Mwaitabele V.R** [1970] 1 EA 659, the former Court of

Appeal for East Africa, **when considering a provision which provided an option for a fine,** the court held that whether to impose a fine or sentence of imprisonment, or both it is **entirely a matter for the Court's discretion** (emphasis added).

In the light of **Section 35 of the Penal Code,** and in the light of the **Court of Appeal's (East Africa) decision,** I am satisfied that the **trial court was not bound to impose a fine first,** and in the case of default a custodial sentence. I am satisfied that the trial court in imposing the custodial sentence quite properly and **judiciously** exercised its **discretion.**

Learned counsels for the Appellant submitted that the trial court **did not exercise that discretion judiciously,** and they suggested that this court should **interfere** with the sentence.

Let me say this, it is an established legal principle that an **appellate court** should **not interfere** with the discretion exercised by a trial court in sentencing an offender, unless it is apparent that the trial court proceeded on a **wrong principle** in assessing sentence or acted on wrong considerations or failed to take into account basic **material factors** (**Bernadeta Paul V.R (1992) TLR 97**)

We have several court of Appeal decisions which support this legal principle, including the following: The case of **James s/o Yoram VR** (1951) 18 EACA 147, and the case of **RV Mohamed Ali Jamal** (1948) 15 EACA 126, and the case of **Sylvanus Leonard Nguruwe V.R** (1981) TLR 66, and more others.

In the referred case of **Sylvanus Leonard Nguruwe VR,** the court of Appeal held that an appellate court cannot alter a lawful sentence imposed by the trial court on the mere ground that if it was sitting as a trial court, it would have imposed a different sentence.

The same court of Appeal reiterated this principle in its decision in the case of **Hatibu Gandhi V.R** (1996) TLR 12, when it held that, an appellate court will not interfere with the sentence imposed by trial court unless such sentences is **manifestly excessive.**

Questions which I have asked myself are: did the trial magistrates proceed on a wrong principle? Was the sentence imposed excessive? Having considered the authorities cited, I have, and I am satisfied that trial magistrates **did not ignore** the important principles of sentencing, and that the sentence was **not excessive,** in the circumstances of the case.

When considering the type of sentence to be imposed on an offender, courts do take into consideration a number of factors, including, the **gravity** and the **prevalence** of the crime, the **interest** of the **accused** and the **interest** of the **society** [**Tabu Fikwa VR**]. Those are, indeed, the essence of the **triad** In the application of the principles set out in the **triad**, courts must in every case, where sentence is to be meted out, weigh the interests of the accused, the seriousness of the crime, against the interests of the community, in order to determine an appropriate sentence. It is impossible to state a **solid formula for the combination** of these factors, for each **case** is **unique** and every **accused differs** from another. That is why courts are given **discretion** to determine the type of sentence to impose on an offender.

I am satisfied that the trial court took into consideration those factors, especially the **interests of the society**. The offence the appellant was convicted of involves **abuse of authority**, which had devastating consequences, not only on B.O.T., but also the economy of the nation as whole. The trial court was satisfied that the offence called for a stiff sentence. The court of Appeal has had the occasion to consider the **efficacy** of **monetary punishments** in criminal cases. In the case of **Laiton VR, Criminal Appeal No. 150 of 1992,** Court of Appeal of Tanzania, at Dar es Salaam, 1994 (unreported), while considering the

punishment of imprisonment versus compensation (fine), Ramadhani J.A (as he then was), said:-

> **"... there is a danger that afluent members of the society may inflict injuries to others on the expectation that they can afford compensation fully to their victims. The stage, if reached, would disrupt social equilibrium of maintaining it..."**

This is one of such cases where the **nature** of the **offence** demanded a stiffer punishment, bearing in mind the **flagrant violation of the functions** and **authority of the Board of Directors of the B.O.T.,** despite consistent warnings to the Appellant and the late Governor Balali. In the circumstances of this case, the trial court was right to reach the conclusion that the **interest of the society** could not have been achieved by the imposition of a fine, hence the custodial sentence.

I am satisfied that the sentence imposed on the Appellant was **lawful appropriate and was not excessive,** in the circumstances of the case. Accordingly, I find **no legal basis to interfere** with the sentence imposed by the trial court. Accordingly, the ground of appeal no 12 is rejected.

Learned counsels for the Appellant bitterly complained about the trial courts' comment when sentencing the Appellant, that "corruption was on the high level in the Country..."

Just for the record, I am satisfied that, it was the slip of the pen, otherwise the trial magistrate did not mean it. The fact is, the Appellant was charged with the **offence of abuse of the office**, and **not** the offence of corrupt transaction.

Having said that I am satisfied this appeal has no merit. Accordingly, it is hereby dismissed in its entirety. Right of appeal granted.

E.M.E Mushi, J.

21/12/2010.

Delivered this 21st day of December, 2010, in the presence of the Appellant, learned counsels for Appellant and learned State Attorneys for the Republic.

THE HIGH COURT OF TANZANIA
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E.M.E Mushi; J

21/12/2010