IN THE HIGH COURT OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 349 OF 2017

(Arising from the judgment of the District Court of Nyamagana as per Hon. G.K. Sumaye (SRM) in Criminal Case No._152 of 2015)

NASSORO SALUM @ WHITE .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

BEFORE; MAIGE, J

At the District Court of Nyamagana, the appellant, **NASSORO SALIM @WHITE** was charged with 19 counts of stealing contrary to section 258(1) and 265 of the Penal Code as well one count of money laundering contrary to section 12(b) and 13(a) of the Anti Money Laundering Act No. 12 of 2006. Of all, he was convicted of the 15th and 19th counts and sentenced to three years and three months imprisonment for each count.

The appellant is unhappy with both the conviction and sentence and he has thus initiated this appeal. In the petition of appeal, the appellant has raised three grounds which in essence revolve around two basis issues namely; *whether the case against the appellant was proved beyond reasonable doubt* and *whether the electronic evidence relied upon by the trial court was admitted in due compliance with the law governing admissibility of electronic evidence*

It was alleged by the prosecution in relation to the 15th count that, on 3rd February 2013 within the City and Region of Mwanza, contrary to **sections 258(1) and 265 of the Penal Code, Cap 16 (R.E.2002)**, the appellant did steal the sum of **TZS 1,750,000** from account number **31602401646** maintained at the National Microfinance Bank Limited (NMB) under the name of **ANASTAZIA MISANGO MTEBE** (PW-2), the property of NMB. The allegation in relation to counter number 19 was such that; between 2nd and 5th February 2013 within the City and Region of Mwanza, the appellant did, contrary to **sections 258(1) and 265 of the Penal Code, Cap 16 (R.E.2002)**, steal the sum of **TZS 200,000/=** from account number 31110001740 maintained at the

National Microfinance Bank Limited (NMB) under the name of **KUSEKWA COSMAS** (PW-4), the property of NMB.

The stealing under discussion, involved modern technology known as skimming. In accordance with the prosecution evidence, the appellant **NASSORO SALUM @WHITE** and his accomplices **COLLINS SANGIJA @ MANIKI KIMANI** and **CONRAD SANGIJA LEONARD MASUNGA** whom are not parties to this appeal, inserted an illegal card reading device and a hidden camera which recorded personal identification numbers entered unto the keypad. Through the gathered information, the appellant and his accomplices were able to duplicate ATM cards that enabled them to drain cash from the bank accounts of **PW-2** and **PW-4.**

The conviction of the appellant was based on circumstantial evidence inferred from three substances of evidence. **First**, the oral testimony of **PW 8**, **PW-11, PW-14** and **PW: 20** on the arrest, search and interrogation of the appellant and his accomplices. **Two**, the documentary evidence in exhibits **P-1, P-2, P-3, P-4, P-5** and **P-6**. **Three**, the electronic evidence extracted from CCTV footages (exhibit P-7) as elaborated by the testimony of **PW-19** and **PW-20.**

In his written submissions through his counsel Mr. Kisigiro, the appellant faults the assessment of the evidence by the **trial court** in many respects. In the first place, he contends that the documentary evidence tendered at the **trial court** was generally applied without clearly demonstrating how would it connect the appellant with the offence. In the second place, the counsel blames the **trial magistrate** in not considering the material discrepancies in the prosecution evidence apparent on the face of the record. On top of that, the counsel challenges the admissibility and weight of the electronic evidence in **P-7**. He submits that the images therein captured were faint and therefore they were not free from possibility incorrect identification of the appellant.

On the issue of the images in exhibit **P-7** being faint, I have had an opportunity to watch the CCTV footages recorded in exhibit **P-7**. In my observation, the images of a person claimed to be the appellant recorded on 2.2.2013 at 22.36, 3.2.2013 at 20.21 were visible enough to enable the Court to make a comparison with the appellant at the dock. However, I have to confess right from the outset that; for the reason that I was watching the CCTV footages in the absence of the appellant, I could not be able to link the images of two the persons appearing severally in CCTV footages with the appellant. All in all, since the **trial**

magistrate had an advantage of looking at both the photographs in CCTV cottages and the appellant during trial, I have no reason why I should doubt his observation on that point.

Besides, it was the counsel' submissions that; exhibit **P-7** was admitted without being authenticated to avoid possibility of being tempered with. The counsel has assigned two reasons. First, there was not adduced any evidence to establish how was the electronic data retrieved from the CCTV footages and stored in the flash device (exhibit P-7). The counsel submitted further that, while the prosecution evidence suggests that exhibit **P-7** had been exhibited in **Criminal Case No. 19 of 2013**, it is not clear in evidence how did **PW-19** retrieve the same from the court file and who kept it to the point of tendering. Relying on the authorities in **MALUMBO VS. DPP (2011)** 1 E.A. 280, the counsel has invited me to look at the evidence in exhibit **P-7** suspiciously on account of breakage of the chain of custody.

In its submissions in rebuttal through **Mr. Karumuna**, learned state attorney, the respondent thinks that the appellant was properly and correctly convicted. The evidence in exhibit **P-7**, the counsel submits, was preceded by the oral evidence of **PW-19** as to authentication. In his view, the oral evidence of **PW-19** demonstrates that he posses adequate

skills in forensic investigation contrary to the assertion from the appellant and his counsel. In conclusion, it was his submission that, the admission of exhibit **P-7** was in substantial compliance with conditions set out in section **18 (2) of the Electronic Transection Act No.13 of 2015.**

On whether there was no proper chain of custody of exhibit **P-19**, the counsel places reliance on the evidence of **PW-19** to the effect that CCTV footages were retrieved from the Digital Video Recorder (DVR) which stored all the footages from the CCTV camera in the presence of the custodian of the CCTV camera. Thereafter, the same was saved into the flash device in exhibit **P-7**. In the view of the counsel, the nature of the evidence is such that it cannot easily be tempered with. He submits further that, the trivial contradictions pointed out in the submissions for the appellant does not raise reasonable doubts. Relying on the authority in **CAPTAIN MANUZU AMBROSE LAMU AND ANOTHER VS THE REPUBLIC,** CRIMINAL APPEAL NO. 145 OF 1991, the counsel has invited me to ignore the pointed out trivial contradictions. In his final analysis, the circumstantial evidence adduced at the **trial court** was watertight as to warrant conviction of the appellant.

I have duly considered the rival submissions and reviewed the judgment and proceedings of the **trial court**. I will now consider the

appeal. I am aware of the cardinal principle of law that; the first appellate Court is duty bound to scrutinize and reevaluate the evidence. (See for instance, **YOHANA DIONIZI AND SHIJA SIMON VS THE REPUBLIC**, CRIMINAL APPEAL NO. 114 OF 2015 (CAT-MWANZA). Since both the two issues seek to test the assessment of evidence by the **trial court**, I will deal with them concurrently as I will be appraising the substances of the evidence upon which the **trial court** drew an inference on the guilt of the appellant.

There appears to be a common understanding between the counsel on the position of law on the reliance of circumstantial evidence to sustain conviction of the accused. In **John Magula Ndongo v. Republic,** Criminal Appeal No. 18 of 2004 CAT, Dar es Salaam (unreported), it was held that, for cicumstatilial evidence to be relied upon, the Court has to satisfy itself that; the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing the inference of guilt from circumstantial evidence, it is necessary to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. The similar position was stated in

Shaban Mpunzu@ Elisha Mpunzu v. Republic, Criminal Appeal No. 12 of 2002 CAT, Mwanza Registry (unreported).

In accordance with the prosecution the evidence, the arrest of the appellant was facilitated by the information from **CONRAD SANGIJA LEONARD MASUNGA** who was arrested on 9th February, 2013 at MNB PPF Plaza branch attempting to withdraw money from customers' accounts by the use of forged ATM cards. **HASSAN NYANGOMA** (PW-11) was the NMB senior official who upon suspecting the said **MASUNGA**, instructed **G. 7069 DC SANDE** (PW-13) to arrest him. **PW13** confirms to have arrested the said **MASUNGA** under the instruction of **PW-11**. He found him in possession of three forged ATM cards (exhibit **P-3**). Before search, **PW-11** had procured a search warrant (exhibit **P-2)**. The forged three cards in exhibit **P-3** in so far as they were not found in the possession of the appellant are incapable, in my view, of connecting him with the commission offence in question.

The evidence on the arrest of the said **MASUNGA** far from being supported by **PW-11**, it is also supported by **PW-8** who testified that, on arrival at the scene of the crime on the material date, he found the said **MASUNGA** had already been arrested. On the next day while he was under police custody, **PW-8** further testified, **MR. MASUNGA**

disclosed to him the whereabouts of his accomplices, including the appellant. He is supported by **PF 1722 INSPECTOR NYANDA MASOTA** who appears to be one of the leading investigators. It was his testimony that upon interrogation, **MR. MASUNGA** admitted committing the offence in conspiracy with the appellant and **MANIKI KIMANI**. He led **PW-8** and his investigation team to Majestic Hotel where they found the appellant and **MANIKI KIMANI**. Upon search, in the presence of **ELIZABETH MAKUNDI** (PW-15), among others, they found them in possession of numerous forged ATM cards, external memory device, shock waves, ATC card readers, lap tops, a bag, cable wire among others (Exhibit **P-5**). The seized items are listed in the certificate of seizure (Exhibit **P-4**).

The testimony of **PW-14** as to who among the three suspects was in the possession of the seized items, seems not to be certain. In his testimony in cross examination by Mr. Kisigiro, advocate for the appellant, the witness told the **trial court** that while the appellant was accommodated in room **243, MR. MANIKI KIMANI** was accommodated in room **2002**. On further cross examination, **PW-14** testified that the rooms in which the appellant and **MANIKI KIMANI** were accommodated, was not recorded in exhibit **P-4**.

I have spent considerable time to study exhibit **P-4**. **PW-14** is not speaking the truth on this aspect. It is express in paragraph 2 of exhibit **P-4** that; the search was conducted in " the House/ Room of one Majef Guest House Room **213**, **217** and **219** at Nyegezi Mwanza". From this apparent material contradiction, there is a reasonable doubt, in my view, that the items in exhibit **P-5** might have not been found in possession of the appellant. The reason being that, according to the evidence of **PW-14** as above narrated, the appellant was found in room 243 and Mr. **COLLINS SANGIJA @ MANIKI KIMANI** in room 2002.

The **trial court** also placed reliance on the bank statements in exhibit **P-1**. The bank statement of **PW-2**, (ANASTAZIA MISANGO MTEBE), reflect there being six (6) ATM cash withdrawals from her bank account number **31602401646** on 4/2/2013. The amounts withdrawn were **TZS 200,000/=, TZS 400,000/=, TZS 400,000/=, TZS 400,000/=, TZS 400,000**/= and **150,000/=,** respectively. The statement on bank account number 31102500852 which belongs to **PW-4** (COSMAS KUSEKWA) indicates of there being an ATM cash withdrawal of **TZS 200,000/=** on 4.02.2013.

The time and place where the fraudulent ATM cash withdrawals were made, are reflected in the posterial reports (exhibit **P-6**). **MR.**

ELLY GADI KIMARO (PW-19) is an expert from the Forensic Department of NMB at the Head Offices in DSM. According to his testimony, posterial reports are computer reporting system through which transections in the customers' accounts are reported to the bank computer system specifying the ATM locations, dates and amounts withdrawn from accounts. The system would determine if the transection was completed or not, he further clarified.

In **P-6,** the first three ATM withdrawals from the bank account of **PW-2** were on 3/2/2013 at 13:45 hours, 20:24 and 20: 26, respectively. The last three cash ATM withdrawals were made on 4/2/2013 at 00:38 hours, 00;39 hours and 00: 40 hours. This would defeat the evidence in exhibit **P-1** that all the six cash withdrawals from the account of **PW-2** were on 4/02/2013. There was not given any plausible explanation from the prosecution to justify this material departure. I entertain no doubt that, in the absence of a clear scientific explanation of the discrepancy, the probative value of the evidence in the said exhibits will be extremely wanting such that it cannot be relied upon to sustain conviction.

Let me wind up with the evidence in exhibit **P-7**. This is an electronic video record extracted from CCTV footages. That electronic evidence is admissible under the laws of Tanzania, seems not to in

dispute. The debate between the parties is two folds. First, whether the conditions for admissibility of electronic evidence were complied with. Two, whether the evidence in exhibit **P-7** deserves strong weight as to warrant the conviction of the appellant.

Before I venture into the issues, I find it important to expose though briefly, the law governing admissibility of electronic evidence in Tanzania. Electronic evidence is a relatively recent addition to the methods of proof in legal proceedings. It covers different forms of evidence that are created, manipulated or stored in a device that can be classified as a computer. It also embraces various forms of devices by which data can be stored or transmitted. Under section 64A(1) of the Evidence Act, electronic evidence is admissible in evidence and can be relied upon to sustain conviction. Under subsection 2 thereof, the issue of admissibility and weight of electronic evidence shall be dealt with "in the manner prescribed under section 18 of the Electronic Transections Act, 2015". This provision has been judicially considered to mean that, the compliance of the provision of section 18 of the Electronic Evidence Act is *sine qua non* in accepting electronic evidence. See for instance, **ZAKARIA LUSIANO MBEDULE AND 2 OTHERS VS R, CONSOLIDATED CRIMINAL APPEALS NOS. 257 AND 264 OF**

2017 HCT, DSM MAIN REGISTRY (UNREPORTED)and VODACOM(T) LIMITED AND ANOTHER VS. MWANSWA JONASA, CONSOLIDATED CIVIL APPEALS NO. O1 AND 2 OF 2016, HCT, MTWARA (UNREPORTED) wherein Honorable Sameju Kerefu, J and Adam Mambi, J respectively have dealt with the provision in *extensio.*

Subsection 3 of section 64A of the Act, defines electronic evidence as "*any data, or information stored in electronic form or electronic media or retrieved from a computer system , which can be presented as evidence".* Section 18 of the Electronic Transections Act which provide for the said conditions provides as follows:-

> *18-(1)In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on the ground that it is a data message.*
>
> *(2) In determining admissibility and evidential weight of data message, the following shall be considered;*
>
> *(a) the reliability of the manner in which the data message was generated, stored and communicated ;*
>
> *(b) the reliability of the manner in which the integrity of the data message was maintained ;*
>
> *(c) the manner in which the originator was identified; and*
>
> *(d) any other factor that may be relevant in assessing the weight of evidence.*

3. The authenticity of an electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where-

a) there is evidence that supports a finding that at all times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of an electronic record and there are no other reasonable grounds on which to doubt the authenticity of the electronic record system;

(b) It is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interests to the party seeking to introduce it.

c) It is established that an electronic record was recorded or stored in the usual or ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record .

4. For the purpose of determining whether an electronic record is under this section, an evidence may be presented in respect of any standard , procedure or usage or practice on how electronic records are to be recorded and stored, with regard to the type of business or endeavors that used, recorded or stored the electronic record and the nature and purpose of the electronic record.

The conditions set out in section 18 (2) in my view, seek to ensure that the evidence which is produced before the court is *prima facie* reliable and worthy of being accepted as evidence. This is what is referred in digital law jurisprudence as authentication. To comply with the

requirement therefore, the authenticating witness has to adduce demonstrative evidence about the process by which the electronically generated document was created, acquired, maintained and preserved without alteration or any change.

The rationale behind imposing the requirement, in my view, lays on that fact that, computer generated evidence much as it is treated as documentary evidence, cannot speak for itself. Its relevancy on the fact in issue , which is an essential element of admissibility, cannot be established without there being oral evidence. Conversely, in ordinary documents, parties and the court have opportunity to inspect the document before admission and determine its relevancy. This is so because an ordinary document is capable of speaking for itself. It is on that account that, demonstrative evidence to explain what the document purports to be and whether it carries an accurate representation of the data or information which is relevant to the proceedings is a condition precedent for admission of such evidence.

Subsection 3 of section 18 in my reading, provides for presumption of compliance with the authentication condition. A piece of electronic evidence would be deemed authentic if the conditions in items (a) to (c) thereof are cumulatively satisfied. The condition under item (c) which

may be relevant in this matter, requires the party wishing to rely on that presumption to establish that *"an electronic record was recorded or stored in the usual or ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record".* In this matter, the testimony of **PW-19** indicates that exhibit **P-7** was processed by him and **PW-20**, one of the police officers who investigated the matter. It is further in the evidence of **PW-19** and **PW-20** that, the memory device was then handed over to RCO. Both the RCO and **PW-20**, in my view, are the persons seeking to introduce the record within the meaning of section 18(3) (c) of the ETA. Therefore, assuming, without deciding that, the conditions under section 18(2) have not been established, it cannot be said that the admissibility and reliability of exhibit **P-7** was based on the presumption under the respective provision.

With the above discussion, it is appropriate to consider the validity of electronic evidence in exhibit **P-7**. The first argument from the appellant is that the same was prematurely admitted for want of authentication evidence. It is claimed that the person who tendered the document was not an expert in information technology. There has not be referred to me any authority requiring that the authenticating witness

must be an expert. My thorough research could not come across with any local authority in support therefor. I had therefore to seek inspiration from other jurisdictions where I came across with the authority of the House of Lord as per His Lordship Griffiths in **R VS. SHEPARD (1993) 1 All. ER. 225.** In the opinion of His Lordship, which I fully subscribe to, an authenticating witness needs not be an expert. It suffices if the witness is conversant on how does the computer operates. In his own words, His Lordship had the following to say, I quote:-

> *Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. I suspect that it will very rarely be necessary to call an expert and.. in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer of the sense of knowing what the computer is required to do and who can say that it is doing it properly-60.*

I have taken time to read the introductory evidence of **PW-19**. I am satisfied that in his evidence, he has at least been able to demonstrate sufficient knowledge on forensic investigation. I will for that reason not accept the submission by the counsel for the appellant.

It was also submitted that, for the reason of absence of concrete evidence as to the proper chain of custody of exhibit **P-7**, the conditions under section 18(2) of the Electronic Transections Act were not met. I have read the evidence of the authenticating witness (PW-19) on this aspect at page 121. The relevant testimony on how the CCTV footages in question was retrieved from DVR and stored to memory flash in exhibit **P-7** is found at the last paragraph which is reproduce it here below:-

> *The photographs are kept in the video recorder. After we had collected all the CCTV security camera, we kept the photograph in flash dose. I did this work together with police investigator Mr. Godlove. We were escorted by the custodians of those camera and lower keys. I still remember the memory stick a right its contents as I prepared the said kept it in the stick.*

Much as I am not, for obvious reasons, going to determine this appeal on the basis of admissibility, I do not think that the evidence of the authenticating witness above reproduced are detailed enough to establish that the electronic evidence in exhibit **P-1** carries an accurate representation of the data or information relevant to the case. Nor does the evidence give assurance of exhibit **P-7** being free from possibility of being tempered with. I am aware of there being some conflicting opinions on the extent to which the conditions under section 18 (2) carters for admissibility and weight of electronic evidence. However, in as much as the issue of validity of **exhibit P-7** can be resolved, without

occasioning any injustice, by appraising its probative value, I do not think that it is right time for me to get into this debate.

PW-19 claims to have extracted the relevant photographs from CCTV footages in collaboration with a police officer named Godlove (PW-20). From the evidence in CCTV video record as elaborated by **PW-19** at page 125 of the typed proceedings, the appellant and **MANIKI** were seen on **31/04/2013** at 06: 35 hours at ATM Kenyata Branch fixing skinning device. This is highly improbable because according to the facts of the case and the evidence of **PW-14** and **PW-11**, the appellant and his accomplices were arrested on **10/02/2013**. How possible could the appellant and **MANIKI** be seen more than two moths after fixing a device in an ATM machine. This raises a reasonable possibility that the evidence in exhibit **P-7** might have been fabricated.

As that is not enough, in accordance with exhibits **P-1**, the alleged fraudulent cash withdrawals from the account of **PW-2** were on 4.2.2013. From the evidence in exhibit **P-7** as narrated by **PW-19**, the dates when the appellant was seen in the ATM machine with **MANIKI** were on 14.1.2013, 18.1.2013, 24.1.2013, 27.01.2013, 29.01.2013, 1.02.2013, 2.2.2013, 5.2.2013 and 31.4.2013. There is only one event on 3.02.2013 which involves the appellant. This was at 05: 57 hours

when, according to the testimony of **PW-19** and the observation of the trial magistrate, the appellant was seen with **MANIKI** holding a bag. The evidence in exhibit **P-1**, as I observed above, indicates that the theft in the account of **PW-2** was committed one day after. This is to say on 4.2.2013.

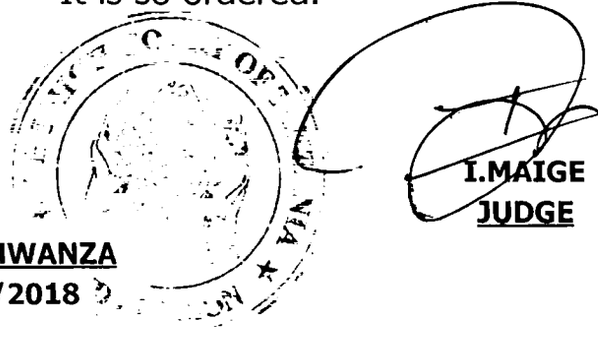
There is yet another weakness in the prosecution case worth mentioning. The charge sheet does not disclose if the offences were committed by the appellant in conspiracy with two other persons. The element of conspiracy is disclosed for the first time in the Facts of the case and evidence. We are told that there were other two offenders. One of them is **MR. MANIKI** who is claimed to have been arrested red handed. It is the same person who disclosed the whereabouts of the appellant. In the testimony the fact is manifest too. More importantly is the fact that the role of the two accomplices in the commission of the offences is portrayed in the prosecution case to be greater than that of the appellant.

I read from the evidence of **PW-20** that the appellant and the accomplices happened to be charged with criminal case number 19 of 2013 wherein the appellant jumped bail. Neither of the prosecution witnesses disclosed the out come of the previous case. I have observed

from the evidence of the defendant in rebuttal that the accomplices were discharged. Regardless of the reasons of their discharge, if that proposition is correct, it would raise a reasonable doubt if at all the prosecution believed the evidence adduced. So as to eliminate doubts to the prosecution story about the commission of the offence, plausible explanations as to why the accomplices were not jointly and together charged with the appellant was necessary.

I am therefore satisfied from the foregoing discussions that the case against the appellant at the trial court was not proved beyond reasonable doubts. The doubts exhibited above were, in my view, reasonable doubts which would have been used by the trial magistrate in the benefit of the appellant. The appeal is henceforth allowed. The conviction of the trial court is hereby set aside and the sentence thereof quashed. The appellant is set free unless withheld for other justifiable causes.

It is so ordered.



I.MAIGE
JUDGE

AT MWANZA
1/8/2018

Date: 01/8/2018

Coram: Hon. Maige, J

Appellant: Mr. Rugaimkamu, advocate assisted by Mr. Innocent Rugaimkamu, advocate

Respondent: Miss. Sabina, advocate

B/C: M. Said

Court: Judgment delivered in the presence of Mr. Rugaimukamu advocate for applicant and Miss Sabina S/A for the respondent, this 1st day of August, 2018.

Sgd. I. Maige
Judge
01/8/2018