IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 120 OF 2020

(Arising from Criminal Case No. 143 of 2017 of Simanjiro District Court in Simanjiro, Manyara Region)

EMANUEL MARK NYAMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23/06/2021 &22/09/2021

GWAE, J

In the District Court of Simanjiro at Simanjiro in Manyara region ("the trial court"), the appellant, **Emanuel Mark Nyambo** and another person called Evance Masuet Mbogo were charged with corruption offences. The appellant was charged with two counts, namely; 1st count, abuse of position contrary to section a31 of the Prevention and Combating Corruption Act No. 11 of 2007 (The Act) and in the 2nd count for the offence of Corrupt transaction in employment contrary to section 20 (2) of the Act whereas that other person was charged in the 3rd count for the offence of corrupt transaction c/s 20 (1) of the Act.

In its conclusion, the trial court found the appellant's guilt to have been proved in the 1st count and eventually sentenced him to pay fine in the tune of Tshs. 2,000,000/= or serve two (2) years in default of fine. Aggrieved by the

conviction and sentence of the trial court, the appellant preferred an appeal to the court challenging the trial court's findings. Seemingly, the appellant promptly filed his appeal vide Criminal Appeal No. 13 of 2020 which however struck for being incompetent on the 18th December 2020. Subsequently, this present appeal.

Before I start dwelling to the prosecution case, it is apposite to have brief facts of the case that led to the appellant's conviction recapitulated as follows; The appellant was employed by the Simanjiro District Council as Human Resourced Officer. His co-employees holding the post of human resource were assigned a duty of preparing interview questions for the post of village executive officers III (VEO). It was the prosecution allegation that the appellant disclosed or revealed the interview questions with exchange of bribery at the tune of Tshs. 150,000/= to one of the candidates, one Denis Evance Mbogo, the money was said to have been sent to the appellant through the phone of that other accused person via phone number 0767609194 on the 2nd April 2015 through his phone number 0757780375.

The appellant's phone was alleged to have been registered with number 0757-780375 alleged to have received Mpesa Tshs. 150,000/= from number 07667-609194 owned by the 2nd accused, the appellant's co-accused person. The appellant's cellular phone was subsequently seized. The statement from the

phone number 0757-780375 was retrieved. Both appellant and another were apprehended, charged, prosecuted.

During defence, both accused persons patently denied to have committed the offences leveled against them. On his party, the appellant refuted to have committed the offence as he was not assigned the duty and denied to have possessed the sim card with Registration Number phone 0757-780375 save his phone which he said to be 0743165745 and that other person denied to have sent money to the appellant through phone number 0757780375 however, he admitted to have been the owner of phone with sim card with number 0767609194.

Being satisfied with the prosecution evidence in respect of the 1st count against the appellant, the trial court convicted him and eventually sentenced him as explained above. Aggrieved by the decision of the trial court, the appellant has now knocked the doors of this court armed with four grounds of appeal, to wit;

1. That, the trial magistrate erred both in law and facts when found that the seized phone from the 1st accused now appellant sent interview questions to the 2nd accused without authentic and accurate proof of electric conversations among the two doers
2. That, the trial magistrate erred both in law and facts, the appellant's phone disseminated interview questions without

collaborating such conversation with the tendered approved interview sheet (PE4)

3. That, the trial magistrate erred both in law and facts when convicted and sentenced the appellant basing on the assumptions evidence which were not proved beyond reasonable doubt
4. That, the trial magistrate erred both in law and facts when convicted and sentenced the appellant basing on the contradictory evidence

The appellant and respondent, the Republic were duly represented by Mr. Josephat and Mr. Hatibu, the learned advocate and state attorney respectively. With consensus of the parties' named representatives, this appeal was argued by way of written submission. The appellant's advocate in his written submission opted to have abandoned or dropped ground 4 and argued ground 1 and 2 jointly. The parties' written submissions shall be considered while determining the grounds of appeal.

In the determination of the 1st and 2nd ground of appeal which read;

That, the trial magistrate erred both in law and facts when found that the seized phone from the 1st accused now appellant sent interview questions to the 2nd accused without authentic and accurate proof of electric conversations among the two doers and that, the trial magistrate erred both in law and

facts, the appellant's phone disseminated interview questions without collaborating such conversation with the tendered approved interview sheet (PE4)".

In respect of these grounds, the learned counsel for the appellant argued that the exhibit P12 and P13 during trial did not correspond with exhibit P4 especially the interview questions if were either found in the exhibit P13 with voda sim card (0757-780375) and Airtel (07855-594883) or phone number 0767-609194 owned by the said Venance Mbogo. Cementing his arguments, the learned counsel urged this court to make a reference to section 18 (2) the Electronic Transactions Act, 2015 and section 40A of the Tanzania Evidence Act, Cap 6 Revised Edition, 2019 and a judicial decision of this court at Mwanza in **Simbanet Ltd vs. Sahara Group Ltd,** Commercial Case No. 2 of 2016 (unreported) where it was held that failure to observe the standards set in section 18 (2) renders the transactions a nullity.

According to the appellant's counsel the conditional precedents envisaged under section 18 of the Act (supra) were not met as the phone allegedly owned by Evance Mbogo and was not tendered nor was extracted contents that were tendered by the PW4, Vodacom employee. He further argued that there was not originator of the text message in respect of the allegedly sent interview questions message that was established

Strenuously resisting this appeal, the learned counsel for the Republic submitted that the appellant's guilt was proved at the required standard since it was clearly established that, the appellant received Tshs.150,000/= from the 2nd accused, Evance as exhibited in PE13 and that the same interview questions that were in the 2nd accused person's phone were also in the appellant's phone. He then cited a case of **Magendo Paulo and Shabani Benjamin vs. Republic,** Criminal Appeal No. 19 of 1993 (unreported) where it held that;

> "The law would fail to protect the community if it admitted fanciful possibilities to defeat the course of justice, if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with a sentence 'of course it is possible but not in the least probable the case is proved beyond reasonable doubt".

In his rejoinder, the appellant's advocate reiterated that the transfer of Tshs. 150,000/= from the 2nd accused, Evance Mbogo to the appellant's phone has nothing to do with the offence of abuse of position, the offence which the appellant stood convicted and sentenced.

Having examined the parties' submissions, typed proceedings, judgments and documents so received by the trial court, I am of the view that, according to the PE11, it is no doubt that the appellant received Tshs. 150, 000/= from the 2nd accused, Evance however when I look at the testimony of PW5, Joseph

Ernest, it is indicative that there were text messages between the appellant and his co-accused person however nowhere the purpose of Tshs. 150, 000/ was expressly stated save the message with effect that the remaining 50,000/= would be paid later on. More so there is message dated 9th April 2015 with effect that possible questions to be asked during interview were recorded and the same are reflected in the PE4 and PE13 read over before the trial court.

I further examined PE13 in order to ascertain if the same correspond but I have none like the same text messages nevertheless the absence of text messages probably might have been deleted or tempered immediately after its receipt and reading of its contents by PW5 as depicted in pages 44 to 45 of the typed copy of the trial court's proceedings. Section 18 of the Electronic Transactions Act (supra)

> "18 (1) In any legal proceedings, nothing in the Rules of Evidence shall apply so as to deny admissibility of a data message on the ground that it is a data message.
>
> (2) in determining admissibility and evidential weight of a data message, the following shall be considered;
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> (a) Reliability of the manner in which the data was generated, stored or communicated
> (b) The reliability of the manner in which the integrity of the data message was maintained

(c) The manner in which its originator was identified and

(d) Any other factor that may be relevant in assessing the weight of evidence

According to the above quoted provisions of the law, it is envisaged that data message may be admitted for evidential value however after its admission the same is reliable upon certain conditions being met, namely; the manner the date message was generated, stored or communicated, its integrity which denotes assurance of its veracity, if its originator or creator is known or certainly identified.

In our instant criminal matter, looking at evidence adduced by the PW5, the texst messages including interview questions (PE4), message contained in the PE13 though as of now they are not available or found to have been deleted but the record especially handwritten proceedings it is revealed that the same were read over by PW5 and duly recorded, therefore in my view, such subsequent deletion does not invalidate the testimony of PW5. The data messages were communicated to the between the appellant and 2nd accused, stored in the phone (PE13) seized from the appellant. It is the appellant and that other person, Evance who are originators of their messages.

The appellant's assertion that there was neither seizure of the 2nd accused person's cellular phone nor were there print outs of the messages that were

allegedly sent to the appellant and vice versa that were tendered during trial to corroborate the prosecution evidence, in my view, carries weight however there is ample evidence that PE13, the text messages that were in the appellant's phone were those sent to the 2nd accused by the appellant and 2nd accused person's texts messages sent to the appellant. Thus, seizure of the appellant's phone with its sim cards was sufficient to establish text messages that were sent to the appellant by the 2nd accused and vice versa as rightly testified by PW5 since the phone (PE13) has received (inbox messages) and sent messages space.

Since the 2nd accused, Evance did not dispute to have been the owner of the phone number 0767-609194 and since there were data messages in the PE13 were aimed at disclosing the interview questions (PE4) to one of the applicants for the posts of village executive officer prior to the date of interview (13/4/2015). How can a responsible officer reveal interview questions either to applicants or any other employee who is not responsible officer or superior officer to the appellant before the date planned for the interview? That is, a clear abuse of the position by the appellant.

Coming to the appellant's ground of appeal no. 3 which is to the effect that;

1. **That, the trial magistrate erred both in law and facts when convicted and sentenced the appellant basing on the assumptions evidence which were not proved beyond reasonable doubt".**

In this ground of appeal, the appellant's counsel was of the argument that there were no corroborative pieces of evidence such as that of an expert from VodaCom or TCRA to support the prosecution evidence particularly owner of the sim card (chip) with number 0757-780375 was called for ascertainment during trial, the same number was registered by the name of one Zainabu Mpilipili. He argued that the trial court could not therefore act on assumptions since it is possible to cause miscarriage of justice by convicting an innocent person, he cited the case of **Nathanael Alphonce and another vs. Republic** (2006) TLR -CAT.

In his response, the counsel for the Republic submitted that the appellant was the owner of the seized phone (PE13) as the same was seized from him as per PE12, Seizure certificate duly signed by him and that the appellant admitted to be the owner of PE1 and its sim cards therein. According to the respondent's counsel, the charge against the appellant particularly in the 1st count was proved to the required standards.

I wholly agree with the learned counsel for the appellant that it is better to acquit 100 guilty accused persons than to convict one accused person who is innocent as was judicially demonstrated by the highest court of the land in **Nathanael Alphonce and another vs. Republic** (2006) TLR where it was held and I quote;

> (i) As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, in the case of Mohamed Said Matula v. R (2) this Court reiterated the principle by stating that in a murder charge the burden of proof is always on the prosecution. And the proof has to be beyond reasonable doubt;
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> (ii) Where circumstantial evidence is relied on the principle has always been that facts from which an inference of guilt is drawn must be proved beyond reasonable doubt;

(See also a decision in the case of **Joseph John Makune vs. R,** [1986] T.L.R 44).

In our case, the appellant during preliminary hearing conducted on the 7th November 2017 clearly admitted to be the owner of the phone number 0757-780375, this admission is corroborated with the testimony of PW5 together with seizure certificate (PE12). Though during trial by the trial court, the name of Zainabu Mpilipili was displayed or the said phone number was noted to have

been registered in that name of a female, yet, in my considered view that alone cannot exonerate the appellant from liability since the sim card was seized from him and he admitted to be the owner of the said phone number. I have also taken recognizance that the sim card was out of use for more than two years, thus it was possible that number to have been re-registered to another person by Vodacom as the case here. I have further paid an attention at the PE7, though was retracted/repudiated yet the same is a reflection of the truth. If at all the appellant was forced to mention his Vodacom sim cards' numbers, he could not state, during interrogation, that he had forgotten his Airtel sim card number while the same is indicated in the seizure certificate (PE12) filled by PW5 and witnessed by PW2 (0785-594883). For the sake of clarity, parts of questions and the interrogations of the appellant by the PCCB's officer, PW2 (Venance Joseph Sangawe) is reproduced;

> Swali: Taja namba zako za simu
>
> Jibu:0757-780375 ya kampuni ya voda ninayo ya kampuni Ya Airtel ila nimeisahau
>
> Swali: Mwanzoni mwa mwezi April 2015 ulifanya mawasiliano yoyote kwa njia ya ujumbe mfupi wa sim na EVENCE MBOGO
>
> Jibu: Ndiyo

Having judiciously considered the prosecution evidence in its totality, I am of the increasingly view that the 1st count of the charge against the appellant was proved beyond reasonable doubt as was correctly decided by the trial court.

As discussed above, this appeal is entirely dismissed, the trial court's decision and its ancillary orders thereto are upheld.

M. R. GWAE
JUDGE
22/09/2021

Court: Right to appeal to the Court of Appeal fully explained

THE HIGH COURT OF TANZANIA

M. R. GWAE
JUDGE
22/09/2021