IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO.123 OF 2020

(C/F District Court of Kiteto District at Kibaya, Economic Case No. 18 of 2017)

THE DIRECTOR OF PUBLIC PUBLICATIONS (D.P.P)..... APPELLANT

VERSUS

JANE KEMILEMBE MUTAGURWA .....1ST RESPONDENT

COSMAS AMBANGILE NSEMWA .....2ND RESPONDENT

ENOCK ROCK MWAKASALA.....3RD RESPONDENT

MAINGE LENGITENG LEMALAL .....4TH RESPONDENT

MICHAEL NDUYIMA WILLIAM .....5TH RESPONDENT

JUDGMENT

05/05/2022 & 26/08/2022

GWAE, J

It is was the verdict of the District Court of Kiteto at Kibaya ("the trial court") dated 17th day of October 2019 that, all five accused persons now the respondents herein above were not guilty of the three offences divided into 8th counts leveled against them due to contradictions of the prosecution evidence. Consequently, the trial court acquitted them under

section 235 (1) of the Criminal Procedure Act, Chapter 20, Revised Edition, 2002 (CPA).

Three categories of the offences against the respondents were; use of documents intended to mislead the Principal under section 22 of the Prevention and Combating of Corruption Act No. 11 of 2007 (Act) in four counts namely; 1st count for all respondents alleged to have purported to show that, there were 6,276 houses demolished by the 3rd respondent for consideration of sum of Tshs.188, 280,000/=), the 2nd count for the 5th respondent only, 3rd count for the 3rd respondent who was alleged to have purported to show Kiteto District Council (Herein the Council") that, there were 7,200 houses which he demolished and the 4th count also for the 3rd respondent alleged to have purported to show the Council that he demolished 934 houses previously uncounted entitling him Tshs, 42, 594,000/=.

The 2nd offence being; obtaining money by false pretenses contrary to section 302 of the Penal Code Chapter 16, Revised Edition, 2002 (Code) comprised of two counts that is in the 5th count for the 3rd respondent regarding his receipt of payment of Tshs. 42,594,000/=falsely pretending to be the costs for the demolition of 934 houses and 7th count also for the 3rd respondent alleged to have falsely received Tshs, 188,280,000/= from

the Council pretending to be the costs of demolition of 6,276 houses and eviction of the people in the reserve.

Third offence being occasioning loss to a specified authority namely; Kiteto District Council contrary to paragraph 10 (1) of the 1st schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, Cap 200, Revised Edition, 2002 (herein to be referred to as EOCCA) which was in the 6th and 8th count and they were against all respondents in respect of the allegedly loss sustained by the Council Tshs. 42,594,000/= and Tshs. 190,000,000/=purported to be costs for 934 extra houses and costs of demolishing 6276 houses.

It is apposite to have facts of the case that led to the charge against the accused persons now respondents briefly outlined; However, Most of the facts of the case are mainly undisputable, they are as follows; that, there was a land case successfully instituted in this court (Land Division) vide Land No. 6 of 2007 by one Tito Shumo and 49 others against the Council. However, in an appeal filed by the Council, the Court of Appeal of Tanzania reversed the judgment of this court through Civil Appeal No. 58 of 2010. Subsequent to the delivery of judgment and decree of the Court of Appeal, the Council filed an application for demolition and eviction of trespassers in the Emborley Murtngos National Reserve within Kiteto

District in Arusha Region. The High Court (Mlacha-Deputy Registrar as he then was now judge of this judge) issued Eviction/Demolition Order on the 8th November 2012 appointing the 3rd respondent, Enock Mwakasala t/a Gemaco Auction Mart & Court Broker.

After the court's issuance of the eviction order to the 3rd respondent, there was team chosen by the Council to count houses which were subject to the intended demolition. The team under the lead of one Phosphor N. Nsuri (PW9) came with a total number of 3570 houses for the intended demolition. After negotiations, it was then agreed that, each house to be demolished for consideration Tshs.30, 000/=making a total of Tshs. 107,100,000/=.The Council and the 3rd respondent then entered into an agreement dated 19th November 2012 and the work assigned to the 3rd respondent was to be concluded within 14 days from the date of signing the contract and the agreed sum was to be paid in three instalments. The agreement (PE2) was then prepared by the 2nd respondent, a legal officer of the Council. It was then signed by the 1st, 3rd and 4th respondent.

Despite the fact that, the parties initially entered into the contract that would come to an end on the 16thday of December 2012 but on the 4th December 2012 entered into another contract whose fees for demolition and eviction purposes being 188, 280, 000/=in favour of the

3rd respondent. The agreed sum was also payable in three instalments. That, after the conclusion of the work the 3rd respondent submitted the report dated 17th December 2012 (PE5) to the Council and thereafter the 3rd demanded payment by the Council for the variation costs emanating from his work.

That, besides, the payment by the Council to the tune of Tshs. 107, 100,000/= in favour of the 3rd respondent relating to the first contract dated 19th day of November 2012, the 3rd respondent demanded Tshs. 229,300,000/= being agreed sum for demolition of additional houses besides of 3, 570 houses initially counted by the team (Tshs.188, 280, 000/= for demolition and amount of money for variation being Tshs. 42, 594, 000/=).

The trial court's records further reveal that, the prosecution accusations against the respondents centered to the 2nd contract entered on the 4th December 2012 and the variation of the costs as submitted and paid by the 3rd respondent and 1st respondent respectively. Henceforth, the charge comprised of a number of eight counts aforementioned against respondents. According the trial court's record. The 1st, 2nd, 4th and 5th respondent were alleged to have committed the offences leveled against them in their respective capacities namely; Kiteto District Executive

Officer, Council Solicitor, Council Chairperson and District Environmental Officer respectively whereas the 3rd respondent was the court broker.

Aggrieved by the decision of the trial court, the Director of Criminal Prosecutions known by her acronym "DPP" has now appealed to the court being armed with following grounds of appeal;-

1. That, the trial magistrate erred in law and fact by That, the learned trial magistrate e erred in law and fact by acquitting the respondents without considering the evidence adduced by the prosecution witnesses
2. That, the trial magistrate erred in law and fact by failure to evaluate all of the prosecution evidence
3. That, the trial magistrate erred in law and fact by stating the credibility of PW2, PW5 and PW9 was greatly in doubt
4. That, the trial magistrate erred in law and fact by stating that the credibility of PW1, PW5 and PW9 was greatly in doubt
5. That, the trial magistrate erred in law and fact by in holding that, the prosecution side has not established its case beyond reasonable doubt

On the 23rd March 2022, this court received information from Mr. Malimi Juma, the learned advocate for all respondents herein that, the 3rd

respondent had passed away though no document that was tendered to that effect. When the matter was called on for hearing on the 30th March 2022, Miss Yunis Makala, the learned state attorney and Mr. Malimi Juma (ADV) who duly appeared representing the appellant and respondents respectively. Then the court and the parties' representatives consensually agreed that, the appeal be disposed of by way of written submission. The parties then filed their respective written submission pursuant to the order of the court.

Arguing for the appeal, the learned state attorney stated that, the trial court misdirected itself for its failure to consider the evidence of PW9 who was the team leader in counting houses which were subject to the demolition by the 3rd respondent, the court broker duly appointed by this court and that, they were only 3,570 houses which were approved by the team whose contract was undisputedly prepared by the 2nd respondent and signed by the 1st, 3rd and 4th respondent (PE2).

It is further the submission of the counsel for the appellant that, the respondents knowingly and fraudulently used another contract dated 4th December 2012 while the former contract was still valid and subsisting and that, the purported 6276 houses by the respondents, was false fact known by all respondents.

Similarly, the appellant's counsel argued that, there was sufficient evidence incriminatory against the respondents in connection with the offence of occasioning loss whose ingredients are; willful act or omission, or negligence or misconduct or reason of failure to take reasonable care or failure to discharge duties in a reasonable manner. He requested the court to probe the 1st contract (PE2) dated 19th November 2012, the payment vouchers for the first instalment (PE3) a report regarding execution of eviction and demolition prepared by the 5th respondent (PE4) handing over certificate prepared by the 3rd respondent (PE5), 2nd contract for demolition and eviction (PE6), payment vouchers (PE7), a 3rd respondent's demand letter (PE8).

Submitting on the 2nd ground of appeal, the learned counsel for the appellant was of the view that, had the learned trial Resident Magistrate objectively evaluated both oral and documentary evidence adduced by the prosecution he could have found the charge against the respondents to have been sufficiently proved.

Arguing for the 3rd ground, the Appellant's counsel stated that the trial court did not take any cognizance as to the admitted facts provided under section 192 (3) and (4) of CPA.

It is his submission in respect of the complaint No.4, the appellant's counsel stated that, the evidence adduced by the PW1, PW5 and PW9 was credible. He further argued that, a remote possibility can be safely ignored since prosecution is not expected to prove each assertion such as that of the 3rd respondent that he concluded the 1st contract on the 3rd December 2012 whereas he was paid half of the agreed sum in relation to the 1st contract on the 5th December 2012 and that he requested for the final payment at the tune of Tshs. 32,000,000/=through his letter dated 17th December 2012. The counsel then invited the court to the decisions in the case of **Magendo Paulo and Shabani Benjamin v. Republic**, Criminal Appeal No. 19 of 1993 (unreported) where the Court of Appeal approved the decision of Lord Denning holding and I quoted;

> *"As it was held by Lord Denning in Millier v Minister of Pensions (1947) ALL ER .The law would fail to protect the community if it admitted fanciful possibilities to deflect the Court of Justices. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable", the case is proved beyond reasonable doubt."*

The learned counsel for the DPP finally held the view that the charge against the respondents was proved beyond reasonable doubt.

In his reply to the appellant's written submission in support of appeal, the respondents' counsel argued that, the second contract was lawfully entered on the 4th December 2012 as the first contract (PE2) which was to commence from 19th November 2012 and ending on the 3rd December 2012 did not take off as agreed to wait for bulldozer and other equipment and that, there was discovery of other 934 houses whose costs were to be paid as variation and that there were houses including 6,276 houses that kept increasing as the demolition exercised was being carried out by the 3rd respondent who notified the 1st respondent to that effect. He added that the execution of the Court's decree was concluded on the 17th December 2012.

Therefore, on his part, the counsel for the respondents seriously refuted the appellant's complaint that, the 2nd contract was dubious by stating that, the special audit was illegal and actuated by suspicion and conjecture as rightly found by the trial court.

The counsel went on arguing in regard to the offence of use of document in order to mislead the Principal contrary to section to 22 of the Act in four counts as explained herein above by stating that the said counts were not proved since its necessary ingredients were not credibly

established since the prosecution failed to establish that each respondent was agent to the Council.

Regarding the 2nd count against the 5th respondent, the learned counsel for the respondents argued that, the document (PE4) was a mere draft as lucidly portrayed by the 5th respondent's testimony. Equally, the respondents' counsel argued that, the offence in the 3rd and 4th count would be not satisfactorily established in the eye of the law for the reason that, the prosecution has failed to establish Agent-Principal Relationship between the Council and the 3rd respondent nor did it call any person from the team members of the reserve visit who were involved in the demolition exercise including police officers. Bolstering his arguments, he invited the court to make a reference to the case of **Aziz Abdallah vs. Republic** (1991) TLR 71 where it was held that an adverse inference may be drawn by the court if a certain vital witness is not called without sufficient reason being shown.

On the offences of occasioning loss, the counsel for the respondent has argued this court to uphold the decision of the trial court on the reason that, the audit report admitted as PE9 was conducted with ill motive of victimizing the respondents taking into account that, the respondents were not vividly interviewed. He further questioned the legality of the

audit report in that the same was not submitted to the 1st respondent, the then District Executive Director (DED), the accounting officer responsible in answering the queries.

The respondents' counsel also submitted that, the second contract was procedurally entered since 6,726 did not feature to the 1st contract nor was the order for eviction and demolition, the business of the Council / Principal since the 3rd defendant was given the work by the High Court via eviction/demolition order (PE1) adding that, the costs of the work are payable pursuant to the Court Brokers Rules, GN. 308 of 2012. Basing on the Court Broker's Rules, the counsel maintained that, the 3rd respondent was entitled to Tshs. 1,945, 650, 000/= instead of Tshs. 357, 974,000/= accepted by him (3rd respondent) after long and mutual negotiations. Hence, According to the respondents' counsel there was no intention to mislead on the part of his clients.

Regarding to the evidential value of the Audit Report (PE9), the respondents' counsel argued insisting that, the same was not conducted in terms of section 48 of the Local Government Finance Act, Chapter 290, Revised Edition, 2002 as the same was neither conducted by the Council Internal Auditor nor it was conducted by external auditor as required under provisions of section 29 read together with section 36 of the Public

has always the burden of proving criminal cases her charge against an accused person beyond reasonable doubt save where the law provides otherwise. And that, no conviction may be safely secured on the basis of weakness of the defence but on the strength of the prosecution evidence. It is also the trite law that, it is safer to acquit nine accused persons who might have committed offences but their quilt is questionable than to convict an innocent person accused of an offence. I would like to subscribe a judicial precedent in **Nkanga Daudi vs. Republic,** Criminal Appeal No. 316 of 2013 (unreported) where the Court of Appeal of Tanzania had this to say:

> "*It is the principle of law that the burden of proof in criminal cases rest squarely on the shoulders of the prosecution side unless the law otherwise directs and that the accused has no duty of proving his innocence*".

See also case law cited by the respondents' counsel in **Christian s/o Kaale and Rwekiza Bernard vs. Republic** (1992) TLR and **Aziz Abdallah vs. Republic** (1991) TLR 71 as well as **Jonas Nkize v. Republic** (1992) TLR 213).

On the other hand, I am not unsound of the principle that, while the prosecution owes a duty to prove its case against an accused person

Finance Act, Chapter 348, Revised Edition, 2002. The counsel further cemented, the audit report could and cannot form the basis for conviction for the offence of occasioning loss. He added that, the evidence adduced by the 1st and 4th respondent revealed that there was no loss occasioned to the Council.

In his response to the offence of obtaining money by false pretense contrary to section 302 of the Code, the counsel for the respondents was of the view that, the payments made in favour of the 3rd respondent were lawfully and authorized as per the testimony of PW6 taking into account that, the respondents' intent to defraud or the money was obtained by means of pretense was not proven. He then invited this court to consider the ingredients of the offence as per section 302 of the Code visa viz the prosecution evidence as well as the decision in the case of **Jadah vs. Republic** (1971) H.C.D 393. He finally prayed for an order dismissing this appeal and confirming the court's findings.

This is what briefly transpired before the trial court and what the parties' learned counsel have submitted for and against the appeal. However, the appellant did not file her rejoinder.

In determining the appellant's grounds of appeal, I shall be guided by the superseding principle in criminal cases that, the prosecution side

at the required standard of proof in criminal cases yet that, principle does not mean each and every remote contention or remote possibility canvassed by an accused person must be proved beyond reasonable doubt.

In the offence of Use of documents in order to mislead the Principal c/s 22 of the Act which are in four counts (1st, 2nd, 3rd and 4th counts) as explained herein section 22 reads and I quote;

> "22 *A person who knowingly gives to any agent, or an agent knowingly uses with intent to deceive, or defraud his principal, any receipt, account or other document such as a voucher, a profoma invoice, an electronically generated data, minute sheet relating to his principal's affairs or business, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal, commits an offence and shall be liable on conviction to a fine not exceeding seven million shillings or to imprisonment for a term not exceeding five years or to both".*

According to the preliminary hearing and evidence on record, it goes without saying that both parties were not in dispute of the documents so tendered and received by the trial court even before commencement of the trial, they were eight (8) documents that were received by the trial

court without any objection from the defence, these were, eviction order dated 8th Nov. 2012 (PE1), first contract dated 19th November 2012 (PE2) initial payment vouchers in respect of the first contract (PE3), eviction and demolition report from 19/11/2012 to 16/12/2012 (PE4), handing over report dated 17th December 2012 (PE5) 2nd contract dated 4th December 2021 (PE6) and payment voucher dated 24th day of January 2013 worth Tshs. 42,594,000/=

Other exhibits received during preliminary hearing are; payment voucher for Tshs. 42, 594,000/- prepared in favour of the 3rd respondent together with the 3rd respondent's demand letter dated 20th December 2012 which were collectively received as PE7 as well as the respondent's demand letter dated 18th December 2012 (PE8) requesting for a total sum of Tshs. 216, 300,000/= addressed to the 1st respondent being the costs of demolishing 6,276 houses allegedly not previously counted and the costs of demolishing 934 houses plus additional expenses (Tshs. 13, 264, 000/=).

As these exhibits from PE1-PE8 were plainly admitted by the trial court during preliminary hearing, hence facts admitted by the respondent during that period cannot be denied subsequently denied and the same are deemed to have been proved pursuant to section 192 (2) & (4) of the

CPA as correctly submitted by the appellant's counsel (See **Republic v. Mastura Abdallah Makongoro and Mike Nwankwo,** Criminal Session No. 46 of 2018 (unreported), this court sitting at Moshi where the said Mike admitted some facts incriminatory against himself during preliminary hearing however he denied the same at the trial.

It follows therefore, the evidence adduced by the 5th respondent that, the report was not genuine, nor was it a team report and that, the same was not used to pay the 3rd respondent but for the office use only and the submission by the counsel for the respondents that the eviction & demolition report purporting to show that they were prepared by the 5th respondent was a mere draft that was not intended for the Council's use is unfounded or an afterthought.

Nevertheless, having judiciously examined the report (PE4), I have observed that, the report is indicative that the extra houses were 7,210 and not 7,200 as indicative in the charge sheet, the 2nd count (See paragraph 4 of page 1 of the typed proceedings of the trial court). In **Musa Mwikunda vs. Republic**, Criminal Appeal No. 174 of 2006 (unreported), the Court of Appeal held;

> *"The principle has always been, that an accused person must have known the nature of the offence facing him.*

This can be achieved if a charge discloses the essential elements of an offence. If that is not done, the accused will not have been put on a proper notice of the nature of the case he has to answer. He cannot, therefore, adequately prepare himself to put up an effective defence".

In our instant criminal case, the 5th respondent found to have been prejudiced by being indicted for the offence of use of the document in order to mislead his Principal by indicating in the document, "taarifa ya zoezi la operesheni katika..." allegedly purporting to show that, there were 7,200 demolished houses whereas the report itself indicates that, there were 7,210 houses demolished besides of 3, 570 houses previously affixed with demolition notices.

The question that follows is, is it possible for the prosecution side to charge the 5th respondent relying on the document, the report (PE4) without carefully ascertaining its contents? I am saying so for a very simple and clear reason that, the investigation must first have commenced and thoroughly conducted followed by framing of the charge against him and his co-accused person and thereafter arraignment to the court since 29th November 2017 till 29thth day of November 2018 when trial of the case began. Worse still, I have observed no tangible evidence on the part of

the prosecution in support of the charge in 2nd count that was adduced to cure the defect appearing the charge sheet save to his admission to preparing a report containing 7,210. The 5th respondent's guilt or innocence in respect of the 2nd count is questionable and of course with other reasons to be demonstrated herein under.

As rightly argued by the appellant's counsel that, the first contract was to come to an end on the 16th December 2012 and that the payments for the 1st contract was made on the 20th November 2012 (1st installment-Tshs. 30,130,000-PE3), the 2nd instalment was paid on the 7th December 2012 at the tune of Tshs. 42,840,000/= and last instalment for the 1st contract was effected on the 21st December 2012 at the tune of Tshs. 32, 130, 000 /=(See PE10-3rd respondent's bank statement). Thus, it was necessary for the responsible officers including the 1st, 2nd, 4th and 5th respondent to seek for Council's approval for the 2nd contract, if at all, there were additional houses (943 and 6,276 houses not previously counted) that were to be demolished by the 3rd respondent.

It is therefore my considered view that, the assertions that, the 2nd contract was dubious and intended to mislead the Council on the reason that, there was no approval by the Council without tangible evidence that, there were no other additional houses and huts, leaves a

lot to be desired in criminal cases like the one since ingredients provided for under section 22 of the Act (supra) would not conveniently be met in criminal proceedings save administrative measures/disciplinary hearings against the wrong doers. The reasons for my holding herein are

a. That, ample evidence is to the effect that, the 2nd contract had not been approved by the Council constituting violations of provisions of the Procurement Act (See testimony of PW1),

b. That, the 2nd contract (PE2) bears no backings of the 1st contract since it is silent on, whether it was for additional work and, if so, how many houses were to be demolished

c. That, the 2nd contract was not indicative of a number of houses that were to be demolished and no report made as to additional houses as was the case for the 1st visit report (PE15) which revealed that there were 3, 570 dwelling houses and huts which were to be demolished.

Though these errors or omissions in the 2nd contract yet I am of the established opinion that, failure to have Council's approval or tender and or omission to make a reference to the 1st contract in the 2nd contract are misconducts on the part of the 2nd respondent who was responsible

for preparing contract as well as the 1st and 4th respondent who signed the same are more administrative and therefore are safely dealt with in disciplinary proceedings than criminal proceedings. I am holding so for an obvious reason that, the respondents had repeatedly admitted to have done so lawfully or with no intent to steal or mislead their principal except to implement their goal. Hence, it might be true that, the respondents did what it now appears to be criminal act (s) but with good intent though skipped some necessary procedures. It is established principle that, if an accused offers an explanation which is reasonable and might possibly be true even if the court is not convinced, it is more justifiable to acquit rather than to convict (See the decision of the Court of Appeal in **Republic v. Kerstin Cameron** (2003) TLR 84).

Although I am aware that the 3rd defendant was given the work by the High Court yet I am not persuaded by the arguments advanced by the learned counsel for the respondent that, the prosecution has failed to establish agent-principal relationship since he was employed by the court, therefore not liable for the offence of 'use of the Document in order to mislead the Principal', simply because it is not deniable that, the 3rd respondent entered into the contract with Council which was represented by the 1st and 4th respondent as the then Council's DED and the Council

Chairperson respectively nor can I be convinced by the respondents' assertion that, the actual eviction and demolition costs as per Court Broker Rules, were more than Tshs.1.9 billion, therefore, the respondents could not be held liable for the offence of occasioning loss to the Council. I am holding so since the 3rd respondent was bound by the terms and conditions of the contract he freely and voluntarily entered into as was correctly emphasized by the Court of Appeal in **Simon Kichele Chacha vs. Aveline M. Kiwale,** Civil Appeal No. 160 of 2018 (Unreported) where it stated that;

> *"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be sanctity of the contract."*

In our case, the arguments by the respondents' advocate that, the 3rd respondent was not an agent to the Council and that payments made to the 3rd respondent by the Council were far beyond the actual payments in accordance with the Court Brokers' Rules are thus found baseless.

Nonetheless, I have taken judicial notice to the effect that, the 3rd respondent had passed away, the incidence which is capable of having all the counts against him abated in terms of section 371A of the CPA which

provides for abatement of an appeal from subordinate court upon death of the respondent or appellant. Though there is no official information or a death certificate to proof that the 3rd respondent had died but the information given to me by Mr. Malimi Juma, the learned counsel for the respondents and my personal probe, the 3rd respondent is certainly dead. Hence, the appeal against him is consequently abated as the said provision of the procedural law.

That, being the case relating to the demise of the 3rd respondent, I am not therefore bound to determine the offence of obtaining money by false pretense contrary to section 302 of the Penal Code in two counts to wit' 5th and 7th count which were solely targeted to him (3rd respondent) save the offence of Occasioning loss to the Specific Authority c/s 10 (1) of 1st Schedule to and section 57 (1) and 60 (2) of the Act in 6th court excluding 8th count. I have opined to exclude the 8th count in my determination of this appeal in respect of the said offence due to the following reasons;

1. That, the 2nd contract (PE2) is not indicative that the amount payable to the court broker, 3rd respondent was Tshs. 190,000,000/= but Tshs. 188, 280, 000/= above all if

Tshs.2,000,000/= alleged being court's fees, the same was not committed on the 4th December 2012

2. That, the payment of Tshs.152,000,000/= in favour of the 3rd respondent as per PE12, payment voucher on the 19th June 2014 and received by him (3rd respondent) on the 1st July 2014 is the period when the loss would legally be stated in the charge sheet and it would be the period when the Council sustained loss and above all the 2nd contract was a mere reference for the alleged payment

3. That, the amount paid that is Tshs. 152,000,000/= was paid as per the court's order and its decree after this court had issued consent judgment dated 5th November 2013 in the presence of the 2nd respondent, Cosmas Nsema who was the then Council Solicitor following the 3rd respondent's institution of the Civil Case No. 30 of 2013 in this court at Arusha on the **18th September** 2013 (See PE14) and

4. That, neither the trial court nor this court could legally reverse the decision of the court or this court is fanctus officio to overrule its valid order dated 5th November 2013

as rightly testified by PW6 unless there is tangible evidence overruling or vacating the said consent decree.

It is now for the court's determination for the offence in the 6th count to the charge against all respondents. According to the exhibits on the trial court's record which were so produced and duly received namely; the 3rd respondent's letter dated 20th day of December 2012 requesting for the payment of variation of costs on completion of the eviction/ demolition assignment as well as the Council's payment voucher for the payment in the tune of Tshs. 42,594,000/ (PE7) as well as the 3rd respondent's bank statement retrieved on the 7th August 2018 covering the period from 1st October 2012 to 1st January 2015.

Examining the said exhibits, it is amply clear that, the 3rd respondent applied for and voucher for the said payment which approved and paid by Council personnel and the 3rd respondent received Tshs, 42,594,000/=on the 28th day of January 2013 via his personal account No. 01J1005093200 withheld by the CRDB Bank-Vijana Branch. The said payment was approved by one Methew, Ninalwa (District Human Resource Officer) and 1st respondent in the Capacity of DED. In order to safely determine the offence in 6th count, it is thus pertinent to have provision of Paragraph 10 (1) of the EOCCA with which the respondents stood charged with;

"10 (1) Any person who, whether or not he is an employee of a specified authority by any wilful act or omission, or by his negligence or misconduct, or by reason of his failure to take reasonable care or to discharge his duties in a reasonable manner, causes any specified authority to suffer a pecuniary loss or causes any damage to any property owned by or in the possession of any specified authority, notwithstanding any written law to the country, commits an offence under this paragraph, if the monetary value of the loss or damage exceeds one million shillings".

According to the above cited provision of the law, a person accused of the offence under such provision of the law may be found guilty when it is proved, **firstly**, that a specified authority has suffered any pecuniary loss or any damage loss to any property owned or in possession of such authority and **secondly,** that, if satisfactorily proved that such accused intentionally committed the offence or through his or her omission, or by his or her negligence or misconduct, or by reason of his failure to take reasonable care or to discharge his duties in a reasonable manner causes such loss.

Examining the first contract (PE1) recognized 1st respondent who appeared as DW1, I have noted that the first contract (PE2) had a clause 5 (ii) which provides that, the court broker would perform his work by

using his own equipment and personnel and the testimony by DWI that, '*there were ten centers which we discussed to be broken and we agreed and put into the first contract'* but none has been substantiated by necessary evidence as she glaringly told the trial court when cross examined by Mr. Kyando that, she had no document to prove her testimony about 934 houses (See third and fourth line of page 81).

It follows that, the 1st respondent and others who approved and signed the payment voucher (PE7) as well as the 3rd respondent who requested for the payment of Tshs. 42, 594,000/=, in my considered view, they brightly omitted to take reasonable care or acted negligently as a result caused the Council to suffer pecuniary loss in the tune of Tshs. 42, 594,000/=. More so, there was no sub-contract in relation to the said 934 additional residential houses and huts, neither the said 934 houses were counted as testified by the 1st respondent when cross examined ("I did not instruct anybody to count the additional houses") as well as the testimony of 2nd respondent (DW2) who told the trial court that, he did not know about 934 houses.

Similarly, the contentious 934 additional houses were also strangely included or repeated in the 3rd respondent's demand letter dated 18th December 2012 (PE8) requesting payment of a total of Ths, 229, 564,

000/ being for demolition of 7,210 (6276 +934=216, 300, 000/=). And additional costs at the tuen of Tshs. 13,264,000/=.

Moreover when I carefully look at the 3rd respondent's demand letter dated 20th December 2012, it is clear that, the expense allegedly incurred by the 3rd respondent at the tune of Tshs. 14, 574, 000/= including wheel loader, accommodations, purchase of diesel for wheel loader whereas the clause 6 of both contracts (PE2 & PE1) is very unambiguous that the Council would not be liable for any damage, costs incurred by the court broker whether directly or indirectly on equipment and personnel hired by the court broker.

Even if the questionable 2nd contract would be valid yet the same expenses incurred by the court broker were prohibited (See clause 5 (ii) and clause 6 of the 2nd contract). That being the court's findings, it is clear therefore the prosecution had been able to sufficiently prove that, the Council suffered the loss of Tshs. 42, 594, 000/= since the same amount was paid by it through its three signatories including the 1st respondent and the said amount was undisputedly received by the 3rd respondent through his personal account. However, I have failed to find if the 2nd, 4th and 5th respondent to be liable for the offence since there is no evidence incriminatory to them, be it oral or documentary evidence.

I have cautiously considered the oral evidence adduced by both sides, documentary pertaining the audit report (PE9) and submission of the respondents' counsel and observed that, one Kambele Mvungi, an internal auditor of the Local Government stationed at Babati District was not a qualified or competent personnel to conduct the audit in another District unless he was duly appointed by CAG which is the case here. This is as per requirement of the law under section 48 of the Local Government Finances Act which provides;

> *"48. The account of every District Council and of any Urban Authority shall be audited internally by an internal auditor employed by the authority concerned, and the external auditor for each of those authorities shall be the Control and Auditor General".*

It is in the light of the above provision of the law, I am of the view as correctly argued by the respondents' council that, the said audit report being prepared by the internal auditor (PW6) who was stationed at Babati District could not be proper personnel to conduct audit in Kiteto District Council as an internal auditor unless he was appointed or given special instrument by the Control Auditor General. The evidence in relation to the audit report (PE9) is thus discarded.

Basing in the above deliberations, I find this appeal is partly merited in that the 1st respondent and 3rd respondent guilty in the 6th count to the charge. I thus according convict her, Jane Kemilembe Mutagurwa of the of offence of Occasioning Loss to a Specified Authority paragraph 10 (1) of the 1st Schedule to, and section 57 (1) and section 60 (2) of the Economic and Organised Crime Act, Cap 200 revised Edition, 2002. I therefore quash and set aside judgment and order of the trial court in respect of the 6th count against the 1st respondent named herein and proceed upholding the judgment and ancillary orders of the trial court in respect of other respondents for the offences leveled against them.

It is so ordered

M. R. GWAE.
JUDGE
26/08/2022

Court: Right of appeal explained

M. R. GWAE.
JUDGE
26/08/2022

Court: As the 1st respondent is found guilty, I thus ask the parties' counsel as to whether she had any previous conviction record and her mitigating factors.

PREVIOUS RECORD

Ms. Mtenga: We pray she be punished in accordance with the law, EOCA.

MITIGATING FACTORS

Ms. Mlacha: We pray for the court's leniency due to the following mitigating factors, **firstly,** she is the first offender, **secondly**, she is aged 58 years old and **thirdly,** she had served the Government, she was therefore dedicated to her services.

That's all

M.R. GWAE
JUDGE
26/08/2022

SENTENCE

I judiciously and mercifully keenly considered the 1st respondent's mitigating factors advance by Miss Mlacha that, the accused is the first offender, she has dependents and that had served the Government with devotion for more than 20 years. Should my hands not tied up with the

requirement under section 60 (2) of the EOCCA, I would impose a lenient sentence as asked by the respondent's counsel. For sake of clarity, section 60 (2) of EOCCA is reproduced herein under;

> "60 (2) *Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act;*
>
> *Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence".*

Guided by the above provision of the law, the 1st respondent, Jane Kemilembe Mutagurwa is hereby sentence to twenty years imprisonment

It is so ordered

M.R. GWAE
JUDGE
26/08/2022

Court: Judgment rendered in the presence of Miss Alice Mtenga and that of all respondents save the 3rd respondent

HIGH COURT OF TANZANIA

M.R. GWAE
JUDGE
26/08/2022