IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CONSOLIDATED CRIMINAL APPEALS NO. 129 AND 133 OF 2022

DEUS GRACEWELL SEIF ..... 1ST APPELLANT

ABUBAKAR SALUM ALLAWI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Economic Case No. 39 of 2021)

JUDGMENT

16th December, 2022 & 10th March, 2023

KISANYA, J.:

Before the Resident Magistrate's Court of Dar es Salaam at Kisutu (henceforth the trial court), the appellants above mentioned were charge with two counts. The first count was abuse of position contrary to section 31 of the Prevention and Combating of Corruption Act, No. 11 of 2007 (the PCCA) as amended, read together with paragraph 21 of the First Schedule, to and sections 57(1) and 60(1) both of the Economic and Organized Crime Control Act, Cap. 200, R.E., 2002, [now R.E. 2022] (the EOCCA). The second count was diversion and was predicated under section 29 of the PCCA as amended, read together with paragraph 21 of the First Schedule, to and sections 57(1) and 60(1) both of the EOCCA.

In the first count, it was alleged that, on diverse dates between 3rd October, 2018 and 6th November, 2018 at Tanzania Teachers Union's offices

within Kinondoni District in Dar es Salaam Region, the 1st and 2nd appellants, being employed in public Services as General Secretary and Treasurer of Tanzania Teachers Union (henceforth "TTU" or "CWT"), respectively, intentionally abused their position thereby obtained an undue advantage of TZS 13,930,963/=.

As for the second count, it was stated that, on the dates and at a place stated in the first count, the 1st and 2nd appellants, being employees of TTU as General Secretary and Treasurer, respectively, diverted for their own benefit the amount of TZS 13,930,963/=, the property of Tanzania Teachers Union which came into their possession by virtue of their positions.

As appellants denied the charges, the trial was conducted. The prosecution called nine witnesses and tendered eleven exhibits (Exhibits P1 to P11). On the other hand, the defence case was based on four witnesses and seven exhibits (Exhibits D1 to D7). At conclusion of the trial, the appellants were convicted of both counts and sentenced to serve a jail term of six (6) months on each count. In addition to the sentences, the 1st and 2nd appellants were ordered to pay the victim (TTU) compensation of TZS 7,590,000/= and TZS 6,200,000/=, respectively. The custodial sentences were ordered to run concurrently.

A brief factual background of the case is that, DW3 Stella Mamoto was a teacher of Chilonwa Secondary School in Chamwino and head of women department of CWT. In her letter dated 28th September, 2018, DW3 requested

CWT to facilitate her trip to Japan. The 1st appellant approved DW3's request. He approved TZS 14,420,000/= in lieu of TZS 17,420,000/= requested by DW3. Thereafter, PW2 Goodluck Wilbad Matari prepared two payment vouchers and cheques whereby PW1 Charles Julius Mbuguni withdrew the TZS 14,420,000 from CWT's account. He handed over the said amount to PW2. Thereafter, PW2 handed over TZS 14,420,000 to PW3 Prosper Aloisi Lubuva for purposes of paying the intended payee (DW3).

It was the prosecution case that the said amount did not facilitate DW3's trip to Japan as intended. The 1st appellant is alleged to have instructed PW3 to pay transport costs and allowance in favour of the 1st and 2nd appellants' trip to Cape Verde where the national team of Tanzania was going to play football. According to PW3 and Exhibits P7 and P9, TZS 6,650,963.94/= was deposited in TFF's account marinated at NBC Bank to cover transport costs for the appellants' trip to Cape Verde. It was further alleged that the 1st appellant was paid allowance of TZS 4,290,000/= whereas the 2nd appellant received allowance of USD 1,300/= equivalent to TZS 2,990,000/=. As the total sum paid in favour of the appellants was TZS 13,930,963/=, they were charged as stated afore.

In their respective defence, the appellant denied committing the offences they were charged with. The duo admitted to have travelled to Cape Verde. However, they stated to have used their own money. It was also the defence case that DW3 travelled to Japan and that PW3 paid her part of the money

approved by CWT. The 1st appellant stated that the charge was instigated with PW3 who had grudges after the latter (PW3) was demoted by CWT and transferred to Bukoba.

After analysing the evidence before it, the trial court was satisfied both counts were proved beyond reasonable doubt. Thus, the trial court convicted and sentenced them as stated above.

The decision of the trial court aggrieved the appellants and the Director of Public Prosecutions. The appellants filed a petition of appeal which was registered as Criminal Appeal No. 129 of 2022. They fronted a total of eleven (11) grounds of appeal as follows:

1. *That the Honourable trial Magistrate erred in law and in fact for convicting and sentencing the Appellants contrary to the provisions of law that the Appellants stand charged.*
2. *That the Honourable trial Magistrate erred in law and in fact for holding that the Appellants were charged on non-existing laws was not fatal and that did not occasion any miscarriage of justice on the part of the Appellants.*
3. *That the Honourable trial Magistrate erred in law and in fact for failure to observe that there was a serious variance between the charge and the evidence brought before the court.*
4. *That the Honourable trial Magistrate erred in law and in fact for misapprehension of the evidence on record leading to injustice to convict the Appellants.*

5. *That the Honourable trial Magistrate erred in law and in fact for failure to observe that there were serious contradiction, discrepancies and inconsistencies on the prosecution evidence to warrant the conviction against the Appellants.*
6. *That the Honourable trial Magistrate erred in law and in fact for failure to appreciate the Appellant's evidence against the charge levelled against them.*
7. *That the Honourable Court trial Magistrate erred in law and in fact for failure to observe that was no tangible evidence to warrant the conviction of the Appellants.*
8. *That the Honourable trial Magistrate erred in law and in fact for failure to observe that the case against the Appellants was not properly investigated.*
9. *That the Honourable trial Magistrate erred in law and in fact for failure to properly evaluate and analyse the evidence on record as a result arrived at a wrong conclusion.*
10. *That the Honourable trial Magistrate erred in law and in fact for failure to observe that the case against the Appellant ought to have been proved beyond all reasonable doubts.*
11. *That the Honourable trial Magistrate erred in law and in fact to note that all prosecution exhibits tendered in court during the trial were not read aloud an act which occasioned miscarriage of justice on part of the Appellants.*

At the same time, the Director of Public Prosecutions lodged an appeal (Criminal Appeal No. 133 of 2022) raising one ground of appeal as follows:

1. *That, the trial Magistrate erred in law and fact by imposing sentence of six months imprisonment to the respondent contrary to the law and without justifiable cause/reasons*.

For convenience in determination of the two appeals, the Court found it appropriate to consolidate them as "Consolidated Criminal Appeals No. 129 and 132 of 2022".

At the hearing of the appeal, the appellants were represented by a team of three advocates which was led by Mr. Majura Magafu. Others in the team were Messrs Jeremia Mtobesya and Mr. Mukoba. On the other side, the Republic/Director of Public Prosecutions enjoyed services of Ms. Cecilia Mkonongo, Mr. Imani Nitume and Lupiana Mwakatobe, learned Senior State Attorneys.

After hearing an oral submission in support of Criminal Appeal No. 129 of 2022, the Director of Public Prosecutions filed a notice of preliminary objection on the point of law to the effect that:

(a) Appeal No. 129 of 2022 is incurable defective for been instituted without proper notice of intention to appeal.

As the rules of the practice demands, I shall first dispose of the preliminary objection before delving in determining the merits of the Criminal Appeal No. 129 of 2022.

Arguing on the preliminary objection, Ms. Mkonongo submitted that every appeal is preceded by a notice of intention to appeal which is issued under section 361(1) (a) of the Criminal Procedure Act, Cap. 20, R.E. 2022 (the CPA). She further submitted that the notice of intention to appeal may be oral or written. The learned Senior State Attorney went on to contend that the notice of intention to appeal in the case at hand was issued by 1st appellant only. Her argument was based on the fact that, the notice of intention to appeal was given by the counsel who mitigated on behalf of the 1st appellant only. On that account, Ms. Mkonongo was of the firm view that the 2nd appellant did not give the notice of intention to appeal. That being the case, she submitted that the petition of appeal is incompetent for containing two appellants and that, it is not the duty of this Court to amend same.

In their respective submissions, Ms. Mkonongo and Mr. Mitume went on to argue that the notice of intention to appeal is defective for wrong citation and non-citation of the applicable law. According to them, the notice of intention was made under sections 359(1) of the CPA which is not applicable. As regards section 361 of the CPA cited in the oral notice of intention to appeal, they argued that the appellants did not cite the specific paragraph of section 361 of the CPA. Referring the Court to the case of **Leila Megli House Enterprises vs International Commercial Bank Tanzania LTD**, Misc. Commercial Case No. 328 of 2014 (TLSLR) 2016, Ms Mkonongo held the view that the trail court was not properly moved.

Responding, Mr. Magafu contended that the objection was raised with ill-motive and without considering the provisions of section 8 of the National Prosecutions Service Act, Cap. 226, R.E. 2019 (the NPSA). It was his submission that the notice of appeal was issued by Mr. Mkoba who was the leading counsel for the defence team. Making reference to the proceedings of the trial court, he argued that the 2nd appellant was also represented by Mr. Mkoba. He further submitted that, the fact that different counsel mitigated on behalf of each appellant does imply that the appellants were represented by different advocates.

On the failure to cite paragraph (a) of section 361(1) of the CPA, the learned counsel argued that the canon of statutory interpretation provides that the provision must be read in totality. It was his submission that the court was duly notified of the appellants' intention to appeal and that, the respondent was not prejudiced by the appellants' failure to cite paragraph (a) of section 361 (1) of the CPA. He contended the case of Leila is not applicable in the circumstances of this case.

Rejoining, Ms. Mkonongo submitted the objection was raised in the course of exercising their duties under the NPSA after noticing the defect in the notice of intention to appeal. Both learned Senior State Attorneys argued that, much as section 361(1) of the CPA prescribes time within which to lodge petition of appeal and notice of appeal, the appellants ought to have cited the specific

provision of law under which the oral notice of intention to appeal was issued. The Court was referred to the case of **Amir Omary vs R**, Criminal Appeal No. 299 of 2015 where it was held that an appeal cannot be entertained unless the notice of intention is given under section 361(1)(a) of the CPA. Ms. Mkonongo reiterated her submission that the notice of intention to appeal was made under wrong provision of law and that, although the case of **Leila Megli House Enterprises** (supra) was in a civil case, the principle stated thereto is applicable to criminal case. She bolstered her argument by citing the case **Mangwira Mashela vs R**, Criminal Appeal No. 76 of 2007 (unreported).

Having considered the contending submissions, I prefer to preface my deliberation by reproducing the provision of section 361 of the CPA which is the basis of the instant objection. It reads:

> *361.-(1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant:-*
>
> *(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and*
>
> *(b) has lodged his petition of appeal within forty five days from the date of the finding, sentence or order, save that in computing the period of forty five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded*.

It is clear that the above cited provision provides for jurisdiction of this Court to seat and hear an appeal against the decision of the Resident Magistrate's Court or District Court in the exercise of its original jurisdiction. In terms of the said provision, the High Court is barred from entertaining an appeal unless, the appellant has expressed his intention to appeal before it and lodged a petition of appeal to such effect.

Both parties are at one that the notice of intention to appeal was given orally on the date of judgment and sentence. It is also not disputed that the notice of intention to appeal was given by Mr. Mkoba, one of the defence counsel. In terms of the record, Mr. Mkoba addressed the trial court as follows:

> *"Under section 359(1) and 361(1) of the CPA we pray to issue oral notice that, we intend to appeal to the High Court challenging the decision and sentence. We pray for the copy of judgment and proceedings."*

Now, the first part of the objection is to the effect that, the 2nd appellant did not give the notice of appeal owing to the fact that Mr. Mkoba mitigated on behalf of the 1st appellant only. I was then inclined to go through the proceedings of the trial court to satisfy myself on whether Mr. Mkoba was representing the 1st appellant only. The record shows that throughout the trial, the 1st and 2nd appellants were represented by Nesto Mkoba, Nashon Nkungu and Queen Augustino, learned advocates. As rightly observed by Mr. Magafu, nothing to suggest that Mr. Mkoba was representing the 1st appellant only. For

instance, when the matter was re-assigned to Hon. R. Kabate, PRM, both parties were addressed in terms of section 214 of the CPA. Thereafter, Mr. Mkoba responded as follows at page 79 of the proceedings:

> *"On behalf of the accused person, all of them, I wish to submit that the matter should proceed from where it ended.*

Furthermore, the 1st appellant was examined in chief by Mr. Nashon and re-examined by Ms. Queen, Mkoba and Nashon. As regards the 2nd appellant he was examined in chief and re-examined by Mr. Mkoba only.

On the foregoing analysis, the argument that Mr. Mkoba was representing the 1st appellant only is not support by the record. The fact that Mr. Mkoba mitigated on behalf of the 1st appellant does not imply that he expressed the intention of appeal on behalf of the 1st appellant only. This is also when it is considered, on the date of the judgment, both appellants were recorded to have been represented by Mr. Mkoba, Queen and Nashon.

As for the second part of objection, it is not disputed that the appellants' counsel did not cite subsection (a) of section 361 of the CPA which provides for the notice of intention to appeal. In my considered view, failure to cite item (a) of section 361(1) of the CPA does not render the oral notice of intention to appeal defective. Considering that the learned State Attorneys did not state how the Respondent was prejudiced by the appellant's failure to cite the relevant

item of section 361 (1) of the CPA, I hold the view that such defect is curable under section 388(1) of the CPA.

In the light of the above discussion, the preliminary objections raised by the respondent is dismissed for want of merit.

Having dismissed the preliminary objection, I will proceed to determine first Criminal Appeal No. 129 of 2022 which hinges on the appellants' conviction.

To tackle the complaints in Criminal Appeal No. 129 of 2022, I will start with the first and second grounds of appeal. Both grounds were merged and argued together. The complaint here is that the trial court erred in holding that charging the appellants under non-existing law was not fatal.

Mr. Magafu submitted that a charge or information is a foundation of any criminal trial. He then argued that determination of the competence of the charge is necessary to enable the court to decide the matter before it. The learned counsel went on to submit that the trial court was required to consider whether the charge is in compliance with sections 132 and 135 of the CPA by stating the statement of offence and particulars of offence. He pointed out that the charge levelled against the appellants was instituted on 03/05/2021 and both counts predicated under the Prevention and Combating of Corruption Act, 2007 (the PCCA) as amended read together with the relevant provision of the Economic and Organized Crime Control Act, Cap. 200, R.E. 2002 (the EOCCA) as amended. Referring to paragraph 2(2) of the General Laws Revision Notice,

GN. No. 140 of 2020 published on 28/02/2020, Mr. Magafu submitted that the laws cited in the charge were not existing. It was his submission that failure on the part of the prosecution to charge the appellant under the appropriate law led the trial court to follow into an error of finding that the appellants were guilty of the offence under the laws which are not existent. He relied on the cases of as held in **Gharib Ibrahim @Mgalu and 4 Others vs R**, Criminal Appeal No. 5 of 2019, **Abdallah Ally vs R**, Criminal Appeal No. 253 of 2013, CAT at DSM and **Malekano Ramadhan vs R**, Criminal Appeal No. 252 of 2013 (all unreported).

Thereafter, Mr. Magafu faulted the trial court in holding that the foresaid omission is curable under section 388 of the CPA. He was of the firm view that the trial court ought to have hold that the charge is defective and require the prosecution to amend the same. In the circumstances, he submitted that the proper recourse is to nullify the proceedings, quash the conviction and set aside sentence and that section 388 of the CPA cannot be employed to salvage a defective charge.

Mr. Mtobesya supported the submission of Mr. Magafu. He went on referring the Court to the case of **Mayala Njigailele**, Criminal Appeal No. 420 of 2015 (unreported) in which the Court of Appeal held that where a charge is incurably defective for being preferred under non-existing provision of law, an order for retrial cannot be made.

In response, Ms. Mkonongo urged the Court to find no merit in the argument that the appellants were charged on non-existing laws. It was his submission that the laws cited in the charge sheet were proper. She argued that charging provision does not apply retrospectively and that the appellants could not be charged under the revised laws of 2019 which were not existing when the offences were committed in 2018. The learned counsel went on to submit that the words "as amended" appearing in the statements of offence of both counts were intended to cover amendments made after R.E. 2022 of the EOCCA and that citation to such effect is provided under sections 12 and 20(1)(c) of the Interpretation of Laws Act, Cap. 1, R.E. 2019.

Submitting in alternative, Ms Mkonongo argued that even if there was a need of citing Revised Edition of 2019, the appellants were not prejudiced. Her argument was based on the ground that the provisions cited in the charge sheet are similar to the provision appearing in the R.E. 2019. That being the case, she was of the view that the authorities cited by the appellants' counsel are distinguishable from the circumstances of this case on the account that they dealt with charging the accused under the provision of law which were not in existence.

In his rejoinder, Mr. Magafu submitted that, since the EOCCA was amended from time to time, it was not sufficient for the charge to state "as amended". He was of the view that the trial court and the appellants were made to assume of the laws and the amendments and that the trial court failed to

pass a proper sentence due to the foresaid confusion. He reiterated that failure to cite the proper provision of the law contravenes sections 132 of 135 of the CPA. Thus, he asked the Court to hold that the charge is defective and dismiss the same.

In view of the above submission, the issue for determination is whether the appellants were charged under non-existing laws. Pursuant to section 132 of the CPA, every charge must contain, a statement offence which the accused person is charged with and particulars which are necessary to give reasonable information as to the nature of the offence. The modes of the charge is taken care by section 135 of the CPA. Paragraph (a) (i) and (ii) of section 135 of the CPA which is relevant to the issue under consideration stipulates:

> *(a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;*
> *(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and,* ***if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;****"*

Going through the above cited provision, it is clear that the statement of offence of the charge or information must make reference to the section of the law which creates the offence. In that respect, I agree with Ms. Mkonongo that,

the statement of offence is required to cite the law which was in existence at the time of commission of the offence. I am fortified by the decision of the Court of Appeal in **Ernest Jackson @ Mwadikaupesi and Another**, Criminal Appeal No. 408 of 2019 (unreported). In that case, a charge was preferred under the repealed law. Upon considering that the new law was operationalized four days before the charged offence was committed, the Court of Appeal held that:

> *"Since the appellants were alleged to have committed the offence on 19th September, 2015, their charge ought to have been laid under 15 (1) (a) of the DCEA instead of the repealed section 16(b) of the DTPITDA."*

In our case, Mr. Magafu is of the firm view that the Prevention and Combating of Corruption Act, No. 11/2007 as amended" and "the Economic and Organized Crime Control Act, [Cap. 200, R.E., 2002], as amended" referred to the statement offence were not in existence when the charge was instituted in 2021. His argument was based on the reason that both laws had been revised vide the General Laws Notice, GN. No. 140 of 2020 published on 28/02/2020.

I respectfully disagree with him. It is my considered opinion that the charge could not be brought under the PCCA and EOCCA, revised edition of 2019 which were not in force when the offences were alleged to have been committed on 3rd October, 2018 and 6th November, 2018. In that regard, the argument that the appellants were charged under non-existing laws lacks merit. Considering the provisions of sections 12 and 20 of the Interpretation of Laws

Act (supra), I am of the view that, the laws cited in the statement of offence of each count were proper.

Having so held, it is clear the trial court erred in holding that the charge was defective for being brought under the repealed revision. That being the case, the first and second grounds lacks legs to stand on. I, accordingly, dismiss both grounds.

Next ground for determination is the third ground on variation between the charge and evidence. The alleged variance is in respect of the amount of money involved in both counts. According to Mr. Magafu, evidence of PW1 and PW2 and Exhibits P1 and P2 show that the money approved in favour of DW3 Stela Mamoto is TZS 14,420,000/= and not TZS 13,930,963/= stated in the charge. He further submitted that PW1 testified to have handed over TZS 14,420,000/= to PW3 for purposes of paying DW3. On that account, the learned counsel argued that the prosecution ought to have amended the charge under section 234 of the CPA. It was his further argument the omission to amend the charge rendered the case against the appellants not proved. To cement his argument, the learned counsel cited the cases of **Noel Gurth @Bainth and Another vs R**, Criminal Appeal No. 339 of 2013, **Kilian Peter vs R**, Criminal Appeal No. 508 of 2016, **Michali Gabriel vs R**, Criminal Appeal No. 240 of 2017 (all unreported).

On the other side, Mr. Nitume conceded that the amount approved in favour of DW3 was TZS 14,420,000/= and the said amount was handed over

to PW3. However, he submitted that the issue whether there is variance between the charge and evidence is addressed by considering whether the appellants travelled to Cape Verde by using their own money and whether DW3 travelled to Japan by using the money paid by CWT. Making reference to evidence PW3, Mr. Nitume submitted that TZS 13,930,965 was paid to facilitate the appellants' personal trip to Cape Verde, whereby TZS 6,000,000 being transport costs was deposited in the account of TFF Sports Development Fund, USD 1300 equivalent to TZS 2,990,000/= was paid to the 2nd appellant, TZS 4,290,000 was paid to the 1st appellant and the remaining balance returned to Moses Lugendo Mnyagi (PW5). In that regard, Mr. Nitume was of the view that there was no variance between the charge and evidence.

Ms. Mkonongo added that the cases of **Noel Gurth @Bainth** (supra), **Kilian Peter** (supra) and **Michael Gabriel** (supra) are distinguishable from the circumstances of this case. She also submitted that each witness called by the prosecution is entitled to credence as held in **Goodluck Kyando vs R** [2006] TLR 363 and that failure to call DW3 as the witness for the prosecution did not affect the prosecution case. She was of the firm view that DW3 was not a credible witness.

Rejoining, Mr. Magafu submitted that PW3's evidence on the remaining balance paid to PW5 is contradicted by evidence of PW5 who stated to have posted TZS 5,839,500 in the ledger. He also argued that PW3 did not produce evidence to have paid the appellants. Contending that PW5 evidence implies

TZS 19,000,000 was withdrawn, the learned counsel reiterated his position that the charge and evidence were at variance.

The learned counsel conceded that the prosecution has a right to call witnesses of its choice. However, he argued the court is enjoined to draw an adverse inference against a party who fails to call material witness, as held in **Jaribu Abdalah** (1991) TLR 71.

At the outset, I agree with the appellants' counsel that, in terms of section 234(1) of the CPA, the proper recourse where there is variance between the charge or information and evidence is to cause amendment of the said charge or information. The law is further settled that failure to cause amendment of the charge renders the charge defective. In consequence, the prosecution is considered to have failed to prove the charge laid against the accused person. Some of the authorities on the foregoing position include the cases of **Noel Gurth @Bainth (supra), Kilian Peter (supra**) and **Michael Gabriel** (supra) cited by Mr. Magafu. For instance, first case, the Court of Appeal underscored that:

> *"…where there is a variation in the places where the alleged armed robbery took place, then the charge must be amended forthwith.* ***If no amendment is effected, the charge will remain unproved and the accused shall be entitled to an acquittal as of right****. Short of that a failure of justice will occur."* (Emphasis supplied).

As stated earlier, Mr. Magafu is of the view that the charge and evidence are at variance in respect of the sum of money involved in the offences levelled against the appellants. I have shown herein, the charge is to the effect that the appellants obtained undue advantage and diverted for their own benefit, a sum of TZS 13,930,963/=. Reading from the prosecution evidence as a whole, I have noted that the amount of money stated in both counts was part of TZS 14,420,000 which was approved in favour of DW3. No witness who testified that the appellants were paid TZS 14,420,000/=. PW3 was firm that upon receiving TZS 14,420,000 from PW2, TZS 6,000,000 was deposited in TFF's account to cover the appellants' transport costs to Cape Verde, TZS 4,200,000 was paid to the 1st appellant, while USD 1300 equivalent to TZS was paid to the 2nd appellant. As tightly submitted by Mr. Nitume, PW3 further testified that the total amount of money paid in favour of the appellants was TZS 13,930,963.

In view thereof, the charge and evidence cannot be held to be at variance. For that reason, the third ground is dismissed for being devoid of merit.

I now move on to the eleventh ground of appeal. The appellants claim that the trial court erred for failure to note that the exhibits tendered by the prosecution were not read aloud thereby occasioning miscarriage of justice. Mr. Magafu contended that Exhibits P1 to P11 were not read aloud as mandatorily required by the law. Relying on the position of law stated in the cases of **Issa Hassan Ukwa vs R**, Criminal Appeal No. 129 of 2017 and **Michael**

Mwakalula Jumba and Another, Consolidated Criminal Appeal No. 276 and 376 of 2020 (unreported), he moved the Court to expunge all exhibits from the record. It was his further contention that, upon expunging Exhibits P1 to P11, there remains no evidence to prove the offence preferred against the appellants.

In rebuttal, Ms. Mkonongo submitted that the requirement to read out the documents admitted in evidence is aimed at enabling the accused person to prepare his defence. To cement her submission, she cited the case of **Issa Uki** (supra) and **Lista Chato vs R**, Criminal Appeal No. 220 of 2017. She went on to submit that the said objective was duly achieved because the contents of all exhibits were made known to the appellants and that the prosecution witnesses cross-examined on the said exhibits. That being the case, the learned Senior State Attorney was of the view that the appellants are barred from raising that issue at this stage and that they (appellants) were not prejudiced. To supplement her argument, she cited the cases of **Anania Clevery Bekera vs R**, Criminal Appeal No. 355 of 2017, **Abas Kondo Gede vs R**, Criminal Appeal No. 472 of 2017, **Ernest Jackson Mwandikaupesi**, Criminal Appeal No. 407 of 2019 (all unreported). Her submission was supported by Mr. Nitume.

This ground should not detain the Court. It is trite law in this jurisdiction that document admitted in evidence should be read out to the accused person. I agree with Ms. Mkonongo that the requirement to read out the document admitted in evidence is aimed at enabling the accused person to understand

the nature and substance of evidence in the exhibits against him. This position was stated in the above authorities cited by the learned counsel for both parties.

In our case, the trial court admitted Exhibits P1 to P11. Having examined the record, I am satisfied that only the bank pay in slip (Exhibit P8) was recorded to have been read out after being admitted in evidence. Although the trial court did not record to have read over Exhibits PE1, PE2, PE3, PE7, PE9 and PE11, the witnesses who tendered the said exhibits disclosed the contents thereto. Further to this, the prosecution witnesses were cross-examined on the said exhibits. In the circumstances, I agree with Ms. Mkonongo that the appellants and their counsel were not denied of the contents of Exhibits PE1, PE2, PE3, PE7, PE9 and PE11. The recourse to be taken was stated the case of **Jackson @ Mwandikaupesi** (supra), when the Court of Appeal held:

> *"Although the record does not expressly indicate that the said documents were methodically read out as directed, it is noteworthy that in the rest of their respective evidence in chief the witnesses canvassed the contents of the documents and thereafter they were cross-examined so substantially on the documents by the defence counsel to leave no doubt that the appellants and their counsel were fully abreast of the contents of the two exhibits. Given these facts, it cannot be said that the appellants were denied to know the contents of the documents. In the premises, we would follow the course we took in* ***Chrizant John v. Republic****, Criminal Appeal No. 313 of 2015 (unreported) where, even though the*

contents of certain documentary exhibits were not methodically read out after their admission, we ignored the anomaly as we were satisfied that the witness who tendered them testified fully on their contents."

Applying the above position of law to the instant case, I am satisfied that the appellants were not denied to know the contents of Exhibits PE1, PE2, PE3, PE7, PE9 and PE11. Since the contents of the said exhibits were adduced by the witnesses who tendered them, the trial court's omission to record that the exhibits have been read out can be ignored. In the end result, an oral evidence adduced on the contents of Exhibits PE1, PE2, PE3, PE7, PE9 and PE11 will be taken into account by the Court.

As for Exhibits PE4, PE5 and PE10, nothing to suggest the contents thereon were made known to the appellants. This is because the witnesses who tendered the documents did not testify on the contents thereon. Also, unlike other exhibits, the prosecution witnesses were not cross-examined on the contents of the exhibits in question. In the circumstances, I hold the view that the appellants were prejudiced because the contents thereon were not disclosed to them. On that account, Exhibits PE4, PE5 and PE10 are hereby expunged from the record. Thus, the eleventh ground is partly allowed and partly dismissed to extent stated afore.

Next for consideration is the fourth, seventh, ninth and tenth grounds of appeal which were merged and urged together. The grievance here is that the trial court failed to analyse the evidence adduced before it thereby arriving to

wrong conclusion of convicting and sentencing the appellants. Mr. Magafu argued that had the trial court analysed the evidence, it would have found that the prosecution did not prove its case beyond reasonable doubts. To expound his argument, the learned counsel pointed out as follows:

One, that no evidence to prove that the appellants diverted TZS 14,400,000/= which was approved to facilitate DW3's trip to Japan. He submitted that DW3 proved to have requested for the fund to travel to Japan. It was his further submission that DW3 testified to have travelled to Japan and that PW3 paid him TZS 10,520,000/=. He further contended that the DW3 testified that PW3 owed her the remaining balance.

Two, there was no witness who testified that the procedure of requesting the money was not proper. The learned counsel submitted that the trial court considered extraneous matters. He was of the view that apart from the evidence of PW3 and PW5, nothing to suggest that DW3 did not received the money. He urged the Court to consider that the remaining balance was still with PW3.

Three, the defence objected admission of Exhibit P11 which shows that PW3 paid the money to the 1st appellant because the names and signature thereon were not his (1st appellant). Citing the case of **Richard Otieno @ Gulo vs R**, Criminal Appeal No. 367 of 2018 (unreported), Mr. Magafu submitted that the names ought to have been proved by evidence. It was his contention that apart from PW7, no witness who testified that the 1st appellant and the person named in Exhibit P11 was one and the same person.

Mr. Mtobesya added that Exhibit P11 should not be considered because some of its annexures were not admitted for being copies of the original. He submitted that neither PW3 nor accountant of PW1 testified on the said copy. He was in agreement with Mr. Magafu that in the absence of Exhibit P11 there is no evidence to prove that 1st appellant received the money from PW3. The learned counsel referred the Court to the cases of **Michael** (supra) and **DPP vs Shida Majana**, Criminal Appeal No. 285 of 2012 (unreported).

Fifth, the trial court failed to note that PW3 had grudges with the 1st appellant owing to the fact that he (PW3) admitted to have a dispute with him (1st appellant). Therefore, Mr. Magafu was of the view that PW3 was not reliable witness because he had grudges with the 1st appellant. Contending further that PW3 failed to pay DW3 her money, the learned counsel held the view that, PW3 instigated the case at hand in order to hide his conduct.

On the tenth ground, Mr. Magafu submitted that the prosecution did not prove its case beyond reasonable doubt as there is no evidence to prove that the appellants abused their positions and diverted the sum of TZS 13,960,963/=. Mr. Mtobesya further expounded that the offence of diversion under section 29 of the PCCA is committed if the property involved belongs to the Government. He submitted that the said offence was not proved for want of evidence to prove that CWT is a Government's agent.

On the foregoing, Mr. Magafu argued that there was misapprehension of evidence on the part of the trial court thereby leading to unfair conviction. He

further contended that the trial court failed to note there were contradictions on the prosecution. Citing the case of **Raphael Mhando vs R,** Criminal Appeal No. 54 of 2017 (unreported), he urged the Court to quash the conviction.

On the adversary part, Ms. Mkonongo was of the firm view that the trial court evaluated evidence adduced by both sides. She contended that the trial court gave reasons for not believing the witnesses called by the defence. It was her further argument that even if the trial court did not analyse the evidence, this Court has mandate to step into the shoes of the trial court and analyse the evidence. She relied on the case of **Edgar s/o Kayumba vs DPP,** Criminal Appeal No. 498 of 2017 (unreported).

With regard to consideration of Exhibit P11, Ms. Mkonongo submitted that, the appellants did not object its admission. It was her submission that PW9 testified how he arrived to the findings stated in Exhibit P11. According to her, the principle stated in the case of **Michael Mwakalula** (supra) were duly complied with. The Senior State Attorney went on to submit that Exhibit P11 was not defective and the defect if any, was not brought to the attention of the trial court. On that account, Ms. Mkonongo was of the view the appellants are barred from raising the same at this stage. She also submitted that PW3 was recalled to testify on the contents of Exhibit P3.

As for the argument that PW9 relied on document which was not original, Ms Mkonongo replied that PW9 did not testify to have worked on the photocopy. She further submitted that PW8 stated that he can examine any document

which is not in original form. It was her further argument that Exhibit P11 was admitted without being objected by the defence and that the trial court was enjoined to rely on it.

Mr. Nitume responded on the contention the prosecution case was not proved beyond reasonable doubts. He submitted that, the appellants did not dispute some of the facts read over during the preliminary hearing, PW2 testified to have received two cheques from PW2 and prepared the cheques to withdrew the money from CWT's account, and PW2 told the trial court that she prepared the payment voucher and handed over the cheque to PW1 who in turn gave the sum of TZS 14,420,000/= to PW3.

The learned Senior State Attorney further submitted that upon receiving the money, PW3 was instructed by the appellant to deposit TZS 6,000,000 in TFF's account and that PW6 and Exhibit P7 proved that the said amount was duly deposited in the names of the appellants. According to Mr. Nitume, the appellants signed a document to acknowledge receipt of allowance (Exhibit P11) and that PW9, PW2, PW4 and PW5 proved that the appellants signed Exhibit P11- A1 and A2. He was firm that PW3 proved that the appellants used TZS 13,930,965 and that the offence of diversion and abuse of position were duly proved.

As regards the issue whether the diverted money belongs to the Government, Mr. Nitume answered that issue in the affirmative. He submitted that CWT is monitored and supervised by the Government which also pays

teachers' salary. On that account, the learned counsel contended that the properties of CWT belong to the Government.

As regards anomaly on the name of the 1st appellant appearing in Exhibit P11, Ms. Mkonongo submitted that the handwriting expert proved that the document in question was signed by the 1st appellant and that the said evidence was supported by PW1, PW2, PW3 and PW5 who were familiar with the handwriting of the 1st appellant. It was her further argument that the case of **Michael Mwakalula Njuga** (supra) is distinguishable from the case at hand because the prosecution gave evidence on the 1st appellant's signature and names.

As for the contention that PW3 had grudges with the 1st appellant, Ms. Mkonongo submitted that PW3 told the truth. Her submission was based on the ground that PW3's evidence was supported by PW1, PW2, PW4, PW5 and PW6. She was of the view that the said complaint is an afterthought because the appellants did not prove that other prosecution witnesses had grudges against the 1st appellant. She also submitted that, during the preliminary hearing, it was not disputed that, on 06/10/2018, the money was deposited in the account of TFF and that PW3 gave evidence to such effect.

On the argument that PW3 used the money received from PW2, Ms. Mkonongo submitted that the said amount was paid to the appellants. She submitted that DW3 who alleged to have received some money from PW3 was not reliable owing to the reason that she told the trial court that the trip to

Japan was not funded while PW3 confirmed that the said trip was funded. Mr. Nitume added that DW3 did not prove to have received the money from PW3.

Undoubtedly, the main issue in the fifth, seventh, ninth and tenth grounds is whether the prosecution proved its case beyond all reasonable. This issue can be determined by considering the complaints fronted by the appellants' counsel to support the contention that the prosecution case was not proved beyond reasonable doubt.

It is trite law that first appeal is in the form of rehearing. In that regard, first appellate court is charged with a duty of re-evaluating the entire evidence on record by reading the evidence on record, subjecting it to a critical analysis and arriving at a decision which may confirm the trial court's decision or may be different. One of the authorities on that position is the case of **Napambano Michael @Mayanga vs R**, Criminal Appeal No. 268 of 2015 where it was underlined that:

> *"The duty of first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at decision which may coincide with the trial court's decision or may be different altogether*. "

In exercising the foresaid duty, the first appellate court has to consider whether the prosecution proved its case beyond reasonable doubts. It is elementary principle and I need not cite any authority that, any doubt on the prosecution case must be resolved in favour of the accused person.

Reading from the charge sheet, the prosecution was, among others, required to prove that the appellants obtained undue advantage and diverted for their own benefit, a sum of TZS 13,930,963/=. Now, it is not disputed that, after DW3's request for the fund to travel to Japan, CWT approved TZS 14,420,000/= in her favour. It is also in evidence that, PW2 handed over the said amount to PW3 for purpose of paying DW3. What is in dispute is whether PW3 paid the appellants in lieu of DW3.

It was the prosecution's case that, after receiving TZS 14,420,000, PW3 spent TZS 13,930,965 to pay transport costs and allowance for the appellants' trip to Cape Verde. However, apart from the oral evidence of PW3, no documentary evidence supports his contention that he was instructed to pay the appellants instead of DW3. When cross-examined by Mkoba, PW2 stated on oath that a person could not be paid "without there being writing as appeared in the hint". Therefore, it is not known as to how PW3 agreed to pay the appellants money which had been approved in favour of DW3 without there being no written instruction to such effect.

That aside, PW3 testified to have deposited TZS 6,650,963.94/= in TFF's account to cover the transport costs for the appellants' trip to Cape Verde. Indeed, PW4, PW6 and Exhibits P7 and P9 confirm that, on 06/10/2019, a sum of TZS 6,650,963.94 was deposited in the TFF account maintained at NBC Bank. As rightly submitted by the learned State Attorney, it was not disputed during the preliminary hearing that TZS 6,650,963.94/= was deposited in TFF's

account. What is dispute is whether the said amount was deposited by PW3 or the appellants. First for consideration is the bank statement (Exhibit P7). It reads that the said amount of TZS 6,650,963.94 was deposited by the appellants herein. The question as to who deposited the said amount was put to PW4 bank officer when he was cross-examined by Ms Queen. His response was as follows:

> *"I don't know who came at the Bank to deposit the money. It might be Deus and Abubakar Allawi."*

The bank teller who attended the depositor testified as PW6. It was her evidence that Exhibit P9 was signed by the depositor. However, PW6 did not tell the trial court whether the depositor of TZS 6,650,963.94 was PW3. Further to this, Exhibit P9 was not shown to PW3. Thus, nothing to suggest that the signature on Exhibit P9 belongs to PW3. Considering that the appellants told the trial court to have deposited the money from their own source, I am of the view that they raised reasonable doubt on the prosecution case. It was not their duty to bring evidence to support their contention. That aside, their contention is supported by Exhibit P7.

Apart from the transport costs, PW3 and PW5 testified that the 1st and 2nd appellants were paid allowance of TZS 4,290,000 and TZS 2,990,000 respectively. According to PW3, the 1st appellant signed a form to acknowledge receipt. His evidence was supported by PW5 who went on to state that the signed form "come in original form". However, the prosecution did not produce

the original form signed by the appellants. It is on record that PW3 and PW7 prayed to tender the said signed list or forms. The trial court did not admit the same for want of original. Thereafter, copies of the signed list or form alleged to have been signed by the appellants were admitted as part of Identification Bureau Report (Exhibit P11).

I am aware that an examination of handwriting can be conducted on copies of original. However, since the appellants disputed to have signed the signing list forms, the prosecution ought to have produced the original documents or tell the Court about the whereabouts of the original documents. This was not done. It is clear that Exhibit P11 was based on copies of signed list or forms. The trial court was not told as to why the original signing list was not taken to IB Bureau for examination. It is my considered view that, in the absence of the original signing list form, Exhibit P11 does not resolve the issue whether PW3 paid the 1st and 2nd appellants, a sum of TZS 4,290,000/= and USD 1,3000/ respectively.

Further to the foregoing, it was PW3's evidence that he spent TZS 2,990,000/= to buy USD 1,300/= which was paid to the 2nd appellant. Yet, the prosecution did not produce the receipt to support his oral evidence. Consequently, it is not clear whether the USD 1,300/= paid to the appellant was equivalent to TZS 2,990,000/= which formed part of TZS 13,930,963 appearing in the charge.

In view of the above, the sole evidence supporting the charge laid against the appellants is PW3's oral evidence that TZS 13,930,963 was paid to the appellants. This give rise to the appellants' complaint that PW3 was not a credible witness.

As rightly submitted by the learned counsel the parties, the law is settled that every person is entitled to credence. Apart from being believed, his evidence must be accepted unless there are cogent reasons for not believing him are given. This position was stated in the case of **Goodluck Kyando v. R** (supra) which was relied upon by the learned counsel for both parties. It is also settled law that, assessment of the credibility on demeanour of a witness is the monopoly of the trial court. As for the appellate court, the credibility of the witness may be determined by assessing whether she gave fundamentally contradictory or improbable evidence. Other ways are to assess the coherence of the testimony of the witness and to consider the witness of the testimony of the witness in relation to the evidence of other witnesses. This stance was taken in the case of **Robert Sanganya vs R**, Criminal Appeal No. 363 of 2019, CAT at DSM (unreported) in which the Court of Appeal held that:-

> *"Testimony of a witness will always be found to be true, consistent and believable unless the veracity of the witness has been assailed on his or her part to misrepresent the facts or has given fundamentally contradictory or improbable evidence. However, there are other ways in which the credibility can be assessed as we held in*

Shabani Daudi v. The Republic, *Criminal Appeal No. 20 of 2001 (unreported) that:*

> *"The credibility of a witness can also be determined in other two ways, that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses."*

In the present case, PW3 and PW5 gave contradictory evidence on the whereabouts of the outstanding balance after paying the appellants the money subject to the offence laid against them. Since PW3 received TZS 14,420,000/= for purposes of paying DW3, the outstanding balance after paying the appellants was TZS 487,037/=. Now, PW3 stated that the remained balance was handed over to PW5, while PW5 denied to have received the said balance. It is my considered view, such contradiction is material. For instance, if it is taken that PW3 did not hand over the money to PW5, he may be held responsible for converting the same to himself or for failing to account how that money was spent. This is when it is considered that in his evidence in cross-examination by Mr. Nashoni, PW5 testified that the money involved was TZS 14,420,000/=. He did not state whether it was TZS 13,930,963 stated in the charge sheet.

Another contradiction is on the money paid to DW3. As stated all along, DW3 was to be paid TZS 14,420,000/= for her trip to Japan. When cross-

examined by Queen, PW2 testified that there was no any other payment made in favour of DW2 apart from TZS 14,420,000/=. However, PW3 told the trial court that DW3 was paid TZS 2,000,000/=. In that respect, it is not clear whether CWT approved other payments in favour of DW3. Having considered that PW2 testified to have received DW2's complaint that she was paid a lesser amount in respect of her trip to Japan and that such fact is also reflected in the evidence of DW3, I am of the view that contradiction on whether the CWT approved other payment in favour of DW3 cannot be taken lightly. That aside, the prosecution did not produce documentary evidence to prove that PW3 was paid TZS 2,000,000/= for other activity than financing her to Japan.

At this juncture, I am of the view that the said contradictions raise reasonable doubt if PW3 was speaking the truth.

I have also considered Ms. Mkonongo's argument that DW3 was not reliable witness. Indeed, the trial court held the view that PW3 was not a reliable witness. One of the reasons were to the effect that PW3 told the trial court that the trip to Japan was not funded while PW8 Obadia George Mwakasiki, member of other trade union who travelled with DW3 confirmed that the said trip was funded. I went through the evidence of PW8 as rightly observed by Mr. Magafu, PW8 testified in his evidence in chief that the organizers of trip to Japan paid air ticket and accommodation only. Upon being cross-examined by Mr. Mkoba, he stated that "each workers association must have facilitated the participant to secure food". In her letter for request for the fund, DW3 did not request for

air ticket and accommodation. As for Mr. Nitume's argument that DW3 did not produce evidence to prove that PW3 paid her a lesser amount, I have considered that none of the prosecution witnesses testified that a person paid by CWT was issued with receipt or a document to such effect. In absence of evidence to such effect, the contention that DW3 did not produce evidence to prove payment effected by PW3 lacks merit. Therefore, I find no basis of finding that DW3 was not a credible witness.

Another issue is on the grudges between the 1st appellant and PW3. It is in evidence adduced by both parties that PW3 and 1st appellant were not in good terms. On that account, the 1st appellant claimed that the charges against them were related to grudges between him and PW3. According to the 1st appellant, PW3 was demoted and transferred to Bukoba. When cross-examined, PW3 admitted to have been demoted and transferred to Bukoba. Now, it turned out that PW3 was aggrieved by the demotion and transfer. He lost a labour dispute referred to CMA and the Labour Court. The foregoing fact if carefully weighed with the evidence adduced by the appellants, raise a doubt, on the case laid against them. Otherwise, the Court has to warn itself before considering his evidence. Ms. Mkonongo was of the view that PW3 was credible because his evidence was supported by other witnesses and Exhibits. Taking into the above contradictions and analysis on the prosecution evidence, I find the credibility of PW3 questionable.

There is also an issue of proof of the second count on diversion. Pursuant to section 29 of the PCCA, one of the ingredients of offence of diversion is that the property diverted must belong to the Government or its agent. The particulars of offences are to the effect that the appellants were employees of Tanzania Teachers Union. The question that arises is whether CWT is the Government or its agent. The said issue was not considered by trial court. It considered that the appellants were public office holder/bearer while that is not ingredient of the offence of diversion. The prosecution did not prove how CWT is an agent of the Government. According to section 4 of the Interpretation of Laws Act (supra) the word Government means the Government of the United Republic of Tanzania. As the name shows, CWT is a trade union. It therefore registered and regulated by the Employment and Labour Relations Act, Cap. 366, R.E. 2019. Nothing to suggest that a trade union is an agent of the Government. The fact that teachers are paid salary by the Government does not make, CWT an agent of the Government as contended by the learned State Attorney. On the foregoing reasons, I agree with Mtobesya, that the said ingredient of the offence of diversion was not proved

For the foresaid reasons, I agree with the appellants that the trial court did conduct a proper evaluation of the evidence adduced before it. Had the trial court conducted a thorough evaluation of evidence, it would not have arrived at the conclusion that the prosecution case was proved beyond all reasonable

doubt. Thus, I find merit in the fifth, seventh, ninth and tenth grounds of appeal.

On the complaint of misapprehension of evidence, it is on record that the trial court considered, *inter alia,* that the procedure of requesting the money was not proper. For instance, the trial court discussed whether the Exhibit P3 qualified to be a loose minute. The learned trial magistrate stated how the Chief Secretary was required to move the Secretary General by quoting the minute and folio number. However, none of the witnesses from CWT who testified on the standard or procedure of the loose minute before approving payment. It follows therefore that the trial court considered extraneous matters thereby misapprehending evidence when it held that the approval for payment in favour of DW3 was not proper.

In the upshot of the foregoing, I find merits in Criminal Appeal No. 129 of 2022. Consequently, I quash the appellants' conviction and set aside the sentences and compensation order passed against them. In the event the appellants have already paid compensation, I order the amount money paid as compensation to be paid back to them.

I now move on to determine Criminal Appeal No. 133 of 2022. As already intimated earlier, this appeal is against the sentence imposed against the appellants. It was argued by Ms. Mkonongo that the appellants ought to have been sentenced to serve a minimum sentence of twenty years imprisonment provided for under section 60(2) of the EOCCA. The said provision is to the

effect that, the sentence of imprisonment for a term of not less than twenty years but not exceeding thirty years, or both is meted upon a person convicted of corruption or economic offence.

Having determined Civil Appeal No. 129 of 2022 by quashing the appellants' conviction, determination of the ground on legality of sentence passed by the trial court will be an academic exercise with no useful purpose. Otherwise, I find no merit in Criminal Appeal No. 133 of 2022 owing to the fact that the appellants were wrongly convicted.

For the foregoing reasons, the appeal by the Director of Public Prosecution is hereby dismissed.

DATED at DAR ES SALAAM this 10th day of March, 2023.

S.E. KISANYA
JUDGE