IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CONSOLIDATED CRIMINAL APPEALS NO. 96 OF 2015

AND NO. 113 OF 2015

BASIL PESAMBILI MRAMBA.....1ST APPELLANT

DANIEL AGGREY NDHIRA YONA.....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Rugazia, J.

The two appellants were arraigned before the Resident Magistrates' Court of Dar es Salaam on a charge consisting of eleven counts. One of the accused in the lower court (third accused) was not found guilty and accordingly acquitted. The first appellant was arraigned on eleven counts i.e. 1st – 10th counts - Abuse of Office c/s 96(1) of the *Penal Code Cap. 16 R.E. 2002* while in the eleventh he stood charged with Occasioning Loss to a Specified Authority c/s 284 A (1) of the Penal Code. On his part, the second appellant faced the 1st – 4th counts

relating to Abuse of Office and 11th count – Occasioning loss. After a protracted trial, the two appellants were each sentenced to serve a prison term of 3 years in respect of each count facing them excepting count eleven for which they were sentenced to pay a fine of Tshs. 5 million or in default 3 years in jail. The sentences were ordered to run concurrently apart from the eleventh count. Naturally dissatisfied with the verdict, they have come to this court by way of appeal.

A total of five grounds have been laid down with are that:

1. *The charge sheet upon which the 1st and 2nd Appellants have been convicted is defective in law for it offends the provisions of section 132 of the Criminal Procedure Act, Cap. 20 RE 2002.*

2. *The Appellants have been convicted based on a defective charge sheet.*

3. *The trial court (majority decision) erred in law by convicting the 1st and 2nd Appellants in a total disregard of the settled and established principles applicable in our criminal jurisprudence, to wit*

i. *On the requirements to establish motive of the accused persons as a requisite component in proving counts I through 10*

ii. *On the consequences of the prosecution's failure to produce material witnesses.*

iii. *On the duty of the court (trial court) to evaluate and give due credit on the prosecution evidence which contains contradictions and inconsistencies.*

4. *That the trial court (majority decision of the court) erred in law and fact in convicting the 1st and 2nd Appellants in absence of any evidence to prove the charges waged against the said 1st and 2nd Appellants and lastly and in the alternative, to grounds (1-4 herein)*

5. *That the sentence imposed on the 1st and 2nd Appellants is not justified under the circumstances.*

In their submission in support of the grounds of appeal, the appellants opted to address grounds number 1 and 2 conjunctively. For record purposes they are represented by defence counsel Mr. Rweyongeza, Mr. Nyange, H., Mr. P. Swai and Mr. E. Msuya.

It was submitted that pursuant to section 132 of the *Criminal Procedure Act Cap. 20 R.E. 2002* a charge has to contain a statement of the specific offence and particulars of the offence charged. That these requirements are not farfetched for they are intended to safeguard and protect the accused's right to a fair hearing. To back up this argument, reference was made to the case of **Musa Mwaikunda vs R.** Criminal Appeal No. 174 of 2006 (unreported) which was reproduced in the case of **Salum Joseph @ Tito & 2 Others vs R.** Criminal Appeal No. 131 of 2006 CAT - DDM where it was stated:

> *"It is a rule of law that in a charge of robbery, the nature of the violence used on the victim, or the threat of it, must be specifically mentioned therein and eventually specifically proved by the prosecution....."*

The Court of Appeal went on that:

'This court in the case of **Musa Mwikunda vs R.** Criminal Appeal No. 174 of 2006 *succinctly emphasized this need thus':*

"The principle has always been that an accused person must know 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...."

It was also emphasized that under section 132 of the Criminal Procedure Act, the word *"shall"* is used implying that it is mandatory. Their further submission was that the charge sheet in respect of counts 1 – 10 offended the requirements of section 132 of the Criminal Procedure Act in that the appellants were charged for contravening an offence which in law does not exist; and, secondly, the said counts did not disclose the particulars necessary to give reasonable information as to the nature of the offences committed.

On the non-statement of the specific provisions of law violated, it was contended that the Public Procurement Act which the appellants are alleged to have contravened contains 76 provisions and 6 Schedules. On

the other hand, it was stated, the Mining Act contains 117 provisions and 6 Schedules. The anomaly here, it was contended, is that it is not stated what specific provisions in the two acts were contravened and by whom.

On the legal distinction between "interest" and "rights", it was submitted that there is a great legal distinction between the two. Reference was then made to **Black's Law Dictionary 9th Edn. West Publishing Company, St. Paul 2009** at page 1436 where "right" is defined as:

> *"That which is proper under the law, morality or ethic. Something that is due to a person by just claim, legal guarantee or moral principle (e.g. right to liberty) a power, privilege, or immunity secured to a person by law (e.g. the right to dispose one's there estate.....Right is a correlative to duty; where is no duty there is no right"*

"Interest" is defined as:

> *"The object of human desire especially advantage or profit of a financial nature. A legal share in something, all or part of a legal*

or equitable claim to or right in property. Collectively, the word includes any aggregation of rights, privileges, powers and immunities; distributive, it refers to any one right, privilege, power or immunity...."

It was asserted, obviously rightly so, that penal statutes are construed strictly due to the nature of their severity to the accused persons. The appellants referred to a decided case on what should be done to remedy the situation i.e. **Oswald Abubakari Mangula vs. R.** (2000) TLR 271 where the court of Appeal of Tanzania held, inter alia,

"The charge sheet laid at the appellant's door having disclosed no offence known to law, all the proceedings conducted in the District Court on the basis thereof were a nullity. Since you cannot put something on nothing, the learned judge of the High Court should have so held and proceed accordingly. Since he did not do so, it falls upon us to do it....."

On the strength of the above decision, I was invited to declare all proceedings of the trial court a nullity.

On non disclosure of the alleged interests, it was contended that in counts 1 – 10 the charge sheet suffers another defect in that the particulars of the alleged *"interests"* were not disclosed. That even the majority members of the panel were also unable to indicate in their judgment these interests which the appellants have prejudiced on account of the alleged act of abuse of office.

According to the learned counsel, while counts 1 – 10 are intended to carter *(sic)* for acts which are prejudicial to the rights of natural persons, section 284A is intended to carter *(sic)* for offences of Occasioning loss to the United Republic of Tanzania. It was therefore improper, it was contended, to charge the appellants for same acts of occasioning pecuniary loss to the United Republic of Tanzania under section 96 (1) and again u/s 284A of the same Act.

The learned Counsel asserted that it is settled law that no person should be punished twice for this will amount to condoning the rule against double jeopardy, which does not allow the accused to be charged twice for offences arising out of the same set of facts. Having

referred me to the case of **Uganda Law Society vs Attorney General** (2006) E.A. 401 it was prayed that the proceedings of the trial court be nullified.

Turning to ground 3 (i) the learned counsel made reference to the case of **Peter Protase and Another vs R** (1970) HCD No. 169 where it was held:

> *"The essence of the offence of abuse of authority is doing an act by a public servant which may have been within his power to do with motives not upholding the law or doing his duties as a public servant but doing it for the prosecution of his own designs and whims with total disregard to the rights of the victim and denying him elementary justice and resulting in damage/injury to the victim"*

It was further submitted that apart from the above submissions which were laid before the trial court, the 1st appellant submitted also that the quoted passage above calls upon the prosecution to prove *mens rea* as an essential component in proving commission of the offence under section 96 (1) of the Penal Code.

However, it was submitted, the trial court did not give due considerations to the submissions advanced and neither did they state the reasons why they decided to differ with the holding in **Peter Protase case** *(supra).* It was stated that failure of the trial court to give due consideration of the requirement to establish motive of the accused person and without giving reasons vitiates the said judgment for being an arbitrary decision and therefore void.

On ground 3(ii) it was contended that material witnesses were not produced at the trial and the prosecution was attacked for this omission and the trial court asked to draw an adverse inference to the prosecution case. That the trial court was referred to the case of **Aziz Abdallah vs R** (1991) TLR 71 of 1972. Unfortunately, it was asserted, the trial court never discussed this aspect of the law.

Further submission was that the conviction of the appellants on counts 1- 10 were solely based on the trial court's holding that the appellants had an upper hand and control in procuring the gold assayer a fact which ought to have been specifically proved against the appellants. Also that, the prosecution never called any witness from the office of the Attorney General to prove the allegations that the assaying

agreement was not sent there for vetting and to prove that the 1st appellant directed or supervised the process of issuing the government notices and no reason was given for such omission.

On ground 3 (iii) concerning the issue of inconsistencies and contradictions in the prosecution evidence, it was submitted that the trial court never said anything apart from a statement in passing at page 27 of the judgment that:

> *"There could be on some areas, inconsistence and or contradictory evidence yes! But here the same cannot vitiate the entire evidence"*

Amplifying on this point, it was stated that the appellants had an issue with the testimonies of PW1 and PW12 at pp.246 and 214/215 respectively. That the defence had invited the trial court to treat these testimonies as unreliable relying on the decisions in **Jeremiah Shemwate vs Republic** (1985) TLR 228 and **Mohamedi Said Matule vs Republic** (1995).

As for ground 4 it was argued that the trial court did not give due weight to the evidence produced. I was invited, as an appellate court, to

look at and evaluate the evidence afresh and come to my conclusion. That this is done where it is established that the lower court adopted a wrong approach in evaluating or failure to consider vital piece of evidence. The appellants referred to the case of M**artha M. Weijja vs The Hon. Attorney General and 3 Others** TLR at page 35. What is complained of here is failure to analyse and evaluate evidence and how it touches upon every individual accused. Also not to lump the accused persons together and wrap them up generally in the blanket of the prosecution evidence. Also to consider the defence evidence otherwise the proceedings become fatal citing **James s/o Kalolo and Another vs Republic** (1981) L.R.T. 283 at page 286.

The appellant also faulted the trial court's finding that the officers of the negotiation team reported to the 1st appellant. Such a finding, it was asserted, is a true reflection that the majority did not understand the evidence and if they did, they never took some little pain to apply the evidence against the appellants. Instead, they submitted, they invented what they thought should have been the evidence. It was argued that it is surprising how and why the court decided to bring in a statement that the 1st and 2nd appellants admitted to have appointed

members of the committee. This, it was stated, greatly influenced the court in convicting the appellants.

On who mandated the committee to search on line and shortlist ultimately Alex Stewart emerging the highest bidder, the appellants submitted that while the trial court held that it is the appellants, the evidence on record is different. This because, according to PW1, it was the Negotiation Committee which prepared the request for proposals for getting the assayer. Also that, PW1 said that it is the committee which shortlisted the companies from a long list and BOT shortlisting criteria was used. That after Alex Stewart was evaluated the highest bidder, the Committee recommended to the Governor that it be awarded the tender. In all, it was submitted that according to the evidence which was led, nowhere was it shown that the appellants has any control over the procurement exercise.

The appellants went on submitting that the trial court further misdirected itself on the issue as to whether Alex Stewart was arbitrarily procured. This is because the trial court found that there was no evidence that Alex was procured on line for lack of any documents (downloaded) to show that indeed the alleged companies were

shortlisted from 21 companies. That this is contrary to the testimony of PW1 and PW2 that 21 copies were solicited online. Further that, even if we assume that there was no tangible documentation as alleged by the trial court, that alone does not justify that the prosecution had proved involvement of the appellants. The appellants stated that if the trial court found the evidence wanting in the cause (sic) of the trial, they could have called on any witness under section 195 (1) of the *Criminal Procedure Act, Cap. 20, R. E. 2002* to assist the court.

As the Negotiation Team reached their decisions by vote of majority, it was submitted, the rejection of PW1's opinion which was frowned upon by the trial court was improper. The evidence on record, it was contended, clearly shows that the contract (Exhibit P23) was executed by the Governor and Mr. Kimela who was not called as a witness.

The appellants also faulted the trial court for rejecting the evidence that President B.W. Mkapa directed the 2nd appellant to urgently procure gold assayers. It was contended that the court acted on speculation and assumption that the style employed by the 2nd appellant to notify the President was arbitrary without there been (sic) any evidence in proof.

The appellants asserted that there was evidence to indicate that the President was not aware of the ongoing process of finding an assaying company. It was contended that it was upon the prosecution to establish that the process employed was arbitrary; short of this, it was stated, the evidence confirms that the President had agreed to the advice given on account of Exhibit P1, P2 and P4. The trial court was also found to have erred regarding the 2nd count when it said nothing but a misconceived assumption that since the appellants arbitrarily procured Alex Stewart they are also liable for extension of the assaying agreement - P.24. However, according to the evidence, the appellants stated, PW1 deposed that it was the BOT Governor who invited the assayer (Mr. Stewart) to sign the addendum extending the contract. Again, DW2 testified that it was the Negotiation Team which participated in the preparation of the agreement for extension (under clause 2.4).

Another flow which was pointed out is that the court did not tackle count 3 at all; and that this is despite the evidence that Dr. Enrique Segura was invited by Mr. Balali (BOT Governor) as exhibited in exhibit P7 as well as the testimonies of PW1, DW2 and DW4 and the appellants themselves. As for count 4, it was contended that the trial court held

that the Appellants ignored the advice of PW1 and the AG on the ground that the said advice was out of place and overtaken by events; and for no apparent reasons. That it also held that they never adhered to the AG's advice at page 24 of the judgment. This holding was said to be erroneous in that what PW1 deposed that what he advised the 2nd appellant was just an alert to him on what was transacted in the negotiation committee. The evidence by PW1, PW2 and DW4 was also referred to that they stated that the negotiation team was under the command of the governor and none of the appellants could interfere with the decision making process. That the trial court's assumption that the appellants had control over the process are no here nor (sic) there and are not supported by any evidence.

On counts 5-10 it was pointed out that the trial court was unable to indicate how the 1st appellant was involved in the preparation of the Government Notices alleged to have exempted tax. It was submitted that the GNs were only sent to the 1st appellant for signature having been prepared by relevant authorities then through the AG for vetting. That in fact as Minister for Finance, he only signed the GNs to give due effect to clause 4.3.1. of the assaying agreement. It was counsel's

opinion that the acts of the 1st appellant were none other than to operationalize the binding agreement and therefore he did not act in abuse of his office.

On the issue of financial loss, it was contended that PW9 and P14 were very clear that tax forgone is no loss. The evidence of PW13 was revisited when he said that if one is exempted from paying tax according to law the exemption cannot be considered as loss.

On grounds regarding sentence, it was submitted that the sentence imposed to the appellants in respect of counts 1 – 10 is not justified in law and it is excessive on the following grounds. Section 96 (1) of the Penal Code under which the said counts are found does not specify the punishment to be imposed – the sentence of three years is provided under section 96 (2). It was asserted that the court should have resorted to section 35 of the Penal Code which provides for a punishment not exceeding two years or with a fine or with both where no punishment is expressly provided. It was therefore prayed that since the sentence imposed is not provided for under the law this court should interfere and set it aside.

Counsel submitted further that the sentence was manifestly excessive and that the trial court did not give due consideration to the mitigating factors. These are that the appellants are first offenders and the 1st appellant is 75 years of age and the second is 76 years. Also that, the appellants are of ill health and the case was prosecuted in court for a period of seven years. The learned counsel contended that being first offenders the sentence should have been of reformative nature. Two decided cases were referred to i.e. **Tabu Fikwa vs Republic** (1988) TLR 48 and **Hattan vs Republic** (1969) HCD 234.

Finally, it was prayed that since the punishment imposed was manifestly excessive, this court interfere to have it altered.

In response, the Republic/respondent took off by supporting the conviction. In its submissions, the Republic had the following to say on the ground that the offence of abuse of office charged in counts 1 – 10 does not exist in law. There is a difference between non-disclosure of an offence and non-existence of an offence. A charge becomes defective for non-disclosure of the offence if the particulars of offence omit all the essential ingredients of the offence charged.

To the contrary, non-existence of the offence is scanned from the statement of the offence; not from its particulars. The use of the word "*interest*" instead of the word "*right*" which is the word used in section 96(1) of the Penal Code does not render the offence of abuse of office non-existent. Secondly, it was submitted, the use of the word "*interest*" does not render the charge incurably defective. This is because, it was contended, both appellants were ably represented by seasoned counsel who know very well all the essential elements of the offence of abuse of office. Furthermore, during defence, the appellants and their witnesses directed their evidence towards proving that the acts complained of in the charge did not prejudice the rights of the Republic but benefitted the public.

Lastly, the appellants denied committing the offences charged so the term "interest" did not mislead or prejudice them in any way. That they were able to comprehend the nature of the offence of abuse of office and were able to put up appropriate defence. The respondent contended that the alleged use of the term "interest" can be salvaged by section 388 of the Criminal Procedure Act because the term "interest"

includes "right" as it has been defined in the appellants' written submissions.

On the allegation that the particulars of offence (count 1 – 10) were inadequate and inarticulate hence denied the appellants a right to a fair trial, the appellants had submitted that none of the provisions of the Public Procurement Act and the Mining Act mentioned in the particulars of offence were specified; also, the "*interests*" of Government were not disclosed. The appellants had also contended that section 96(1) of the Penal Code which creates the offence guards against the arbitrary acts prejudicial to the *"rights of natural persons"* and not *"artificial persons"* like the government.

On failure to cite the specific provisions of the Public Procurement Act and the Mining Act, the respondent submitted that the reason is because the appellants were not charged under those Acts and that they were just mentioned in the particulars of offence to let the appellants know the nature of abuse of office they were accused of. In law, it was stated, a statement of offence is required to make a reference to the section of the law creating the offence charged only. This, it was stated, is in line with the provisions of section 135 (a) (ii) of the Criminal

Procedure Act. In the instant case, it was submitted, it is only section 96(1) which ought to have been cited and, indeed, it was cited. The respondent asserted that there is no law which was violated for not citing the provisions of Public Procurement Act and the Mining Act in the particulars of the offence since mentioning of the said two laws in the particulars of the offence was only for purposes of amplification of the nature of abuse of office with which the accused were charged.

On non-disclosure of the "interests" of the Government, it was submitted that pursuant to the provisions of section 135 (a) (ii) of the Criminal Procedure Act, particulars of the offence have to be brief. According to the respondent, the phrase *"without necessarily stating all the essential elements of the offence"* used in section 135 (a) (ii) of the Criminal Procedure Act means that it is not necessary to capture all the essential elements of the offence charged in order to make the charge valid. That the absence of some words constituting some essential elements of the offence in the particulars of the offence does not necessarily render the charge incurably defective. Likewise, failure to amplify or specify the type or nature of anything mentioned in the particulars of the offence does not render the charge fatally defective.

Further submission was that section 132 of the Criminal Procedure Act cited by the appellants in support of their contention that the charge is incurably defective, does not say that where a charge contains inadequate or inarticulate particulars of the offence it becomes incurably defective. This section, it was stated, should be read together with sections 135(a) (ii) and 388 of the Criminal Procedure Act.

On the contention of the appellants that section 96 (1) of the Penal Code creating the offence of abuse of office was intended to guard against arbitrary acts prejudicial to the rights of natural persons, and not artificial persons like government; here the submission was that there is nothing in the section from which an inference can be drawn that it was intended to protect the rights of natural persons only. That the word "another" used in that section refers to another person.

On the meaning of "persons," the respondent revisited the *Interpretation of Laws Act, Cap. 1 R. E. 2002* for its definition. Under section 4 of the Act it is defined:

> *"Person means any word or expression descriptive of a person and includes a public body, company or association"*

The respondent submitted that section 96(1) of the Penal Code falls within Chapter X which covers other offences, which in nature, affects the Republic only as a person. That if section 96(1) was not intended to protect artificial persons like the government, it would not have been placed in Chapter X where it is.

Turning to double jeopardy, the respondent submitted that section 70 of the Interpretation of Laws Act defines double jeopardy as punishing a person twice for the same offences.

The said Section says:

> *"70 - Where an act constitutes two or more offences, whether under the same written law or otherwise, the offender is liable to be prosecuted and punished for any or all such offences but is not liable to be punished twice for the same offence"*

The offence of abuse of office, it was stated, is distinct from occasioning loss to a specified authority and the two offences arise from different or factual situations. If I understand the respondent well, what is stated is that the act of procuring an assayer in disregard of the

prescribed procedure is what constitutes abuse of office. That being so, it was asserted that non-compliance with the Procurement Act in itself would constitute the offence of abuse of office without proof of the loss occasioned as a result of that non-compliance with procurement procedure.

The respondent went on submitting that the offence of occasioning loss in count 11 does not arise from the same act constituting the offence of abuse of office though it is founded on the same series of facts constituting the latter offence. It was thus asserted that the offence of occasioning loss to a specified authority was therefore properly charged conjunctively with the abuse of office pursuant to section 133(1) of the Criminal Procedure Act. Further submitting on the point, the respondent stated that where the court finds that there was double jeopardy, all what it can do is to set aside the sentence for the minor offence and leave the sentence for the serious one without quashing the entire conviction and sentences imposed. In support of this proposition, the republic made reference to the case of **Joseph Mapema vs Republic** (1986) TLR 148 at page 154.

In conclusion, it was submitted that the charge is not defective in form or content as alleged. And that if it is found to be, the defect is curable under section 388 of the Criminal Procedure Act because no embarrassment or failure of justice was caused by the alleged defects. Reference was made to a number of decided cases on the subject i.e. **Issa Athumani Mduyah vs Republic** (1983) TLR 336; **Kauto Ally vs Republic** (1985) TLR 226 to mention but a few.

In testing the effect of any omission or irregularity, the respondent stated, the court should not consider the use of the word *"shall"* in the provision, but rather resort to the provisions of section 388 of the Criminal Procedure Act which was meant to salvage the omissions or irregularity on the face of criminal charges or proceedings under the Criminal Procedure Act - I was referred to the case of **Bahati Mkeja vs Republic** Criminal Appeal No. 118 of 2006 CAT – DSM (unreported). On the strength of this case, the respondent emphasized that the use of the word "shall" in the Criminal Procedure Act does not necessarily mean "mandatory." The respondent asserted that this decision of the Full Bench overrides all authorities of the Court of Appeal made before it.

On ground number three which is on proof of motive, the respondent submitted that not all criminal offences require proof of motive. It was submitted that section 96(1) of the Penal Code does not required proof of motive as one of the ingredients of the offence of abuse of office. That it is sufficient to prove that the accused's act was arbitrary and prejudicial to the rights of another. Reference was then made to Sarkar's Law of Evidence, 13th Edition at page 77 where it is stated

> *".....there are cases where all attempts to discover motive become fruitless. These acts though apparently motiveless cannot be really so, but the motive remains invisible to all except the person who is moved by its impelling force. When there is clear proof that a person has committed a crime, motive or previous ill-will, becomes immaterial and is not necessary to sustain a conviction*

In the instant case, it was submitted, the prosecution proved that the appellants violated the prescribed procedure for procurement and tax exemption hereby denied the government its right to advantages of competitive tender and revenue. The respondent pointed out that the

case of **Peter Protase and Another vs Republic** (1970) HCD no. 169 did not point out motive as an element of the offence – he used the term as an example and not as an element of the offence.

On failure to call key witnesses i.e. Maria Kejo, Bosco Kimela and procurement expert it was submitted: these were not important to the prosecution. What they had to prove had already been proved by documentation and thus no adverse inference should be drawn as there was no concealment of the witnesses. It is only when the testimony of the witness not called would affect the outcome of the trial that failure to call a material witness can be said to have occasioned miscarriage of justice – referring to **Chandrakant Patel vs Republic** (2004) TLR 128 at page 229.

It was further submitted that the case of **Azizi Abdallah vs Republic** (1991) TLR 7 relied on by the appellants was clarified in the case of **Speratus Theonest @ Alex vs Republic** Criminal Appeal No. 138 of 2005 (AT – MZA – (unreported) where it was held, inter alia,

> *".....As is clear from the Court's holding in AZIZI ABDALLAH (supra) the prosecution has discretion as to which witnesses should be*

called. After all, it is well settled that even the evidence of a single witness, if believed, would be sufficient to prove a fact. This is so because the evidence has to be weighed and not counted ..... it is also our firm view that if the defence honestly believed that those two people, who were not named by Mr. Muna, were very essential for a just decision of the case, it ought to have asked the prosecution to offer them for purposes of cross examination or even call them as defence witnesses. That it did not do so is a clear indication that the defence was not prejudiced at all".

It was further contended that Exhibit P21 proves that the appellant was aware of the legal requirement under the Public Procurement Act for a contract to be vetted by the Attorney General before it is signed. It was also contended that Exhibit P.21 clearly proved that the contract was not vetted by the Attorney General so it was not necessary to call Maria Kejo from the AG's office to prove that fact.

On inconsistencies and contradictions in the prosecution evidence, the respondent submitted that the trial court considered this issue and explained it away that they were minor – at page 27 of the judgment. The case of **Alex Kapinga and 3 Others v Republic** Criminal Appeal No. 252 of 2005 CAT was revisited. Part of the holding in that case is that:

> *"The fact that there are discrepancies in a witness testimony does not straight away make him or her unreliable witness and make the whole of his/her evidence unacceptable"*

The respondent contended that the appellants have not shown the alleged contradictions or discrepancies. Even if the said contradictions had been pointed out, the respondent asserted, this cannot render the whole evidence of PW1 and PW2 worthless.

Ground no. 4 of the appeal is that the charge was not proved. The respondent submitted that the testimony of PW7 and Exhibit P15 clearly show that the 2nd appellant was advised on the procurement procedure for procuring the assayer. Also, PW1 who tendered exhibits P9 and P10 and deposed that the Ministry of Energy and Minerals in collaboration

with the Bank of Tanzania appointed a team of four people to look for a gold assayer (page 79 – proceedings). That PW1 as a member of the team, he updated and advised the 2nd appellant on the process. The second appellant, it was asserted, never acted on the advice given by PW1 resulting in the conclusion of the contract with covenants on tax exemption and 1.9% price from royalties. Another piece of evidence is exhibit P3, a loose minute to His Excellency the President updating him on the process which was ongoing. The respondent also made reference to the caution statement (Exh. P.17) which, it was asserted amounted to a confession much as it contains some exculpatory statements.

It was also submitted the 1st appellant participated in the process (Exh. P19 – caution statement). Exhibit P3 is also evidence of 1st appellant's participation in discussions with 2nd appellant and Governor on the process. Another piece of evidence pointed out is Exhibit P5 a letter written to the 2nd appellant which is proof of his active participation. Another exhibit which was referred to is P8 and P27 allegedly showing appellants' upper hand in the process. The respondent also singled out Exhibit P7 which is the Governor's letter to the appellants.

On whether the appellants' acts were arbitrary and in abuse of office, it was submitted that the Public Procurement Act was flouted. That PW7's advice to the 2nd appellant was disregarded and PW5 too whose advice to 2nd appellant was also not heeded. Again, it was submitted, in April, 2003 the 1st appellant vide his letter – Exhibit P5 advised the 2nd appellant. It was contended that the BOT was involved in the process of procuring the assayer as a mere agent of the Government. The procurement, it was submitted, was initiated and funded by the Government (Exhibit P1 – 4th paragraph from top). The respondent further contended that the 2nd appellant through his minute to his Excellency the President proposed the mode of getting the assayer under Paragraph (b) of exhibit P3. It was asserted that the Public Procurement Act, 2001 did not exclude the application of its provisions where government procurement was conducted through a Parastatal.

In support of this proposition, reference was made to section 3(1) of the Act which defines procurement as:

> *"Buying, purchasing, renting, leasing or otherwise acquiring any goods, works or services by a procuring entity spending public*

funds on behalf of the ministry, department or regional administration of the Government or public body and includes all functions that pertain to the obtaining of goods, work or services, including description of requirements, selection and invitation of tenders and preparation and award of contracts"

A procuring entity is defines as:

"Ministry, Government department, agency, parastatal organization, a regional or a local authority as the case may be"

It was contended that if you look at the *Public Procurement (Selection and Employment of Consultants) Regulations, 2001* made under the Act, it is clear that they are applicable in all government financed projects. Reference was made to Regulation 2 which provides:

"2(1) These Regulation shall apply:
(2) To the services of consultants which are required by a procuring entity in connection with public financed projects"

In view of the provisions of the above Act, it was asserted that the said provisions were applicable in the procurement of ASAGBC. It is from the foregoing evidence and provisions of law that the trial court found the appellants guilty in the 1st to 5th count and convicted them accordingly so submitted the respondent.

With respect to count 5 to 10 against the 1st appellant which defence counsel claimed not to have been proved, the respondent submitted that the Minister cannot exercise his discretion under the Income Tax Act without due regard to what is provided under other laws: e.g. *Tanzania Revenue Authority Act 1995.* Also that tax exemptions were granted in total defiance of advice given to him.

The respondent submitted that as a result of the exemption, the government suffered a pecuniary loss of Tshs. Eleven Billion, Seven hundred fifty two million, three hundred and fifty two thousand, one hundred forty eight shillings (Tshs. 11,752,350,148.00). That this was a subject matter in the 11th count whereby the appellants were charged with Occasioning Loss to a Specified Authority c/s 284A of the Penal Code. It was contended that it is erroneous for the appellants' Counsel to base their assessment on selective portions of the testimonies of PW9

& PW13 and conclude that the prosecution's evidence does not show that the government suffered loss. On the strength of the foregoing, the respondent submitted that the fourth ground of appeal has no merit.

Ground number five is on the illegality of the sentence of three years imprisonment imposed on the appellants for the offence of abuse of office. The respondent conceded the argument submitting that indeed, where the offence of abuse of office is committed not with a purpose of gain, the penalty provision is section 35 and not 96 (2) of the Penal Code. However, the republic was not in agreement with a fine option. It was submitted that imposition of fine or imprisonment or both is entirely a matter for the court's discretion referring to **Mwaitebele vs. R.** (1970) E.A. 659. According to the respondent, abuse of Minister's office being a high office in the country, is a grave offence which cannot be deterred by imposition of a fine. The interests of society have to be taken into account, and that these override the mitigating factors which were put forward on behalf of the appellants. Finally, it was prayed that the appeal be dismissed.

In rejoinder, the appellants stood their ground that the charge was defective and as a result they were prejudiced and, consequently, they

could not put up an effective defence. It was emphasized that the appellants' acts, if any, did not violate any known law for these acts to constitute an offence under section 96(1) of the Penal Code. It was also reiterated that the interests of the state the appellants are alleged to have prejudiced should have been stated. It was contended again that the offence created under counts 1-10 do not arise out of the same act with one of the offence charged under count 11. The appellants contended that the evidence relied upon by the respondent to establish commission of offences under section 96(1) is one and same evidence the respondent has relied on to establish commission of the offence under section 284 A (1) of the Penal Code.

The appellants also made a point on the proposition by the respondent that in view of the decision in **Joseph Mapema case** *(supra)*, this court save the graver count in the event it is found that the accused were double jeopardized. It was stated that this proposition would have been valid only if the charges were properly presented and in a valid charge sheet. On the suggestion to invoke section 388 of the Criminal Procedure Act in the event this court finds for the respondent and order that the defects are curable, it was contended that this

proposition can only apply in the event it is found that the appellants were not embarrassed by the defects and or the defect did not occasion a miscarriage of justice.

Due to the defective charge, it was contended that even the court was left to speculate on what these charges were all about and in the end, they based their conviction on speculation. On the reliance of the respondent on the case of **Bahati Mkeja** *(supra),* it was contended that the said case merely reinstated the application of section 53(2) of Cap. 1 vis a vis the provisions of section 388 of the Criminal Procedure Act. The respondent's proposition was therefore disputed to this extent. It was reiterated that motive is an essential element pursuant to the case of **Peter Protase** *(supra);* and also that the passage in *Sarkar's Law of Evidence* was quoted out of context because it is not stated how it is relevant to the instant case and that this proposition can only be relevant where there is proof that a person has committed a crime.

On failure to call witnesses, it was submitted that Mr. Kimela should have been called as he was a vital witness to inform the trial court why the said agreement was not sent to the Attorney General's Office before it was signed and the role, if any, played by the appellants

in the process. Referring to the **Speratus Theonest case** *(supra)*, it was submitted that the said case was decided on facts pertaining to the said case. Since the decision in this case was arrived at basing on speculation that the appellants had an upper hand in the procurement process which is not supported by any evidence, the holding in **Speratus Theonest case** *(supra),* where there was cogent evidence is not binding on this court in the circumstances of this case.

On inconsistences and contradictions, the appellants still maintained that the inconsistencies in the testimony of PW1 and PW2 remained unattended by the trial court.

At the risk of repetition, I think it suffices to say that the appellants maintained that the charge against them was not proved. And that they never interfered in the procurement process at any one time because the negotiation team worked independent of anybody. The appellants submitted at length revisiting the evidence which submissions I am not reproducing here because I will do the same in the course of this judgment where need arises.

Reference was the made to Exhibit P17 which is a caution statement of the 2nd appellant and Exhibit P.19 caution statement in

respect of the 1st appellant. It was strenuously argued that it is a misconception for the respondent to claim that these statements contain admission of the offence. This is because the trial court never made any reference to these exhibits so the argument is misconceived and there is nowhere in the said exhibits the appellants made such an admission.

The appellants also submitted that the Governor of BOT was not under their control so he went ahead and signed the agreement and they refuse *(sic)* to have approved the signing of the assaying agreement. Further, it was contended that the phrase appearing in Exhibit. P7 at P2. i.e. "will sign the contract on *ad referendum* basis: does not establish as a fact that the appellants had an upper hand as held by the trial court.

On tax exemptions, it was submitted that it is common knowledge that the GNs which constitute the basis of counts 5-10 were all issued in consonance to the assaying agreement *(Exhibit. P23)* under clause 4.3.1. which exempted the Auditor all taxes. The main point here is that there was no wrongful act in issuing the GNs as this was in compliance with the already signed contract which was binding on the government.

On the illegality of sentence it is common ground that both parties are at one that the custodial sentence in respect of counts 1-10 is not what is provided under the law. They only part ways on the option of fine suggested by the appellants which is fiercely opposed by the respondent. It was prayed that this court do give due consideration to the facts surrounding this case and interfere with the punishment imposed by the trial court.

I now turn my attention to the appeal by the Republic which was consolidated with that by the appellants. The said appeal consists of only two grounds which are as under:

1. *That the learned trial magistrates grossly erred in law and fact by acquitting the 3rd accused of all counts he was facing on grounds that the charges against him were not proved beyond reasonable doubt*

2. *That the learned trial magistrates erred in law by failure to order the 1st and 2nd accused, in addition to custodial sentence, to pay to the Government compensation equal to the amount of actual loss incurred*

In its submission, the respondent opted to start with the second ground of appeal. It was submitted in respect of this ground that the 1st and 2nd respondents were found guilty of Occasioning Loss to a Specified Authority, c/s 284A(1) of the *Penal Code Cap. 16, R.E. 2002.* Apart from the sentence of fine of five million shillings or 3 years imprisonment in default, it was asserted, the trial court did not make an order for the respondents to compensate the loss they occasioned to the government. The republic is relying on section 284A(6) which makes it mandatory for a person convicted of an offence under the section to be ordered to pay compensation of an amount not exceeding the amount of the actual loss incurred by the specified authority.

The respondent contended that the court was bound to order the accused to compensate the government as provided under the said section. According to the respondent, the learned trial magistrates overlooked the mandatory requirement to order the 1st and 2nd respondents to pay compensation provided under subsection (6). It was therefore prayed that this court make an order to that effect.

Regarding the 1st ground, it was submitted that the trial court erred by finding that the prosecution did not prove who out of the three

permanent secretaries to the Ministry of Finance was involved in getting the assayer. It was contended that at the time there were two permanent secretaries and three deputy permanent secretaries. The respondent submitted that according to the defence evidence (P.199), it was so testified, so it is not correct to hold that the Ministry had three permanent secretaries. That the 3rd respondent was not only a permanent secretary but a paymaster general as well. It was asserted that he himself testified as much and that his colleague dealt with administrative duties only. It was further submitted that all correspondence relating to the issue of assayer were addressed to Permanent Secretary Treasury and that it was the third respondent.

Pointing out the evidence implicating the third respondent, reference was made to Exhibit P.7 which, it was stated, was authored prior to the execution of the contract with the assayer. – the letter, it was submitted, was addressed to the 3rd respondent personally. The third respondent, it was stated, was requested by the Governor to appoint a person who will attend the negotiation of the assayer. It was submitted that the third respondent went ahead of the request by the Governor. That he endorsed on Exhibit P7 that the contact with

Commonwealth Secretariat may have to be halted. The republic submitted that what was to be learnt from the Secretariat was the proper fee charged by assayers in other states.

The Republic submitted further that by ordering the advice seeking process to be halted that was detrimental to the government. Another piece of evidence pointed out is Exhibit P12 & P14 which were addressed to the Principal Secretary, Ministry of Finance and that it is clear that the contents of these two documents relate to matters of finance and not administration.

The third piece of evidence is Exhibit P21. In this exhibit, it was submitted, the first respondent sought advice from the 3rd respondent on tax exemption. In his defence, it was contended, the 3rd respondent did not deny to have seen Exhibit P21 nor to have provided the advice sought. Exhibit P22 was also singled out wherein, the 3rd respondent recommended for exemption, notwithstanding the precaution in Exhibit P22 that the contract should not be signed before the issue of exemption and assayer fee was resolved. The 3rd respondent, according to the Republic, did not raise any querry on the exemption sought.

Exhibits P7, 12, 14, 21 and 22, the Republic stated, provide evidence from which an inference can be drawn that the 3rd respondent had knowledge of the entire tax exemption process; he had a control over it and he was privy to it under the doctrine of common intention. The role he played, it was submitted, brings him within the ambit of the doctrine.

The Republic submitted further that the 3rd respondent when testifying in defence denied to have seen the advice from TRA in Exhibit P12 & P14. This was a lie it was contended, because Exhibit D3 shows that the message in minute 9 of Exhibit P12 which is an advice from TRA was drawn to his attention through Exhibit D3 which made reference to Exhibit P12. The effect of telling lies, the Republic contended, was discussed in the case of **R. vs Erunasoni S. Eria & Another** (1947) 14 EACA 47 where it was held that although lies and evasion on the part of an accused do not in themselves prove a fact alleged against him, they may, if on material issues, be taken into account along with other matters and evidence as a whole when considering his guilt. Reference was also made to the case of **Daudi @Senga Sedrick & Another vs. R** Criminal Appeal No. 25 of 1998 CAT Mbeya (unreported) where lies of

an accused have been taken to corroborate the case for the prosecution. The Republic invited me to invoke the principle in **Daudi's case** *(supra)* and consider the third accused's lies as corroborative evidence of the prosecution's case.

Winding up, it was submitted that it is clear from the record that the third respondent recommended for exemption of tax to assayer after receiving Exhibit P12, and that it was after his advice to the Minister that GNs No. 423 of 2003, 424 of 2003, 497 of 2004, 498 of 2004, 377 of 2005 and 378 of 2005 were issued. That as a result of such exemption, the assayer did not pay taxes amounting to Tshs. 11,752,350,148 which is the subject matter in the 11th count. It was finally prayed to find the 3rd respondent guilty of counts 5-11, convict him and sentence him accordingly.

In his response, the appellant submitted that although it is true that there were two permanent secretaries, this in itself is not proof of charges against the 3rd respondent. That the mere fact that the 3rd respondent had his employment duties including matters of tax exemption does prove the charges levelled against him. It was contended that no evidence was led by the prosecution to prove the

rges against the 3rd respondent and the trial court so found. Reference was made to the case of **R. vs Kerstin** (2003) TLR 84 on the duty of the prosecution to prove the case beyond reasonable doubt. The appellant, it was contended, tried to implicate the respondent at the trial court with processing of the GNs despite the advice from TRA discouraging the said exemption. However, the respondent submitted, he neither had powers nor issued the said GNs. The respondent made reference to the dissenting judgment (pp.94-95) where the issue was dealt with at length and the learned magistrate rightly held that there was no evidence showing that the 3rd respondent processed the GNs. The respondent contended that his testimony and that of PW2 is very clear that the procedure for making GNs was under relevant departments including the Legal Services Department and could go direct to the Minister or pass the 3rd respondent whose role was to forward them upon being advised to do so.

Regarding the alleged correspondence in the matter, they too do not prove the charges and there is no proof that he was made aware of them as rightly held by the trial magistrate in his dissenting decision at pp. 55-96. The testimony of PW2 was referred to where she deposed

that she was not sure if the letter she wrote to TRA was seen by any of the two Principal Secretaries. Furthermore, it was submitted, the 3rd respondent in his testimony referring to exhibits P12 and 14 which are letters from TRA recommending not to issue tax exemptions to the assayer, deposed that it was his first time to see them in court. Also that (p.209 of defence proceedings), the respondent testified that it is not known which PS attended the two letters as the said letters do not show who did. Further it was stated, exh. P14 does not show if it was received at the Ministry.

From the foregoing, it was humbly submitted that the 3rd respondent cannot be said to have known about exhibit P11 which was written by PW2 to the TRA nor exhibits P12 and 14 regarding the advice on tax exemption. Further, it was submitted that PW4 who wrote Exhibit D1 requesting for advice regarding tax exemptions deposed that he was not sure if the 3rd respondent or his deputy PS were aware of the same. That even the reply to Exhibit D1 which was written by PW6 (Exhibit P14) never reached the 3rd respondent. The respondent's testimony was reproduced when he said that he did not see Exhibits P12 and 14 and

that if he had dealt with the said letters he could have marked or endorsed something on them.

On the alleged lies by the 3rd respondent, it was submitted that the reference to TRA in exhibit D3 cannot be said to be reference to Exhibit P12 and P14; that if they were so, the author could have stated so in disputing the allegation by the appellant that he lied in that the advice from TRA was contained in Exhibit D3 through minute no. 9. It was asserted that this conclusion is not backed by any evidence on record. At best, it was submitted, reference of TRA in exhibit D3 and testimony of P12 – (p.222 and 223 of prosecution proceedings) all refer to the process involved before the Minister was advised to grant tax exemption. It was thus submitted that the alleged lies by the appellant are unfounded.

On exhibit P7 the appellant had contended that vide that exhibit, the 3rd respondent halted contact with the Commonwealth Secretariat to the detriment of the government. It was submitted that this conclusion by the appellant is flawed in that the 3rd respondent being part of the government and having known that the matter was being dealt with by the Governor, BOT; and that the same was at the negotiations level had

to halt other parallel process. It was at that time that the 3rd respondent knew of the appointment of the assayer and the tender had been concluded and winner identified and invited for negotiations, the 3rd respondent as a civil servant was bound by government directive.

The testimony of PW8 was revisited where he deposed at p. 178 of the prosecution proceedings that when he wrote the letter (exhibit P16) and the Minister replied that there were directives from State House on the matter, he had nothing to do with the matter. It was submitted further that as the President had approved the programme and the Ministry of Finance where the 3rd respondent was PS was charged with the task of looking into how to finance the assignment, the 3rd respondent could not be expected to continue with a parallel process. The matter, according to the 3rd respondent, had been overtaken by events. The respondent asserted that the appellant is clearly trying to mislead this court by its unfounded assertion that *"it is third respondent who ordered the advice seeking process to be halted....."* The assertion was that the Commonwealth move had become superfluous because an assayer had been appointed without the participation or knowledge of the 3rd respondent.

It was submitted that it is not correct to say, as the appellant did, that under exhibit P22, the third respondent recommended tax exemption notwithstanding the precaution contained therein. That as rightly held by the disserting learned magistrate (page 96), the third respondent was counselled to advise the Minister for Finance to grant tax exemption to the assayer. That the 3rd respondent did so since the assaying contract (Exhibit P23) had already been signed and needed implementation. His evidence was revisited where he testified that he had to advise the Minister to exempt tax payment to the assayer because he learnt that the contract had been signed already. That being so, he had to recommend exemption because payment to the gold assayer exempted tax.

Another piece of evidence which was revisited was by the Commissioner of Minerals (PW5) who deposed that he signed GN No. 260 of 2003 because ASAGBC had signed the contract, and that as Commissioner for Minerals, he had no doubts with 1.9% but as Mwakalukwa in person he had doubts. In view of this, it was contended that just like PW5 the third respondent advised tax exemption in compliance with the contract (Exhibit P23).

The respondent submitted that as he had to be out of office on some occasions, he could not attend to each and every correspondence. That is why, he asserted, he did not deal with exhibits P12 and 14 on TRA's advice that there should not be tax exemption. It was finally submitted that the appellant has failed to show any misdirection or non-direction on the evidence to warrant interference of this court to depart from the unanimous finding of the court below. It was thus prayed that the appeal be dismissed.

In their response in respect of the cross appeal, the 1st and 2nd respondents stated boldly that it was beyond the criminal jurisdiction of the trial court to stretch the definition of loss beyond that which the parliament intended when enacting the legislation. According to them, section 284A (1) was intended for financial loss and destruction to property whose value stands at not less than ten million shillings. That it was intended to include forms of harm which can be categorized as torts or civil wrongs. It was further submitted that in criminal cases where penal statutes are to be construed strictly in favour of the accused and the standard of proof is beyond reasonable doubt, it is very serious for the prosecution to make a mistake and either cite an

inapplicable/erroneous provision or to misstate the nature of the crime and then fail to prove it. In any of these cases, it was contended, the court could be said to have tried and convicted the accused without its jurisdiction having been properly invoked.

The inappropriateness of charging the respondents under section 96(1) of the Penal Code was restated. The quarrel here revolves around the use of the words prejudicial to the *"interests"* as opposed to *"rights"* of the Tanzania government. The prosecution and the trial court was also faulted for refusing to accept that it was the governor and not the ministers who procured the gold assayer. The prosecution and the trial court were also blamed for not taking into account the agreement between the Assayer and Bank of Tanzania, and that they even failed to consider PW6's testimony of 19/3/2010 that the BOT had government mandate to hire the assayer. It was emphasized that the negotiation team was under the BOT and the respondents had no control over it.

On exemption of taxes, the respondents stated that they find it difficult to believe that they were faulted for doing that which the 1st respondent had absolute discretion under the law but which was also statutorily obligatory. Reference was then made to section 5(1) of the

Tanzania Revenue Authority Act, Cap. 399 R.E. 2002 which provides for its functions which includes advising the Minister. It was asserted that it is not provided for in that legislation or in any penal statute that if the Minister for Finance does not take TRA's advice he has committed an offence. The respondents faulted the trial court for holding that the 1st and 2nd respondents and in particular the 1st guilty of abuse of office with respect to tax exemptions despite the prosecution evidence which show that they were not and that in fact the 1st respondent had unfettered discretion over tax exemptions. To beef up their argument, some excerpts of prosecution evidence by PW3 and PW6 was reproduced which I will revert to in the course of this judgment if need arises.

Reference was made to the *Income Tax Act, Cap. 332 R.E. 2002* sections 14 and 15 with particular reference to the First Schedule thereto where the Minister of Finance is given power to exempt tax in certain cases. Reference was also made to the *VAT Act Cap. 148 R.E. 2002.* It was submitted that for purposes of the offence of abuse of office, evidence should have been adduced to the effect that the 1st and 2nd respondents were directly involved in the negotiations and that the gold

assaying agreement did not involve the government; lastly that it was not in the public interest to exempt the assayer from payment of tax.

On causing pecuniary loss, the submission was that the offence was not proved. The respondent revisited the testimony of Emmanuel Paul Mahendeka (PW9) a Principal Tax Officer whose evidence, crucially, is that Minister has powers to grant exemptions. Also the evidence of Christine Shekidele (PW13) whose evidence, again crucially, is that the exemptions were issued according to law.

The respondents contended further that the trial court in its judgment at page 26 came up with something new when it said:

> *"....any improperly exempted tax may not be loss but still a clear loss altogether. The wording in section 284A (1) of the code is, in our view, not restricted to pecuniary loss. It could be other forms: expectations, injuries harm, damage and so on and so forth (categories not disclosed)"*

According to the respondents, by so finding, the court amended the section to include just any loss and secondly it completely altered the rules on burden of proof and convicted the 1st and 2nd respondent for an

offence which was not proved. It was argued that since the trial court agree that no pecuniary loss was occasioned, the appeal against sentence has to fail and also the conviction cannot stand.

It was finally submitted that the trial court's judgment is completely divorced from the evidence. This court was urged to allow the appeal and quash the conviction.

In his dissenting judgment, the trial magistrate raised, *suo motu,* what I can rightly refer to as preliminary objections. Having so raised them, he proceeded to deal with them, upheld them, consequently holding that the charges laid down against the accused were not only defective but fatally defective. I think I will not be far off the mark if I say, as I now do, that it was this move by the court which awakened the appellants' defence counsel, for, two of the grounds of appeal are hinged upon the court's holding on the points raised *suo motu.* While I have no quarrel with the trial magistrate for raising the points as he did for, a point of law, as it is now settled, can be raised at any time even on appeal or, by the court *suo motu* - see **Anwar Z. Mohamed vs Saidi S. Masuka** Civil Reference No. 18/97 CAT (unreported); my main concern is the way the trial magistrate handled the matter. I think it

cannot be proper for a court of law to raise a point of objection and proceed to rule on it without affording the parties an opportunity to address it before giving a decision – see **Margwe Erro & 20 Others vs Moshi Bahalulu** Civil Appeal No. 11 of 2014 CAT – Arusha (unreported).

Be that as it may, much as the trial court strayed into a procedural error and the defence counsel took advantage of it, I have no option but to deal with it because it has now been transformed into grounds of appeal. In his decision, the trial magistrate in his dissenting judgment faulted the Republic for wrongly drafting the charge in respect of section 96(1) of the Penal Code. The main bone of contention is the use of the word "interests" instead of "rights" which is used in the section. This, it is apparent, is what is now the 1st and 2nd grounds of appeal. Having said that in the foregoing, it is now opportune to turn to the grounds of appeal.

In arguing the said grounds, the appellants opted to argue the first and second grounds conjunctively. These are that the appellants were convicted on a defective charge. Sequel to this, it was contended that the offence of abuse of office does not exist in our legislations and that

The appellants have been convicted based on a defective charge sheet for want of duplicity. It was also submitted that the provisions of the Public Procurement Act and The Mining Act which are alleged to have been contravened and by whom were not specifically stated. Also that the interests of the state which are said to have been prejudiced were not specifically stated.

The appellants made reference to case law to cushion their position. This is **Musa Mwaikunda vs. R.** Criminal Appeal No. 174 of 2006 CAT (unreported) where it was held:

> *"The principle has always been that an accused person must know the nature of the offence facing him. This can be achieved if a charge discloses the essential elements of an offence"*

It is significant to note here that the **Musa Mwaikunda case** *(supra)* was referred to in the case of **Salum Joseph @Tito and 2 Others vs R.** Criminal Appeal No. 131 of 2006 CAT (Dodoma) (unreported). In that case, echoing what was stated in **Musa Mwaikunda case** the court stated:

"If this 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...."

It is beyond controversy that there is a marked difference between the word "rights" and "interests", but did the use of the word "interests" in the charge prejudice the appellants; were they not able to adequately prepare for the case and put up an effective defence. Most importantly, did it make the charge incurably defective and thereby occasion failure of justice. The appellants' answers to these questions is in the affirmative. However, the Republic's answers to these questions is in the negative.

There is another contention that by using the word "interests" the end result was that the appellants were charged under a non-existent offence or an offence not known in law. Also that, section 96(1) which creates the offence of abuse of office was intended to guard against arbitrary acts prejudicial to the rights of natural persons and not artificial persons like the government. The trial magistrate in his dissenting

judgment dealt with this issue at P.81 and 82 of his judgment and concluded that the government cannot be covered under the said section. In my view, I do not see where the controversy lies because section 5 of the Penal Code which was referred to is clear that "person" and owner in relation to property also includes the Government. Thus, as I see it, in the eyes of the law the Government being a person by definition, is also covered by the section.

On non disclosure of which "interests" of the state were prejudiced I cannot say that they were disclosed. The Republic submitted, referring to section 135 (a) (ii) of the Criminal Procedure Act that it is not necessary to capture all the ingredients of the offence to make the charge valid. Here, reference was made to the phrase "without necessarily stating all the essential elements of offence" appearing under the said section of the Criminal Procedure Act. It has to be pointed out that it was not proper for the Republic not to specify those "interests". My only doubt is if it is true as alleged, that the appellants were thereby prejudiced thus unable to put up an effective defence. According to the Republic, the appellants were able to put up a spirited defence and, emphatically, that during defence case, the appellants and their

witnesses led their evidence towards proving that their acts complained of in the charge did not prejudice the interests of the Government but benefitted the public - reference being made to pages 29-30 and 152-53 of the defence proceedings. Furthermore, although it was played down when raised by the respondent, the fact that the appellants were defended by very able and seasoned advocates should not be taken lightly in the light of what is at stake.

Having said all that in the foregoing it would appear that with the putting into place section 388 of the Criminal Procedure Act, the main test now is whether the accused is prejudiced resulting into failure of justice. When dealing with this issue, the full bench of the Court of Appeal had this to say in the case of **Bahati Makeja vs R.** Criminal Appeal No. 118 of 2008 CAT – DSM (unreported):

> *"It is our considered opinion that s. 388 is absolutely essential for the administration of justice under the CPA. There are a number of innocuous omissions in trials so if the word "shall" is every time taken to be imperative then many proceedings and decisions will be*

nullified and reversed. We have no flicker of doubt in our minds that the criminal law system would be utterly crippled without the protective provision of s. 388. We are, therefore, of the well decided view that the interpretation of the word "shall" given in s. 53(2) of Cap 1 must be subjected to the protective provisions of s. 388 of the CPA"

In view of the holding in this case, and the fact that the defence never raised the objections until after they were raised in the dissenting judgment, I hesitate to make a finding that the charge was fatally defective and the appellants thereby prejudiced resulting into failure of justice. This takes care of the first and second grounds of appeal which are therefore found to have no merit.

On double jeopardy, the contention is that the appellants were punished twice for the same offence. It was submitted that it is inconceivable that the same person charged for abuse of office and the evidence led to establish that he arbitrarily procured ASAGBC to render

vices to the Government; that he exempted taxes thereby occasioning loss; yet, it was submitted, that same person is charged with Occasioning loss to c/s 284A (1) of the Penal Code. The respondent was of the view that these are distinct offences arising from different acts.

However, if you go through the charge, in my opinion, counts 5-10 which relate to issuing of GNs the interpretation is that it is through the said GNs that the alleged loss was occasioned due to tax exemption. It was therefore improper to charge the appellants with Occasioning loss. The second appellant in fact, was wrongly joined in the 11th count because as it is evident, he had nothing to do with the GNs which is why he was not charged in the 5th to 10th counts so he was wrongly convicted. Consequently, his conviction on this count is hereby quashed and set aside.

The respondent submitted that in the event it is found that there was double jeopardy, I was invited to set aside the sentence for the minor offence and leave the sentence for the serious one. Reference was made to the case of **Joseph Mapema vs. R** (1986) TLR 148, to back up this contention.

In that case, this court observed that in the event the court convicts on offences which are based on the same set of facts the normal practice is to uphold conviction and sentence on the graver count. The appellants lamented that the respondent did not point out which of the two offences is graver than the other and, indeed, that is the case.

I have to confess that I have found myself in an uncomfortable situation over this point. This is because, whereas the offence under section 96 (1) attracts a sentence of two years imprisonment, the offence under section 284A (1) of the Penal Code attracts a sentence of not less than three years imprisonment but there is an option of fine. In my view, since imprisonment is the last wish any normal living soul would wish to befall him and being such a harrowing experience, I think an offence which has a fine option would be the lesser one. This is where it becomes difficult to understand some legislations. It is beyond my comprehension that somebody who has occasioned loss amounting to billions of shillings is given an option of a paltry amount of fine and gets away with it. Anyway, I think the legislators in their wisdom know

tter. I therefore make a finding that the offence under section 96(1) is a graver one.

The third ground of appeal was divided into three parts. The first one is on proof of motive. In their submission in respect of this ground, the appellants made reference to the case of **Peter Protase and Another vs R.** 1970 HCD No. 169 where it was held, *inter alia,* that:

> *"The essence of the offence of abuse of public authority, is doing an act by a public servant which may have been with motives not upholding the law or doing his duties as a public servant but doing it for the prosecution of his own designs and whims..... "*

The trial magistrates were criticized for not giving reasons why they decided to differ with the holding in the above case. The respondent on its part countered that not all criminal offences require proof of motive. It was contended that motive can only become an essential element of the offence where it is expressly required by the law, and that section 96 (1) of the Penal Code does not require proof of motive as one of the ingredients of the offence of abuse of office.

I think there is sense in this argument. I do not think that for every offence of abuse of office motive has to be proved. An official in a public office who will for instance do an act in total disregard of the law or laid down procedures which act is prejudicial to the rights of another will be held liable. If for assistance it is true that tax exemptions were granted in total disregard of advice against them that, to me, would amount to abuse of office.

The second part of ground three of appeal is the alleged prosecution's failure to call essential or material witnesses who are within reach with no reasons given. It was submitted that the trial court, unfortunately, said nothing on this point. Conversely, it was submitted, the trial magistrate in the dissenting judgment held that the prosecution had a duty to call those persons who participated in the signing of the contract. The respondent on its part countered that they did not need those witnesses because what they would have deposed had already been proved by documentary evidence and other witnesses.

In the instance case, there is no hint that there were deliberate and wilful efforts by the prosecution to conceal the witnesses to defeat the ends of justice. If anything, the appellants should have asked the

prosecution to offer them for cross-examination or, at best, call them as defence witnesses. This is the gist of the holding in the case of **Speratus Theonest @Alex vs R.** (supra). Thus, since it is within the prosecution's discretion as to which witness to be called and since it has not been shown that failure to call them was aimed at defeating the ends of justice; worse still, as the defence did not ask the prosecution to offer them for cross-examination or call them as defence witnesses, they cannot be heard raising a complaint that material witnesses were not called.

Part three of ground three of appeal is on the issue of contradictions and inconsistencies in the prosecution's case. The appellants singled out PW1 and PW12 as the main culprits and that they had invited the trial court to treat their testimonies as unreliable. Reference was made to the case of **Jeremiah Shemwate vs R** (1985) TLR 228. Reacting to this, the respondent submitted and rightly so in my view, that these were minor. Indeed, the Court of Appeal once held that discrepancies in a witness testimony doe not straight away make him or her unreliable – see **Alex Kapinga & 4 Others vs R** (supra). I find myself inclined to join hands with the respondent that it did not

enhance the appellants' case to lay a bare claim of there being contradictions and inconsistencies without pointing them out. In view of the foregoing, I find this part of the ground of appeal to carry no weight.

Ground four of the appeal is that on the evidence laid down the charge was not proved.

As can be noted from this judgment, the submissions by both the appellants and the respondent have been noted. According to Bashir Mrindoko (PW7) vide Exhibit P.15 – a loose minute – he cautioned the 2nd accused on the shortcomings pertaining to the impending procedure of procuring an assayer. He put it very clearly that section 16 prohibited public bodies from bypassing the Public Procurement Act 2001. The 2nd accused cannot therefore plead ignorance for he was warned right at the embryonic stage. Another point is that Pw1 who was a member of the Negotiation Team kept the 2nd appellant updated on the progress and advised him but the 2nd appellant did not heed the advice.

Turning to the much hyped Presidential directive on the loose minute giving a go-ahead to the process and, urgently, I not that it was given on 20/3/2003 (Exhibit P1) while the caution to the 2nd appellant was given by PW7 on 11/9/2002. It has to be noted also that in the

caution statement involving the 2nd appellant (exhibit P27) he put it that, if I may quote a certain portion:

> *".....Hivyo Benki Kuu kwa kuwa ndicho chombo kinachoshughulika na dhahabu kama foreign exchange kwa kushirikiana na Wizara ya Nishati na Madini kwa masuala ya kiufundi na nguvu za kisheria za Kamishna wa Madini katika kusimamia madini, Wizara ya Fedha kwa sababu ya malipo (financing) pamoja na Ofisi ya Ofisi ya Mwanasheria Mkuu wa Serikali..... tulishirikiana katika kuhakikisha mkaguzi wa madini anapatikana....."*

According to the respondent, this caution statement amounts to a confession but the appellants oppose this view claiming that the statement in Exh. P25 (not exh. P17) does not constitute any admission that he procured ASA Co. and its subsidiary ASAGBC. It was stated that the 2nd appellant was very particular that it was the Bank of Tanzania with procured the Assayer as it supervised the negotiation team. All what the appellants are saying is that the Bank of Tanzania is the Institution which conducted the whole process. Much as the trial court

ver made reference to the cautioned statements and it does not amount to a confession in law, still it tells us of the appellant's participation in the process.

Another exhibit which involved the two appellants is P5 which is a letter from the 1st to 2nd appellant concerning the process. Exh. P27 is a letter written by the Governor of BOT to the 2nd appellant putting him into the picture on the progress of the Negotiation Team and seeking his recommendations on the duration of the contract and tax exemption. If at all as suggested the appellant had no role to play in the whole process was there any need for the governor to seek his views. Even exhibit P8 which is a letter by the 1st appellant to the 2nd appellant tells us something which is incongruent with the suggestion that the two appellants had nothing to do with the procurement process.

Another piece of evidence is that of Mwakalukwa (PW5) who advised the 2nd appellant to halt the process in order to sort out matters, on legal framework, fees to be paid and seeking views and expertise from the Commonwealth Secretariat. Is it insignificant that even this expert advice was not heeded.

It is clear from the evidence that the Bank of Tanzania was just acting as an agent of the government as evidenced by exh. P1 fourth paragraph by the use of the words:

> *".....Kamati ya wataalam kutoka Benki Kuu Wizara ya Nishati na Madini imekaa na kuchambua makampuni yanayoweza kufanya kazi hiyo kwa niaba ya serikali"*

From this excerpt it cannot be said that the Bank of Tanzania had full autonomy in the process. It was the government which was paying for the whole exercise. In the face of all the foregoing, the appellants cannot distance themselves from the deliberations of the Negotiation Team.

On the President's directive, what I can say is that there is not much weight as the appellant would like us to believe. This is because, it was issued on the strength of the recommendation of the 2nd appellant. Important to note here is that this recommendation was despite the caution given to him way back on 11/9/2002 by PW7 which was ignored. Since as it were, the President could not have been aware

of what was in the background, it is not proper to use him to justify whatever wrong-doing.

On absolute powers by the 1st appellant in granting tax exemption and the notion that tax exempted is tax forgone, it cannot be said that there are such absolute powers when there is evidence that TRA was consulted on the issue (Exh. P11 and P12). To say that there was no option since the agreement had already been executed so there had to be compliance with clause 4.3.1 that too does not carry any weight. This is because as already found, the two appellants had a strong hand in the Negotiation Team so even the said agreement could not have been signed without their knowledge. What is even worse is that the said contract was signed without being subjected to vetting by the office of the Attorney General notwithstanding its great importance to the nation.

On the claim that tax forgone is no loss, obviously it is not loss if exemption is granted within the confines of the law which was not the case here so Loss was therefore suffered. It would appear that there was determination to engage the assayer notwithstanding the high fee at 1.9% which was said to be the highest in the world.

It is on the basis of the foregoing that I find the 4th ground to have no merit.

On ground five, it was submitted that the sentence imposed was not justified and excessive. This point is straightforward in respect of counts 1-10 because since there is no sentence specified under section 96(1) of the Penal Code, the appellants were supposed to be sentenced under section 35 of the Penal Code which provides for a sentence not exceeding 2 years with a fine or with both. Apart from this omission, notwithstanding the mitigation factors which include the advanced age of the appellants (both in mid 70) the sentence imposed, by any yardstick, was not excessive. If we take into account the amount of tax loss, I find that the sentence in respect of the 11th count was extremely lenient and not commensurate with the offence.

As I pointed out, the republic also cross-appealed laying down two grounds. The first against the acquittal of the third accused and the second ground failure of the trial court to order the first and second appellants to pay compensation to the Government equal the amount of the loss incurred.

On the involvement of the third accused in the procurement of the assayer, reference was made to Exh. P7 which is a letter addressed to him from the Governor of BOT. Upon receipt of this letter, the 3rd accused made an endorsement on exh. P7 reading that the contract with the Commonwealth Secretariat may have to be halted. Personally, in my view, I find nothing irregular with the endorsement because first, it was just a suggestion and not a decision and, secondly, there is no evidence that it was done in bad faith.

Another piece of evidence which was alleged by the respondent to implicate the 3rd accused is exh. P12 and PW14 which are correspondences from the TRA discouraging tax exemption. The accused claimed in his defence that he did not see the said exhibits and, in any case, this accused had no powers to exempt taxes except to advise his boss the 1st respondent. This is where Exh. P21 comes on the scene wherein the first respondent sought advice on tax exemption and proceeded to recommend it; he deponed in his defence that he so advised the Minister after learning that the contract had been signed and it contained a tax exemption clause. This line of defence cannot be just thrown out because it is plausible.

All in all, for lack of evidence against the third respondent, I cannot fault the trial court for acquitting him. The appeal therefore fails on this ground.

As regards the 2nd ground, it is beyond any controversy that the order of compensation to the government had to follow. This is line with the dictates of subsection 6 of section 284 (A) of the Penal Code. However, this will not apply in view of what I have observed in the foregoing.

All said and done, I now proceed to quash the conviction and sentence in respect of the 11th count for the 1st appellant but uphold the convictions and sentence in respect of the rest of the counts. Likewise, the 2nd appellant's conviction is upheld save count 11 which has been quashed and set aside. The sentence of 3 years imprisonment is however quashed and substituted thereof that of 2 years in respect of 1st appellant for each count i.e. count 1 – 10 and 2 years imprisonment on each count i.e. count 1 – 4 for 2nd appellant. Sentences to run concurrently.

The fine imposed in respect of the 11th count if paid be refunded to the appellants.

P.A RUGAZIA

JUDGE

02/10/2015

Date: 02/10/2015

Coram: Hon. Rugazia, J

For the 1st Appellant: Mr. Rweyongeza

For the 2nd Appellant: Mr. H. Nyange

For the 3rd Appellant: Mr. Swai

Mr. J. Nyange

Mr. Msuya

Prof. Shaidi

For the Respondent: Mr. Vitalis – PSA

CC: Eveline

Court: Judgment delivered

P.A RUGAZIA

JUDGE

02/10/15