IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC CRIMINAL APPEAL No. 07 OF 2020

(Arising from Economic Crimes Case No. 05 of 2017 before the Resident Magistrate's Court of Geita at Geita)

1. **NATHALIA BERTHOLD .....1ST APPELLANT**
2. **GEORGE PIUS MATUNDALI ..... 2ND APPELLANT**
3. **DAVID MARWA MAGIRA.....3RD APPELLANT**

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

29th July & 31st August, 2021.

TIGANGA, J.

The appellants herein Nathalia Berthold, George Pius Matundali, David Marwa Magira together with one Magreth Marwa Magira, who did not appeal, stood charged before the court of Resident Magistrates of Geita, with a total of four counts. The first count charges, Nathalia Berthold, George Pius Matundali hereinafter referred to as the 1st and 2nd

appellants respectively, for Abuse of Position contrary to section 31 of the Prevention and Combating of Corruption Act, No. 11 of 2007.

In the second count, the 1st and 2nd appellants were charged with an offence of Use of Document Intended to Mislead Principal contrary to section 22 of the Prevention and Combating of Corruption Act, No. 11 of 2007. The third count, was facing the 3rd appellant and 4th accused before the trial court who did not appeal, they were charged with an offence of Obtaining Advantage contrary to section 23(1)(a) of the same law as in the 1st and 2nd counts. While in the fourth count, all accused were charged for Occasioning Loss to a Specified Authority contrary to paragraph 10(1) of the 1st schedule to and sections 57(1) and (60)(2) of the Economic and Organised Crime Control Act [Cap. 200 R.E 2002] (Now R.E 2019)

The particulars of the offence in respect of the first count, are that the 1st and 2nd appellants, on 24th day of January 2014, at Geita District Council office being employed by Geita District Council as District Health Secretary and Accountant respectively, while in discharge their functions did intentionally abused their position by preparing payment voucher No.100/1 for the payment of Tanzanian Shillings Thirty Two Millions, Five Hundred Thousands only (Tshs. 32,500,000/=) to M/S MAGIRA Pharmacy

purporting to be payment for supply of medical and health facilities, a fact they knew to be false and thereby conferring undue advantage to the said M/S MAGIRA Pharmacy which is owned by David Marwa Magira and Margret Marwa Magira.

In respect of the second count, it was particularised that, on the same date and in the same capacity as in the first count, with intent to deceive or defraud their principal, the 1st and 2nd appellant knowingly, did use payment voucher No. 100/1 dated 24th January 2014 worth Tanzanian Shillings, Thirty Two Millions, Five Hundred Thousands only (Tshs. 32,500,000/=) purporting to show that they purchased from M/S Magira Pharmacy medical and health facilities a fact which they knew to be false and intended to mislead their principal/employer.

In respect of the third count, the 3rd appellant and the 4th accused who did not appeal before this court, on the same date and at the same place as mentioned in the first and second counts herein above, being the sole proprietors of business called M/S Magira Pharmacy, without lawful consideration did obtain advantage of Tanzanian Shillings Thirty Two Millions Seven Hundreds Thousands (Tshs. 32,700,000/=) from Geita District Council.

While in respect of the forth count, all accused persons before the trial court, on the same date and at the same place as mentioned in the first, second and third counts herein above, and in their various capacities as reflected in the above counts, wilfully caused Geita District Council to suffer a pecuniary loss of Tanzanian Shillings Thirty Two Millions, Five Hundred Thousands only (Tshs. 32,700,000/=)

After the consent of the Director of Public Prosecutions issued in terms of section 57(1) of the Prevention and Combating of Corruption Act No. 11 of 2007 and the Certificate of the same Director of Public Prosecutions issued in terms of section 12(3) and (4) of the Economic and Organised Crimes Control Acts [Cap. 200 R.E 2019] conferring jurisdiction to the Resident Magistrate Court of Geita, at Geita, all accused on arraignment, pleaded not guilty to all counts, consequence of which the case was to go for trial. In the effort to prove the case, the prosecution called six witnesses namely Noel John Makuza, who testified as PW1, Restituta Masaga, as PW2, Chistopher Kidubo as PW3, Denice Misaba, as PW4, Vansada Mkalimoto, as PW5, and Abdallah Kidwaka, as PW6.

Generally speaking, their evidence as deciphered from the record is that PW1, who said in his evidence that, was the Regional Medical Officer

of Geita Region at the time when the offence was committed, with the duty to supervise the medical duties in the region, but who was described by PW6 to have been a District Medical Officer In charge of Geita District at the time when the offence was allegedly committed, saw a payment voucher signed by the 1st accused person for purchase of medical and health facilities. It was reported by the auditor from the Controller and Auditor General (CAG) that, there was audit query which related the purchased medicine and medical equipment but were not seen in the store and that query remained uncleared. Following that report, PW2 the District Council Medical store keeper was asked if she received the supplies but she denied to have received the alleged medicine and health facility in her store. She went further and said that even the person who purportedly said to have received the said supplies who was mentioned to be Daniel Nkwabi is not known. That lead to the matter to be reported to the District Executive Director of Geita District, PW6 who directed the Internal Auditor, PW3 to audit the store and books of accounts in relation to that supplies and upon completion of his duty the Auditor found that the medical supplies worth Tanzanian Shillings Thirty Two Millions Seven Hundreds Thousands (Tshs. 32,700,000/=) which were purportedly procured by the

1st and 2nd appellants were missing. It was also his report that, the procurement procedures were not adhered to. When the internal Auditor report was submitted to PW6, he reported the matter to the PCCB for investigation.

Upon such a report to the PCCB by PW6, PW5 was assigned to investigate the matter, who according to her investigation that included the interrogation of the suspect that is the 1st and 2nd appellants who according to her they admitted to have committed the offence by not following the procurement procedure. Following that admission and taking into account of the evidence of PW2 that the supplies were not received in the store, PW5 believed that the accused committed the offence they were accused of.

Basing on that evidence and five exhibits which were tendered by the prosecution, the trial court found the prosecution to have established the *prima facie* case for the accused persons to answer in terms of section 231 of the Criminal Procedure Act, [Cap. 20 R.E 2019].

In their defence, the second respondent who testified as DW1 denied to have committed the offence he relied on the defence of alibi that, on

24/01/2014 he was not in office, as he was on annual leave which commenced on 22/01/2014 and was ending on 16/02/2014 he tendered a leave request and permit form as exhibit D1. He disputed to prepare a payment voucher dated on 24/01/2014 and said some one else might have used his password to access the system that is why even the said document had no signature.

On cross examination he said although he had a password to access the computer system, but on the material date he disputed to have accessed the computer system to prepare the payment voucher as alleged. He said he do not remember to have given password to any person and while on leave he never returned to prepare the said voucher. Further to that, he said, although he admitted to some facts in his cautioned statement the same was made under duress and cannot be termed as confession in the real sense.

In further cross examination he said although PW1 and PW2 are better positioned to know whether the supplies were purchased or not, their evidence should not be relied upon absolutely as they are not trustful.

DW2 denied have committing the offence, but admitting to have been involved in the procurement process of the medical supplies in question from Magira Pharmacy and to have initiated the payment made in respect of the supply to on 24.01/2014. He said the Local Purchase Order, (LPO) was signed by PW1 and PW6 as well as the District Treasurer. She contended that the signing means they authorised the payment. She nevertheless admitted to have originated the payment voucher and the same was encashed.

However, in her defence, she said nothing as to whether the said medicine were delivered or not but said she did not know the person who is alleged to have received the purchased medical supplies as she could not know all the staffs in health department who are approximately 600 (six hundred) in total.

She also said she did not remember the names of the members of the committee who received the medical supplies in question on quality and quantity of the supplies. According to her, she believed that the payment voucher she signed were prepared by the 2nd appellant, because she was not aware that the said 2nd appellant was on annual leave.

Regarding the defence of 3rd appellant, he acknowledged to have received an order, the Local Purchase Order, (LPO) from Geita District Council, and after satisfying himself that, it had the signatures of all authorising officers and after such an order he supplied various medical supplies as ordered and delivered the consignment to the Geita District Council. Following that delivery he was paid Tshs. 32,700,000/=.

In his opinion the transaction he made was clear therefore he committed no offence. Regarding the delivery of the consignment, he said that the consignment was delivered by his servant one Mwita Zakaria who told him that the supplies by seven staffs of the Geita District Council. However the 3rd appellant did not personally witness the delivery of the supplies. Responding as to question why he did not call the said Mwita Zakaria to testify as his witness he said he had already left the job and at the time of the defence testimony his where about is not known, but that servant told him that the he delivered the supplies. He however acknowledged that PW1 and PW2 were the ones better positioned to know as to whether the consignment was delivered and received or not. He said they normally hire private transport to deliver the supplies to the purchaser just like he did in this case, but he tendered no proof of the transport he

hired to deliver the consignment. He said in the end that he committed no offence, so he asked for the appeal to be allowed and he be acquitted.

The defence by the 4th accused who did not appeal was that, although she is a co director of the business called M/S Magira Pharmacy together with the 3rd appellant, but on the fateful day she was on safari at Muhimbli Hospital where she was attending treatment. Nevertheless, she was informed by the 3rd appellant that he did business with Geita District Council, but she did not in any way participate in the transaction.

That marked the defence case as well, after that, the trial court found the case to have been proved beyond reasonable doubt on the reasons that, the 1st and 2nd appellants, were found guilty of executing payment voucher No. 100/01 dated 22/01/2014 which purports to show that they purchased from M/S Magira Pharmacy, medical and health facilities, a fact which they knew to be false thereby misleading the principal.

In the same vein, the court found that, the 3rd appellant being one of the proprietors of M/S Magira Pharmacy without lawful consideration obtained advantage of Tshs. 32,700,000/= from Geita District Council.

Basing on the above findings it was also found that the 1st, 2nd, and 3rd appellants by their criminal acts afore mentioned, caused the Geita District Council to suffer pecuniary loss of Tshs. 32,700,000/=.

Consequently the 1st and 2nd appellants were found guilty and convicted for abuse of position, contrary to section 31 of the Prevention and Combating of Corruption Act, (supra) and use of documents intended to mislead the principal contrary to section 22 of the same Act. It also found the 3rd appellant guilty of the offence of obtaining advantage contrary to section 23(1)(a) of the same Act, while the three appellants were all found guilty for occasioning loss to a specified authority contrary to section 57(1) and (60)(2) of the Economic and Organised Crime Control Act (supra) read together with paragraph 10(1) of the 1st schedule to the said Act.

The 4th accused who did not appeal, was found not guilty in all counts she was facing, and consequently she was acquitted.

In respect of the first count, the 1st and 2nd appellants were sentenced to pay fine of Tshs. 2,500,000/= each or three years in jail, while in respect of the second count, the 1st and 2nd appellants were

sentenced to pay fine of Tshs. 3,500,000/= each or four years in jail in default of paying fine. In respect of the third count the 3rd appellant was sentenced to pay fine of Tshs. 5,000,000/= or four years in jail in default of paying fine, while in respect of the fourth count the 1st, 2nd, and 3rd appellants were all sentenced to five years custodial sentence which was ordered to run concurrently.

Last, all convicts were ordered to pay compensation of the pecuniary loss they had occasioned to the government that is Tshs. 32,700,000/=.

Aggrieved by the decision of the trial Court, they appealed to this court. Initially, on 04/01/2021 the appellants filed a joint petition of appeal with six grounds of appeal that was on 04/01/2021, but on 03/05/2021 Mr. Kassim Gilla learned Counsel for the 1st and 2nd appellants, asked and was granted leave to file the amended petition of appeal. Following that order to amend, the counsel for the 1st and 2nd appellant filed four grounds of appeal as follows:

1. That, the offences with which the appellants were charged and convicted with were not proved beyond all reasonable doubt.

2. That, the decision and conviction of the appellants was against the evidence on record as such the decision of the trial court was illegal.

   ALTERNATIVELY

3. That, the trial court erred in law in admitting exhibit PE3 omnibusly while the same were illegally procured.
4. That, the proceedings commenced from July 2018 and the resultant judgment thereof are null and void for failure of the successor Magistrates to assign reasons for the taking over of the matter in contravention of section 214(1) and (2) of the Criminal Procedure Act [Cap 20 R.E 2002] [now RE 2019]

The counsel for the 3rd appellant filed three grounds of appeal as follows:

1. That, the trial court erred in law and fact in rejecting the contract /local purchase order entered between M/S Magira Pharmacy and Geita District Council.
2. That, the trial court erred both in law and facts for convicting and sentencing the 3rd appellant for the offences which were not proved beyond reasonable doubt

3. That, the trial court erred in both law and fact for failure to correctly consider and evaluate the evidence on record and thus reaching into wrong findings.

Both counsel asked for the conviction against all three appellants to be quashed, the sentence conviction to be set aside and appellant be set at liberty.

The 1st and 2nd appellants were represented by Mr. Kassim Gilla, leaned counsel, and while the 3rd appellant was represented by Mr. Elias Hezron also learned counsel. The respondent, Republic was represented by Daniel Garaji Masambu and Kelvin Murusuri, State Attorneys from NPS Geita.

At the request of the parties and the leave of the court the appeal was argued by way of written submissions. Parties filed their respective submissions according to the schedule fixed by this court.

In the submission in chief which was made in support of the appeal and against the conviction and sentence of the 1st and 2nd appellants, Mr. Kassim Gilla, combined the first and the second grounds of appeal and

argued them together, he dropped the third ground, and argued the fourth ground of appeal separately.

With regard to the combined first and second grounds of appeal, he submitted that, the prosecution was required to prove that the 1st and 2nd appellants did intentionally abuse their positions in the performance of their respective duties for purposes of obtaining an undue advantage to themselves or for the 3rd appellant. In respect of the second ground he submitted that the Republic was duty bound to prove that the first and second appellant gave the third appellant Voucher No. 100/01 which contained false statement and which to their knowledge was intended to mislead the principal or their employer, while regarding the fourth ground they were supposed to prove that through the appellant's actions they caused pecuniary loss of Tsh. 32,700,000/=, to Geita District Council.

Mr. Gilla referred this court to the reasons based upon by the trial court in convicting the 1st and 2nd appellants as reflected at pages 17 to 23 of the judgment, and said it can be concluded that, the appellants were convicted not on the strength of the prosecution evidence rather on the alleged weakness of their defence. He submitted further that is contrary to sections 110(1) and (2), 111 and proviso to section 114(1) of the Evidence

Act, [Cap 6 R.E 2019] which places a burden of proof on the prosecution to the standard of beyond reasonable doubt.

He said further that, the judgment of the trial court at page 14 and 15 based on the oral testimony of PW5, but upon a careful scrutiny of the said testimony the same is found to be contradicting the documentary evidence specifically exhibit PE2 collectively which are the Profoma Invoice No. 0505, Delivery Note No. 002, dated 22/01/2014 and a payment voucher No. 100/01 dated 24/01/2014 which confirms that the said medical supplies were properly ordered and delivered to Geita District Council. He furthermore submitted and that, the payment voucher upon scrutiny indicates that, it makes reference to the Local Purchase Order (LPO) No. 2014115 as the basis of preparation of the payment voucher, as such, collaborating both oral written testimony of the 1st and 2nd appellant and the testimony of PW6 which confirms that the procedure and all necessary documents were in place at the time of initiating and paying for the said of the medical supplies.

Further to that, he complained that PW5's oral testimony contradicts exhibits PE3 collectively (caution statement of the 1st, 2nd and 4th accused persons) which do not contain any confession on their part rather they

contain their respective defence or evidence which exculpated themselves from the commission of the alleged offences. The said exhibit PE3 though were tendered by the prosecution, in essence was the defence for the appellants as they exculpated them from criminal liability. In support of his contention he cited the decision of the Court of Appeal in the case of the **DPP vs Abdallah Zombe and Eight Others** [2017] TLS LR 182 at page 184, 204 and 205. In addition he referred this court to page 65 and 66 of the typed proceedings where PW5 said the said medicine was never received to be contradicting his own exhibit PE5, an audit report dated March 2015 which at its page 20 and 21 clearly shows that the said purchase was made and received but the store ledgers were not made available to the auditors. Further, at the bottom of page 20 of the said report it was indicated that the cause of which was inadequate by the Council Management to record the procured stores.

Further more he faulted the truthfulness of the testimony of PW5 as it was contradicting the evidence of PW6 as reflected at page 70, 72, 73 and 74 of the typed proceedings which is to the effect that, the medical supplies were actually purchased but not recorded in the store ledger, as he signed the payment voucher which was accompanied with all necessary

attachments which included the requisition form, Local Purchase Order, Tax Invoice Delivery Note and a Report from the Therapeutic Committee and that he earlier on had formed the Therapeutic Committee to inspect and receive the purchased medical supplies earlier on purchased, and that all the procedures were complied with. According to him, basing on the contradictions pointed out above the appellant's conviction was illegal and contrary to both oral and documentary evidence on record.

Regarding the observation that the 1st appellant failed to give explanation on the missing necessary documents, he submitted that the 1st appellant was not a custodian of the said documents and that he was not charged with the storages of medical supplies and no evidence was given to the contrary by the prosecution. Further to that, there was no evidence tendered by the competent officer like Human Resource officer to prove that Daniel Nkwabi was not an employee of the Council.

He submitted further that even if it was proved that Daniel Nkwabi was not an employee of the council, then, it was the duty of the Therapeutic Committees formed by PW6 which was to be asked about the delivery of the said medical supplies and not the 1st appellant. And regarding the observation by the trial Court that, the 2nd appellant's

evidence is contradictory and incriminating has no any bases as the said observation is contrary to the evidence on record and in essence is the courts own invention.

Regarding the fourth ground of appeal, that the change of magistrate had no reasons assigned and more specifically at page 1-32 indicates that the matter commenced before Hon. Swalo – SRM who recorded the evidence of PW1, PW2 and PW3. Then from page 33 to 50 another Magistrate J.A. Kato- SRM took over the matter and recorded the testimony of PW4 and partly of PW5, while from pages 51 to the end of the hearing up to delivery of judgment, another magistrate Hon. O.F. Bwegoge – SRM, took over the matter, recorded the testimony of PW5, PW6 and the defence case to the delivery of the judgment. The record indicates that, throughout the change of the trial Magistrates, no reasons were given for the abrupt change and the accused were never asked as to whether they wished to comment on such changes. In essence, he submitted that, this is contrary to mandatory provisions of section 214(1) and (2) Criminal Procedure Act, [Cap. 20 R.E 2002] as (revised in 2019) which requires the successor Magistrate(s) to record reasons for taking over the matter, failure of which renders the subsequent proceedings and the resultant

judgment a nullity. This position was clearly stated in the case of **Mariam Samburo (Legal Personal Representative of late Ramadhani Abas) vs Masoud Mohamed Joshi and Two Other,** Civil Appeal No. 109 of 2016, CAT at Dar es Salaam (unreported), and reiterated **Diamond Motors Limited vs K Group (T) Limited,** Civil Appeal 50 of 2019, CAT at Dar es Salaam. Whereby in both decisions it was held that, absence of valid reasons for change of Judges or Magistrate render proceedings a nullity, unlike in the situation where the change of the magistrate is done with the knowledge of the parties especially where they had opined to proceed with the trial then the said proceedings could have been legal as it was held in the most recent case **Huan Qin and Another vs The Republic,** Criminal Appeal No. 173 of 2018, CAT at Dar es Salaam, (unreported) where at page 30 of the said decision it was held that change of Magistrates with the knowledge of the parties and where they had commented on the said changes then the resultant trial and the judgment were held to be legal and in compliance with the law. He in the end he asked the appeal against the 1st and 2nd appellants be allowed as prayed

Submitting in support of the appeal, the counsel for 3rd appellant submitted in support of the first ground of appeal, which was to the effect

that, the trial court erred in law and fact in rejecting the contract /Local Purchase Order entered between M/S Magira Pharmacy and Geita District Council. He submitted that the 3rd appellant issued a notice to produce dated on 24/08/2020 of the proceedings but the trial court rejected the notice on the reasons that it was issued to a wrong party. In his opinion the notice which was served to the Republic was served to the proper party as the Geita District Council is in fact a complainant in the matter at hand therefore it was the duty of the Republic to communicate with the complainant so that it could respond to the notice. Further to that, he submitted that the assertion by the Republic that the document could not be obtained was supposed to be proved by the affidavit from the officer responsible stating as to whether the document was found or not. In this view, what the respondent, Republic said is a mere submission from the bar which is not evidence, as held in the case of **The Republic vs Donatus Dominic @ Ishengoma and 6 others,** Criminal Appeal No. 262 of 2018. In fine, he prayed the first ground of appeal to be allowed.

Regarding the second ground as raised by the 3rd appellant which raises a complaint that, the trial court erred both in law and facts for convicting and sentencing the 3rd appellant for the offence which were not

proved beyond reasonable doubt as per section 110 of the Evidence Act (supra) and as held in the case of case of **John Makolobela, Kulwa Makolobela and Another vs The Republic,** [2002] T.L.R 296. He submitted that a careful scrutiny of the prosecution case proved that, the case was not proved beyond reasonable doubt. He submitted that, the evidence is clear that the 3rd appellant supplied and delivered the medical supplies to Geita District Council which supplies were received by Daniel Nkwabi as supported by exhibit PE2 collectively. He submitted that whether or not the said Daniel Nkwabi was employed by Geita District Council, or not is immaterial as it was the duty of the prosecution to disprove that Daniel Nkwabi was not employed by the council. Further to that, the admission of DW2 that it was not possible to know all staffs working under health department proves that the said Daniel Nkwabi was there. Further more PW6 the accounting officer of Geita District Council, at page 74 of the proceedings also said he remembers LPO, Tax invoice and delivery note, were availed to him before he authorised payment. It should be noted that although the LPO was not tendered but PW6 and DW2 said to have seen it before authorising the payment. He submitted that, the evidence of PW6 and DW2 at page 91 proves that the LPO was signed by the DMO, DED

and the District Treasurer, as well as the Therapeutic Committee which in this case reported to the DED on medical supplies delivered and received and that the said evidence corroborates the evidence of DW3 that the supplies was delivered and received.

Further to that, he submitted that the report from CAG exhibit PE5 does not show that the medical supplies were not purchased. What the report shows is that the stock was not brought to account and at the end of the table it is stated that the "cause is inadequate", that in his opinion meant that the supplies were received but were not properly recorded and were not stored to where they were supposed to be recorded. To justify that, he relied on the recommendation made at page 21 of the report which "urged the management to ensure that good system of delivery, inspection and prompt recording of all procurement is in place."

He submitted that, that was internal affairs of Geita District Council which in any way does not concern the 3rd appellant as those were issues beyond his control as after delivery of the supplies he could not control how the council was to handle the supplies. To support his contention he relied on the authority in the case of **Barimba General Supply vs The**

Regional Medical Officer – Mara and 2 Others, HC – Civil Case No. 24 of 2013 (unreported). Held *inter alia* that;

> *"on the testimonial evidence of DW1, if suppliers were not involved in preparing the purchase Request Forms why then should the plaintiff be faulted on irregularities admittedly which were of the defendants themselves."*

He also complained that, the whole evidence of the prosecution was full of contradiction, he cited two contradictions which stood as example, the first example was the evidence of PW1 at page 18 line 3 of the proceedings where he said that no committee was constituted by PW6, while PW6 said at page 73 of the proceedings at line 1 that he did constitute the Therapeutic committee in respect of the medical supplies purchased which are the subject matter of the proceedings at hand.

The argument advanced is that, PW3 said that, PW2 who was said to be a store keeper did not qualify to be a store keeper as reflected at page 26 of the proceedings something which might have led to an internal inadequacy of handling the store. He submitted that these contradictions must be resolved in the favour of the 3rd appellant. To support his contention he cited the case of **Mohamed Said Matula vs The Republic**

[1995] TLR 3 and **Moses Thobias Ikangara vs The Republic**, Criminal Appeal No. 12 of 2010.

Further to that, he complained that, the findings that the invoice, delivery note, as well as the payment voucher were recovered from the 3rd and 4th accuseds as reflected at page 10 and 15 of the judgment has not been supported by the evidence, as no prosecution witness said that, therefore that was the make of the trial Magistrate.

Furthermore the trial Magistrate at page 14 of the judgment went as far as saying that the Therapeutic Committee was not involved, while PW6, the accounting officer admitted to have involved the committee, while again at page 15 and 16 the trial Magistrate found without evidence that PW6 did not recall all the facts and presumed that all supporting documents might have been in place before he approved their payment, while in fact the PW6 at page 74 of the proceedings stated clearly that he recalled all the facts relating to the case and that all the documents were actually in place.

He also raised a complaint that, the judgment at page 21 and 22 the court shifted the burden to the 3rd appellant to prove his innocence, which

is a wrong application of the principle in the case of **Nathaniel Alphonce Mapunda and Another vs The Republic** [2006] T.L.R. 395. He submitted that, the fact that the 3rd appellant sent his employee to deliver the supplies on his behalf does not incriminate him especially were there is enough evidence that the supplies were delivered.

Also that, the allegation that Daniel Nkwabi is not the employee of Geita District Council was not proved and that was not the business to be proved by the 3rd appellant who is not an officer of the council. He submitted that, the 3rd appellant was convicted and sentenced on the offence which was not proved beyond reasonable doubt; he prayed the second ground to be allowed.

Regarding the third ground of appeal which raises a complaint that the trial court did not evaluate evidence, he submitted that in line with what he submitted, the trial magistrate did not evaluate evidence as had he evaluated the evidence he would have managed to find that the case was not proved beyond reasonable doubt. In sum, he prayed the appeal to be allowed, conviction be quashed and sentence be set aside, the appellant be acquitted and released from jail.

The respondent Republic, in the reply submission in respect of the combined first and second grounds of appeal as raised by the 1st and 2nd appellants, the learned State Attorneys submitted that, the case was proved beyond reasonable doubts, as the evidence established that the 1st appellant originated the payment voucher, exhibit PE2 collectively, which was approved by PW6 which payment was effected to M/S Magira Pharmacy, the business firm under the proprietorship of the 3rd appellant and the 4th accused who was acquitted and did not appeal. That the necessary supporting documents such as LPO, Requisition for Medical Stores, and receipts were not found by the Internal Auditor, PW3 as well as External Auditor. The Xerox of Invoice, Delivery Note as well as the payment voucher No. 100/01, were recovered from the 3rd appellant upon search by the PCCB investigator.

Although to the great extent the submission by the respondent Republic reiterated the evidence which has already been summarised herein above, they in additional said that the trial court evaluated the evidence of both sides and rightly found that the evidence had proved the case beyond reasonable doubt. They reminded the court of the principle in sections 110(1) and (2), 111 and 114(1) of the Evidence Act (supra) on the

burden and standard of proof, and relied on the principle in the case of **Materu Leison and Another vs R. Sospeter** [1988] T.L.R 102 where the appellate court was cautioned not to interfere with the trial court's findings of facts unless it has been established that the trial court had omitted to consider or had misconstrued some material evidence or had acted on a wrong principle or had erred in its approach to evaluate evidence.

They further relied on the case of **Ali Abdallah Said vs Saada Abdallah Rajab and Others** [1994] TLR 132 where it was held that;

> *Where a case is essentially one of fact, in the absence of any indication that the trial court failed to take some material point or circumstance into account, it is improper for the appellate court to say that the trial court has come to an erroneous conclusion, and where the decision of a case is wholly based on the credibility of the witnesses then, it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record.*

In the same zeal, the learned State Attorneys reminded this court of the principle in the case of **Salum Mhando vs The Republic** [1993] T.L.R 170, in which it was held that, the power of the appellate court to

interfere with concurrent findings of the subordinate court on the evidential issues is limited to the extent prescribed above.

They submitted that, since the case based on facts and the trial court had not omitted to consider or had not misconstrued the material evidence into account or had not acted on wrong principle or had not erred in its approach in evaluating the evidence, then in the upshot it cannot be said that the trial court erred in its judgment. Therefore he asked for the intended appeal to be dismissed forthwith for lack of merits and the judgment of the trial Court be upheld.

Regarding the fourth ground of appeal, the learned State Attorney submitted that, both parties knew that the predecessor magistrates were transferred and the defence side did not raise any issue during the trial therefore the appellants were not prejudiced. They submitted that section 214 of the CPA (supra) gives powers to the successor magistrates to assume jurisdiction over a matter and continue with a trail on the evidence taken by the predecessor Magistrate who became unable to complete the trial within reasonable time. He cited the case of **Huang Qin Xu Fujie vs The Republic**, Criminal Appeal No. 173/ 2018 CAT- DSM which held to the effects that, where there is evidence that failure to record the reasons for

taking over the matter by successor Magistrate or Judge did not prejudice the appellant, for example where the parties are represented then, the omission is not fatal to the proceedings.

They submitted that as in this case parties were represented by Advocates, they were aware that the former magistrates were transferred to another duty stations therefore the appellants cannot be taken to be prejudiced. The said counsel therefore asked the appeal to be dismissed for want of merits.

In the rejoinder submission filed by the counsel for the 3rd appellant, he insisted that, there was no evidence against the 3rd appellant to prove that the said accused committed any offence.

On the issue of non compliance to section 214 of the CPA, he conceded that parties were not prejudiced and subscribed on the authority in the case of **Huang Qin Xu Fujie vs The Republic,** (supra) cited in support of the respondent's case. He added however that, in event the court finds that, the omission was not fatal, still there was no evidence to convict the 3rd appellant, he asked appeal to be allowed and his client be acquitted.

That being a comprehensive summary of the record, grounds of appeal and the arguments made in support and against the appeal, I will straight away start pointing out the issues that are not disputed which will involve this court. **One,** it has not been disputed that, the 1st and 2nd appellants were employed by Geita District Council as the District Health Secretary and Accountant respectively, this is according to the evidence of PW6 at page 70 of the typed proceedings.

Two, it has not been disputed that the Health Secretary's duty is to supervise human resources, finance resources and infrastructure of the hospital generally, and to supervise the preparation and implementation of the budget of the health department in the District Council, this is according to her own evidence, as DW2 at page 90 and 91 of the typed proceedings. The 2nd appellant being an accountant his role was to prepare payment voucher after being directed by the user department to do so and after he had satisfied himself that all authorising officers who are the head of departments, in this case the District Medical Officer, the District Executive Director and the District Treasurer as reflected by the evidence of DW1 at page 84 and 85 of the proceedings.

Three, it has also been established that, the 1st appellant originated the payment of Tshs. 32,700,000/= which payment was seemingly prepared by the 2nd appellant, though the 2nd appellant denied to have prepared such payment voucher and to have participated in the process of payment.

Four, there is no dispute also that the payment was made to M/S Magira Pharmacy Mwanza, owned by 3rd appellant and the 4th accused who was acquitted therefore did not appeal, the same being received in consideration of the supply of medical stores and medical facilities to Geita District Council, this is according to the evidence of PW5, DW2 and DW3.

Five, it has also been established that the purported medical supplies for which the amount was paid were not delivered by the 3rd appellant personally, but he said he sent his servant one Mwita Zakaria, who reported back to him that the consignment was delivered and received by more than seven staffs of the council. However, it has not been disputed that PW2 who was a full time store keeper of the medical store of Geita District Council in the year 2014 and who was on duty on the fateful day disputed to have received the consignment.

Six, it has also been established that, the consignment according to the record was alleged to have been received by one Daniel Nkwabi, who was unknown to PW2, PW1 and even the 1st appellant who was in charge of human resource in the entire health department of Geita District Council. Despite the facts that, she said that she could not know all the employee, but that does not negate the fact that the placement of that person to that duty post was or may not have been made without her knowledge as the supervisor of human and financial resources.

Seven, the fact that the medicine allegedly purchased was not in the medical store and was not received as such as proved by the evidence of PW2, the report of CAG, exhibit PE5, the testimony of PW3, the Internal Auditor and PW5 the investigator is also not disputed.

These facts being not disputed and therefore taken to have peen proved beyond reasonable doubt, then it can be concluded, that the medical supplies allegedly procured by Geita District Council, from M/S Magira Pharmacy and for which Tshs. 32,700,000/= was paid and received by M/S Magira Pharmacy via the 3rd appellant, was not received by PW2 who is the store keeper, thus making its delivery also to remain not proved.

Logic and common sense dictates that, being the supervisor of human and financial resources, of the health department in Geita District Council, and being the one who originated the payment for the said allegedly procured medicine and medical supplies, and basing on the fact that the alleged procurement did not involve the procurement department as to per evidence of PW4 at page 36 of the proceedings, the 1st appellant was, as a matter of procedure and reality, required to be sure that the said supplies were delivered and received, which the 1st appellant did not do. Therefore, the 1st appellant being not sure of whether the said supplies were received it can safely be concluded that the said supplies were not delivered and received by the persons who were supposed to receive them.

Following the facts that, the 2nd appellant who on record prepared the payment voucher and was involved from the account department in the preparation of the payment, denies to have prepared the said payment voucher proves that the whole process was tainted with dubiousness and whoever participated was with evil intention and did so fraudulently.

Having established all these, the next question is whether basing on the grounds of appeal filed and argued by the parties, this appeal has merits?

It should be noted that the 1st and 2nd appellants, filed four grounds of appeal, but at the hearing he dropped the third ground, and argued the first and second together, while the fourth was argued separately. In my discussion, for the reasons which I will soon give, I will start with the fourth ground of appeal which raises a complaint that, the proceedings are null and void for failure of the successor Magistrates to assign reasons for the taking over of the matter in contravention of section 214(1) and (2) of the Criminal Procedure Act [Cap 20 R.E 2002] [now RE 2019].

My take, I entirely agree that, section 214 (1) empowers the Magistrate, to take over the proceedings of the case previously assigned to his fellow Magistrate who has already heard and recorded either the whole or any part of the evidence in any trial, but for any reason beyond her/his control has been unable to complete the trial and may act on the evidence or proceedings recorded by his predecessor. He may also re-summon witnesses who had already testified or recommence the trial where he considers it necessary.

Subsection (2) of the said section empowers the High Court to set aside any conviction passed basing on evidence not wholly recorded by the

magistrate or order retrial, only if it is of the opinion that, the accused has been materially prejudiced thereby and may order a new trial.

This provision was a subject of interpretation in the case of **Huang Qin Xu Fujie vs The Republic**, Criminal Appeal No. 173/ 2018 CAT- DSM in which it was held to the effect that, it is not always that whenever the successor Magistrate fails to record the reasons for taking over vitiates the proceedings. It is only where the appellant was prejudiced by such omission. But where both parties are aware of the reasons for taking over, then there is no need for such recording reasons and failure to record does not vitiate the trial.

In that case, just like in this case, the successor Magistrate took over the matter after his predecessor had been transferred to another duty station, and as in this case parties were represented by Advocates who knew reasons for taking over, and the Advocates agreed to proceed from where the predecessor Magistrate ended, just like in this case as submitted by Mr. Elias Hezron in the rejoinder, there is enough evidence that the appellants were not prejudiced by such omission therefore the proceedings can not be vitiated. Therefore the authority in the case of **Mariam Samburo (Legal Personal Representative of late Ramadhani Abas)**

vs Masoud Mohamed Joshi and Two Other, Civil Appeal No. 109 of 2016, CAT at Dar es Salaam (unreported), and **Diamond Motors Limited vs K Group (T) Limited,** Civil Appeal 50 of 2019, CAT at Dar es Salaam, are distinguishable in this case. I thus find the ground unmerited and it is hereby dismissed for the reasons given.

In my reading between lines, the rest of the grounds of appeal, I find the first and second grounds of appeal as raised by the 1st and 2nd appellants, as well as the second ground of appeal as raised by the 3rd appellant raised the same and relatively common the complaint that, the offences with which the appellant were charged and convicted with were not proved beyond reasonable doubt, as the decision and conviction was against the evidence on record, thus rendering the decision of the trial court to be illegal.

In addressing these complaints, it is worthy to note that, It is both a common law and statutory law principle under section 110, 111 and 114 read together with section 3(2) (a) of the Evidence Act, (supra) that the prosecution is duty bound to prove the case at the standard of beyond reasonable doubt. That position forms the principle in the case of **John**

Makolobela, Kulwa Makolobela and Another vs The Republic, [2002] T.L.R 296.

The respondent, Republic opposed the above three grounds of appeal in that, the case was proved beyond reasonable doubt. They further informed the Court that the conviction of the appellants was founded on the factual evidence and referred this court to the authority in the case of **Materu Leison and Another vs R. Sospeter** [1988] T.L.R 102, to which I subscribe to be portraying a true and correct position of the law, that the appellate Court is cautioned not to interfere with the trial court's findings of facts unless it has been established that, the trial court had omitted to consider or had misconstrued some material evidence or had acted on a wrong principle or had erred in its approach to evaluate evidence.

The other authority which provide to the same effect is in the case of **Ali Abdallah Said vs Saada Abdallah Rajab and Others** [1994] T.L.R 132 as relied on by the respondent, Republic, that the findings of the trial court based on facts should not be interfered with, unless there is indication that the trial court failed to take some material point or circumstance into account, as it is improper for the appellate court to say that the trial court has come to an erroneous conclusion. This is to say

that, the power of the appellate court to interfere with concurrent findings of the subordinate court on the evidential or factual issues is limited to the extent prescribed above. This is also a principle as found in the case **Salum Mhando vs The Republic** [1993] T.L.R 170.

Now the issue is whether the appellants based their appeal on the findings based on the issue of facts? If yes, then the issue is whether in its consideration of evidence the trial court went against any principle, either it omitted to consider or had misconstrued some material evidence or had acted on a wrong principle or had erred in its approach to evaluate evidence.

The appellants in their appeal and argument in support of the three grounds of appeal, have pointed out the following errors; namely, contradiction in the evidence of the prosecution, especially the oral testimony of PW5 that the accused committed the offences they were charged with as reflected at page 14 and 15 which contradict his documentary evidence specifically exhibit PE2 collectively. The exhibit PE2 collectively which are the Proforma Invoice No. 0505, Delivery Note No. 002 dated 22/01/2014 and a payment voucher No. 100/01 dated 24/01/2014 which confirms that the said medical supplies were properly

ordered and delivered to Geita District Council. Also that, the payment voucher makes reference to the Local Purchase Order (LPO) No. 2014115 which was the basis for preparation of the payment voucher.

The other set of the referred contradiction is that, PW5's oral testimony contradicts exhibits PE3 collectively (caution statements of the 1st 2nd and 4th accused persons) which do not contain any confession on their part, rather they contain their respective defence or evidence which exculpated themselves from the commission of the alleged offences. The said exhibit PE3 though were tendered by the prosecution, in essence was the defences for the appellant as they exculpated them from criminal liability. I have passed through the evidence by PW5 and the documentary evidence he tendered, that is exhibit PE2 and PE3, I see no any contradiction in the evidence he gave and the documentary evidence tendered. In law, evidence are led to prove the charge against the accused, the charges which the appellant were facing are for Abuse of Position contrary to section 31 of the Prevention and Combating of Corruption Act, No. 11 of 2007, the Use of Documents Intended to Mislead Principal contrary to section 22 of the Prevention and Combating of Corruption Act, No. 11 of 2007, Obtaining Advantage contrary to section

23(1)(a) of the same law as in the 1st and 2nd counts, and last was Occasioning Loss to a Specified Authority contrary to paragraph 10(1) of the 1st schedule to and section 57(1) and (60)(2) of the Economic and Organised Crime Control Act [Cap. 200 R.E 2002] (Now R.E 2019) all the evidence was geared to prove the said charges. I have painstakingly passed through the evidence of PW5 and other prosecution witnesses together with the documents tendered, I find no any contradiction in the evidence, I find each witness gave account of what he witnessed or did not witness. For instance PW5 especially regarding the documents she tendered, she said categorically that the documents were not in the custody of Geita District Council, and that the same were not given at will by the 3rd appellant, but were seized during search conducted at the 3rd appellant's place. That in my considered view cannot be termed as contradiction.

Moreover, even if, for the sake of arguments we find that there was contradictions, it goes without saying that, the said contradictions are minor and do not go to the root of the matter. In law not every contradiction injures the prosecution case, this is a principle in the case of

Dickson Anyosisye vs The Republic, Criminal Appeal No. 155 of 2017 in which the Court of Appeal held *inter alia,* that;

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

Citing the authority in **Maramo Slaa Hofu and Three Others vs. The Republic**, Criminal Appeal No. 246 of 2011 (unreported) the Court of Appeal held *inter alia* that;

> *"Normal discrepancies are bound to occur in the testimony of the witnesses due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Minor contradiction or inconsistence embellishment or improvement on trivial matter which do not affect the case for prosecution should not be made a ground on which the evidence can be rejected in its entirety."*

While in the case of **Chrisant John vs The Republic**, Criminal Appeal No. 313 of 2015, it was held that;

> *"We wish to state the general view that, contradiction by any particular witness or among witnesses cannot be escaped or avoided in any particular case. However, in considering the nature, number and impact of contradictions it must always be*

remembered that witnesses do not make a blow by blow mental recording of the incidents. As such contradictions should not be evaluated without placing them in their proper context in an endeavour to determine their gravity, meaning, whether or not they go to the root of the matter or rather corrode the credibility of a party's case.

The techniques on how the court should evaluate the discrepancies were laid out in the case of **Dickson Elias Nsamba Shapwata & Another v. The Republic**, Criminal Appeal No.92 of 2007, the Court of Appeal further held that;

"In evaluating discrepancies, contradictions and omissions, it is undesirable for court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the discrepancies and contradictions are only minor or whether they go to the root of the matter"

In this case, the central issue before the trial court as can be related to the grounds of appeal under consideration, is whether the case was proved beyond reasonable doubt. As earlier on pointed the principle is both common law and statutory, but the statutes have not given a comprehensive definition of the terms. However, case laws have

comprehensively done that. In the case of **Maliki George Ngendakumana vs Republic,** Criminal Appeal No. 353 of 2014 (CAT) Bukoba (unreported) the duty vested to the prosecution is said to be in two folds as follows;

> *"...it is the principle of law that in criminal cases, the duty of the prosecution is two folds, one to prove that the offence was committed and two that it is the accused person who committed it"*

In the case of **Magendo Paul & Another vs The Republic** [1993] T.L.R 219 (CAT), term beyond reasonable doubt has been defined as follows*;*

> *"...for a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed"*

This was held in the line with the philosophy in the case of **Chandrankat Jushubhai Patel Vs Republic** Crim. App No 13 of 1998 (CAT DSM) in which it was held that;

> *"...remote possibilities in favour of the accused person cannot be allowed to benefit him. Fanciful possibilities are limitless and it would be disastrous for the administration of criminal justice*

if they were permitted to displace solid evidence or dislodge irresistible inferences."

From these authorities, it means beyond reasonable doubt is not beyond doubt; it means doubt may be there but should be reasonable, and reasonableness in terms of the above authorities is based on the remote possibilities in the favour of the accused. It is quite difficult to do away with such possibilities. However, the possibilities which are proximate affect the prosecution case, while those which are remote do not affect the strong evidence by the prosecution.

Now in this case, from the evidence there is no direct evidence implicating the appellant to have directly committed the offence, they are charged with. The apparent evidence available is circumstantial. In law, for the circumstantial evidence to be relied upon, the same must comply with the requirements established in the case of **Ndalahwa Shilaga, Buswelu Busahi vs The Republic,** Criminal Appeal No. 247 of 2008 CAT Mwanza, under which three conditions were established as tests to be met before circumstantial evidence has been relied on to found the conviction. These conditions are as follow;

(a) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established.

(b) Those circumstances should be of definite tendency unerringly pointing towards the guilt of the accused person, and

(c) The circumstances taken cumulatively should form a chain so, complete that there is no escape from the conclusion that within all human probabilities the crime was committed by the accused person and no one else.

The evidence at hand starting from when the said payment process was initiated, by the 1st appellant, who being the supervisor of both, human and financial and other resources of the health department would not have commenced payment without first receiving requisition from the respective section. She also ought to have been aware of the fact that the medicine and medical supplies she ordered and paid for were delivered and received, she, being the supervisor of human resources was supposed to know the person who allegedly received the said supplies at the store.

Even if she could not have been familiar with the face of the employee who allegedly received the said medicine and medical supplies but that person was supposed to be on the human resources staff disposition, therefore she would not have been expected to deny knowing him. Last but one, she was not expected to be unaware that the said supplies were not in store and was not received by PW2, the person she posted to be working at the store. Lastly her behavior of refusing to know

anything when she was asked by PW1, as to whether she knew anything about the payment as reflected at page 15 and 16 of the proceedings was inconsistent with her innocence.

Regarding the evidence against the 2nd appellant that, that his account and password were used to prepared and effect payment and the fact that he had never given his password to any one else shows that it was nobody else but himself who prepare the payment. Now the fact that he is disputing to have made the payment while all other evidence points irresistibly that he is the one who prepared the payment voucher and participated in the whole process of payment, proves him to be not innocent.

While the 3rd appellant who really admits to have received the money in return to supplies of the medicine and medical supplies to Geita District Council, but who did not prove to have delivered the said consignment. It be noted that, in the circumstances where he is accused to have not delivered the consignment, he was expected to have called the person he sent to deliver the consignment to prove before the court that he really delivered the said consignment. I am aware that he said that that person he referred to be Mwita Zakaria, had already left his job and his where

about is not known. However, he said he hired the vehicle to take the consignment; there are no reasons as to why he did not call the driver to prove that the consignment was delivered. I am aware that, the principle requires the accused to be found guilty on the strength of the prosecution evidence not on the weakness of the defence case, see **Christian Kale and Another vs Republic**, [1992] TLR 302 CAT,

Moreover, section 112 of Evidence Act, (supra) provide for burden of proof of particular facts which in this case I find it to be relevant as providing as follows:

> "***The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence****, unless it is provided by law that the proof of that fact shall lie on any other person"*

In this case, the prosecution has proved through the evidence of PW1, PW2, PW,3 PW5 and PW6 that the medical supply for which the 3rd appellant was paid through M/S Magina Pharmacy was not delivered as the store ledger did not record the said consignment and PW2 a full time store keeper did not receive it either. That said and proved to that effect, the 3rd appellant who insists that the consignment was taken by his servant, who just told him that he delivered the consignment, shifts the burden

particularly on that particular fact to himself, as to whether the consignment was delivered or not. Since he is desirous and wishes the court to believe on the truth of the fact, then he had the duty to prove the same tough, as held in the case of **The Republic vs ACP Abdallah Zombe and 12 Others**, HC Crim Session No. 26 of 2006 DSM- (unreported) the burden is not beyond reasonable doubt, but on the balance of probabilities.

That said I find the evidence as paraded by the respondent, Republic proved the case against all the appellants in respect of these ground beyond reasonable doubt. Therefore the first and second grounds of appeal as presented by the 1st and 2nd appellants, as well as the second ground of appeal as presented by the 3rd appellant are found to have no merits and therefore disallowed.

Regarding the first ground of appeal by the 3rd appellant which raises a complaint that, the trial court erred in law and fact in rejecting the contract/local purchase order entered between M/S Magira Pharmacy and Geita District Council. The documents subject to this ground of appeal was sought to be tendered under section 67(1)(a)(i)(ii)(iii) as secondary evidence because it was alleged that it was in the possession of Geita

District Council. Section 67(1)(a)(i)(iii) allows the secondary evidence to be given when the original is **shown** or **appears** to be in the possession or power of;

(i) the person against whom the document is sought to be proved or

(ii) N/A

(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;

From the this provision, it goes without saying that, for the person to be entitled to rely on secondary evidence, it has to be shown or it should appear that, the original is in the power of the person against whom it is sought to be proved or that a person legally bound to produce it, failed to produce it even after the notice specified in section 68, such person does not produce it. Under section 68 the notice to produce may be given to the party in whose possession or power the document is, or to his advocate.

Although it was not shown that the document was in the possession of the prosecution or Geita District Council but the notice was given to the prosecution, who stand as a representative of Geita District Council who is alleged to have the document. Therefore I entirely agree with the counsel

for the 3rd appellant that, the LPO was erroneously rejected as the counsel for the 3rd appellant complied with the law on notice to produce.

The issue remains, whether failure to admit the said document prejudiced the 3rd appellant, in other words whether the admission of the said exhibits would have changed the findings of the court. In my considered view the admission would not have changed the findings of the court. I hold so because there is no dispute that there was such an LPO, and that the same being the document showing the details of the product the buyer wants to purchase, something which was not disputed that the said supplie were paid for which means that the same was there. What is in dispute in this matter was the delivery of the supplies; the delivery can not customarily be proved by the Local Purchase Order. It is the fact that the said supplies were not delivered to the purchaser that is why the 3rd appellant is taken to have obtained advantage and occasioned loss to Geita District Council. That said, I find the said ground to have no effects.

Last is the third ground of appeal that, the trial court erred in both law and fact for failure to correctly consider and evaluate the evidence on record and thus reaching into a wrong finding. Gathering from the totality of the discussion which I have actually made herein above, I find the

ground to have no merits, as the trial Magistrate tried his best to analyse and evaluate the evidence on record and reached to a correct and just conclusion in the circumstances of this case. That said, I find the entire appeal to have no merits, and it is dismissed, the decision of the trial court is hereby up held as passed.

It is accordingly ordered.

DATED at **MWANZA** this 31st day of August, 2021

J.C. Tiganga

Judge

31/08/2021

Judgment delivered in the absence of the appellant but in the presence of their Advocates but in the absence of the respondent, Republic. Right of second appeal explained and guaranteed.

J.C. TIGANGA

JUDGE

31/08/2021