

REPORTABLE (41)

**PADDINGTON JAPAJAPA
v
THE STATE**

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MAKONI JA & CHIWESHE JA
HARARE: 2 FEBRUARY 2024**

L. Madhuku with *P. Kufakwaro*, for the appellant

R. Chikosha, for the respondent

MAKONI JA:

1. This is an appeal against part of the judgment of the High Court of Zimbabwe (“the court *a quo*”), sitting as an appellate court at Harare, dated 9 October 2023. The part appealed against is the dismissal, by the *court a quo*, of the appellant’s appeal against both conviction and sentence. After hearing submissions from counsel, we allowed the appeal and made the following order:

1. The appeal be and is hereby allowed.
2. The judgment of the court *a quo* is set aside and substituted with the following:

“(i) The appeal against conviction be and is hereby allowed.

(ii) The judgment of the trial court be and is hereby set aside and substituted with the following:

‘The accused be and is hereby acquitted’.

2. We indicated that reasons would be given in due course. These are they:

FACTS

3. The appellant was tried, convicted and sentenced in the Provincial Magistrates Court at Harare for the crime of Incitement to Commit Public Violence as defined in s 187(1) as read with s 36(1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (“the Criminal Law Code”).
4. The State’s allegations were as follows. On 31 July 2018, the appellant was at the Harare International Conference Centre (“HICC”) as an accredited local election observer representing the Movement for Democratic Change Alliance (“the MDC Alliance”) political party awaiting the announcement of the results of the Zimbabwe harmonised elections by the National Elections Command Centre. Following the announcement of the results, the appellant was alleged to have protested the results in a tirade during which he was alleged to have uttered the following words at a press conference:

“If people come to rallies it means they appreciate the candidate. You cannot follow a candidate whom you cannot vote for. So we are saying all those people who were coming for example in Mkoba the stadium was full to capacity with more than 45 000 people. In Mutare, I attended. In Masvingo, I attended. Chamisa was pulling more than 30 to 40 000 and now we are seeing a different scenario altogether. So we are saying, as people of Zimbabwe this is a watershed election. It’s a do or die we are not going to accept this rubbish. ZEC must do the right thing by announcing the proper results. Failure to do this as a leader of Civic Organization, I am going to call for chaos in this country. We are not concerned about the consequences. We want the right thing to be done. And we are going to have an audit of this election and if there are any irregularities I am sorry as Civic Society Organizations we are not going to accept this rubbish...”
5. On the following day, 1 August 2018, members of the MDC Alliance political party, of which the appellant is a member, protested the results announced by the National Command Centre which protest resulted in countrywide civil unrest which turned violent.
6. The State alleged that the appellant intended, by such communication, to incite public violence or knew that there was a real risk that his target audience would, by such

communication, be persuaded or induced to commit public violence. The State case was based on a video clip uploaded onto an internet online platform known as *YouTube*. The video evidence was downloaded and preserved on compact disc by a State witness who testified at the appellant's trial. The video depicted the appellant at the HICC wearing a full election observer's regalia which included a bib, addressing listeners who are out of the picture, and uttering the above stated words.

PROCEEDINGS BEFORE THE TRIAL COURT

7. The appellant denied the charge. He however admitted that he was at the HICC on 31 July 2018 as an accredited agent of the MDC Alliance. He also admitted that it was him who appeared in the video and that it correctly depicted what he was wearing on the day in question. He however denied making the utterances attributed to him in the charge. He said the video was created by the State through a process called 'photo shopping'. He explained that by 'photo shopping' he meant that his correct image was used, accompanied by some voice over, to make it appear as if he had addressed a press conference and made the inflammatory statements.
8. The State called two witnesses. The first to give evidence was one Jealousy Nyabasa, an Assistant Commissioner in the Zimbabwe Republic Police ("the ZRP") at the time of giving evidence. It was his evidence that in July 2018 he was deployed to police the Harare area during the harmonised elections held during that period. On 31 July 2018, in the evening, he was watching a show called 'Just Imagine' on *YouTube*, when he stumbled on a video of the appellant speaking in, what appeared to be, an interview during which he uttered the inflammatory words forming the basis of the charge.

9. He further testified that the video later went viral on social media that evening and the following day members of the MDC Alliance party violently protested the results of the elections. He concluded that the demonstrators were members of the MDC Alliance because they were wearing MDC Alliance regalia. He instructed the Law-and-Order division of the ZRP to investigate the issue of the video which he had seen on *YouTube* the day before the violent protests broke up. He believed that the disturbances were incited by the appellant's utterances.
10. He denied any suggestions that it was a mere coincidence that the turmoil took place after the video had been posted on *YouTube* and that the video was produced by the State to falsely accuse the appellant of inciting the violence. He asserted that the video was genuine and not 'photo shopped', as alleged by the appellant, because he (the witness) knew the appellant's voice and demeanour on television.
11. The second witness called by the State was one Simbai Nyamayauta who testified as a cyber expert. He holds a Bachelor of Science Degree in Management of Systems and a Certificate in 'Reducing Cybercrime through Knowledge and Capacity Building'. He gave evidence to the effect that he had 10 years' experience in the Zimbabwe Republic Police and was, at the time of giving evidence, working at the Criminal Investigations Department's Headquarters as a Systems Administrator.
12. It was his evidence that on 3 August 2018, he downloaded, from *YouTube*, a video depicting the appellant addressing what appeared to be a press conference and preserved it on a compact disc for future reference as evidence. He noted that it had been uploaded on 31 July 2018.

13. During cross examination, the defence played a video depicting the late President of Zimbabwe which they said had been manipulated to demonstrate that videos could be created or manipulated. The second State witness could not say whether the video of the late President had been edited or photo shopped. He confirmed that photo shopping exists and described it as a process whereby a photograph or a video is edited to show or add characters, pictures or features which were not in the original video or picture. The appellant then urged the court to reject the video evidence because it was not credible in the absence of the audience being addressed in the video and evidence regarding who recorded and uploaded it onto the internet.
14. At the end of the trial the appellant was convicted and sentenced to imprisonment for a period of three (3) years of which one (1) year was suspended for (5) five years on the usual conditions of good behaviour. In its reasons for judgment, the trial court made the following findings. The second state witness had conceded that it was possible for a video recording to be tempered with and had also conceded that he could not dispute that the video was susceptible to alteration before being uploaded to *YouTube*. Having observed as above, the court still found that the video produced in court was authentic and credible and therefore safe to rely on.
15. The court found that it had taken into account all the attendant circumstances of the case. The video had been uploaded on 31 July 2018. The appellant had not disputed that he was the person appearing in the video. He was indeed at the HICC as the MDC Alliance election observer on the day. The court was satisfied beyond reasonable doubt that the appellant's utterances were inflammatory. The court accepted that there was no direct evidence linking the utterances in the video with the civil protests that took place on 1 August, 2018. It

however concluded that there was a real likelihood that the publication of the video through social media had instigated the political violence which erupted on 1 August 2018.

PROCEEDINGS IN THE COURT A QUO

16. The appellant, aggrieved by the outcome, appealed to the High Court against both conviction and sentence on 25 July 2019. Against conviction, the appellant argued that the trial court misdirected itself by placing reliance on a contested video as evidence, to convict the appellant, without giving reasons for its decision to rely on the video as the appellant had contested its authenticity.
17. The appellant's counsel also argued that the possibility that the video may have been edited before uploading onto *YouTube* was not eliminated by any evidence at the trial and that too made the conviction unsafe. The appellant's counsel further argued that, to the contrary, the second witness purported to give evidence as an expert whereas his testimony was based on insufficient facts or data and thus consisted of mere guesswork and conjecture.
18. The appellant's counsel further argued that the court *a quo* erred in convicting the appellant in the absence of evidence *aliunde* confirming that the appellant held a press conference. He submitted that in the event that appellant did not succeed against conviction, there was a sound legal basis for the court to interfere with the sentence.
19. Firstly, he submitted that the effective term of imprisonment was not called for because the sentence of imprisonment of 24 months imposed by the trial court was within the threshold of the non-custodial option of community service. Secondly, the trial court misdirected itself by placing undue weight on the fact that the appellant's conduct contravened the Electoral Act [*Chapter 2:13*], a consideration which was irrelevant to the charge which the

appellant had been convicted of. Thirdly, the trial court misdirected itself when it failed to take into account that the appellant did not announce results of the election.

20. The appeal was opposed by the State which argued that the evidence led at the trial was overwhelming and proved that the appellant uttered the words forming the basis of the charge. The State also argued that the appellant had not disputed, at his trial, that he was the person shown in the video on *YouTube* wearing an election bib.

21. State counsel conceded that the State did not adduce direct evidence to prove that the protesters were instigated to commit violence by the inflammatory utterances. He however argued that the connection could safely be inferred and that in terms of our law, it was not necessary for the State to establish a direct connection between the inflammatory words and the violence which occurred the following day. He based the submission on s 187(2) of the Criminal Law Code which says it shall be immaterial to a charge of incitement that the person who was incited was unresponsive to the incitement and had no intention of acting on the incitement or that the person who was incited did not know that what he or she was being incited to do or omit to do constituted a crime.

22. With regards to the sentence, the State submitted that the sentence was appropriate and there was no justification for the High Court, sitting as a court of appeal, to interfere with the sentencing discretion of the trial court.

23. In its judgment, the court *a quo* held that the person who uploaded the video on *YouTube* was not known, however, the absence of such evidence was not the end of the enquiry. It held that it was not the only factor that it could take into account but it was also entitled to take into account other relevant factors. The court further held that that the video was

showing on *YouTube* and thus circulating on the internet was an undeniable fact. The source of the video produced in court was therefore known and easily accessible by the appellant.

24. The court went on to hold that the second witness was able to download it without changing its contents and preserved it professionally. He did not interfere with its contents. The court therefore held that the attack on the second witness's evidence was therefore baseless as his role was simply to download and preserve the evidence for production in court. The court *a quo* agreed with the trial court's finding that the video evidence was confirmed by other State evidence either admitted or not controverted by the appellant at his trial.
25. It was also the court's finding that the appellant was not consistent in his defence. The appellant did not contest the existence of the video but objected to the video on the basis that it was created by the State. The second contradiction was that the appellant initially denied the charge on the basis that he had not made the utterances attributed to him in the charge. He however confessed in mitigation that he uttered the words forming the basis of the charge "... as a result of temptation and emotional stress". He said his moral blameworthiness was reduced by the fact that 'he succumbed to temptation and the circumstances surrounding him'
26. The court was not persuaded by the appellant's argument that the mitigation did not necessarily constitute a confession to the crime and that he was merely abiding by the judgment of the court which had convicted him. The court held that the appellant was therefore volunteering information which was peculiarly known to him which he wanted to be considered as truth of what transpired. He was, thus, taking the court into his confidence as a sign of remorse and repentance.

27. The court thus held that his insistence on appeal that the video was a creation of the State and that he did not utter the words which formed the basis of the appeal was, therefore, not *bona fide*. The court also held that it was not necessary for the State to adduce direct evidence connecting the appellant's utterances with the violent protests which occurred. Accordingly, the court held that the appeal against conviction lacked merit.
28. With regards to the appeal against the sentence, the court held that, barring a misdirection or an irregularity, the court would not interfere with the sentencing discretion of the trial court unless the severity of the sentence amounts to a miscarriage of justice. The court found no misdirection in the manner in which the trial court approached the issue of sentence and accordingly held that the appeal against sentence lacked merit.
29. Dissatisfied by the decision of the court *a quo*, the appellant noted the present appeal on the following grounds of appeal.

GROUND OF APPEAL

1. "The court *a quo* misdirected itself and erred in law in upholding the appellant's conviction on the basis of what the appellant said after conviction and in mitigation of sentence, given that as a court of appeal the court *a quo* was restricted to assessing the conviction only on the evidence considered by the convicting court (that is, the magistrates' court).
2. The court *a quo* misdirected itself and erred in law in not finding that the convicting court (that is, the magistrates court) had misdirected itself in convicting the appellant in circumstances where no reasonable court could have failed to find that it was reasonably possible that it might be true that the video evidence relied on by the State was not authentic.

3. The court *a quo* misdirected itself and erred at law in not finding that the convicting court (that is, the magistrates court) had misdirected itself in convicting the appellant without taking into account all the mandatory factors set out in section 379E of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for the assessment of the evidential weight to be given to electronic evidence.”

30. The appellant sought the following relief;

“1. That the appeal succeeds with each party bearing its own costs.

2. That the judgment of the court *a quo* is set aside and in its place the following is substituted:

“(a) That the appeal against conviction succeeds. The Judgment of the trial court *a quo* is set aside and in its place the following is substituted:

“The accused, Paddington Japajapa, is found NOT GUILTY. Accordingly, the whole sentence falls away.””

PROCEEDINGS BEFORE THIS COURT

31. Mr *Madhuku*, for the appellant, argued that the court *a quo* erred in dismissing the appeal on the basis of what had been said by the appellant in mitigation. Counsel further argued that the court *a quo* would have dismissed the appeal had it not looked at what the appellant said in mitigation. He further contended that the sentiments made during mitigation were not presented as evidence by the appellant but were submissions made by his legal practitioner. In any event, it was improper for the court *a quo* to go beyond the evidence produced before the trial court.

32. Mr *Madhuku* also argued that the court *a quo* departed from the findings of the trial court. The evidence before the trial court was weak and no reasonable court could have made a conviction based on such evidence. It was also his argument that the appellant’s defence

was that he did not utter the words in the video and that the video was doctored. This defence was not found to be false beyond a reasonable doubt.

33. Counsel submitted that the trial court further made a finding without a basis for doing so, that it was the appellant who uttered the words attributed to him in the video. Further, the trial court was not alive to the requirements of s 379E of the Criminal Procedure & Evidence Act [*Chapter 9:07*] (the ‘Criminal Procedure & Evidence Act’) regarding the admissibility of electronic evidence.

34. *Per contra*, Mr *Chikosha*, for the respondent, argued that it was the appellant who was in the video and that this was not denied by the appellant. Counsel further argued that the court *a quo* looked at other factors in convicting the appellant. He however conceded that there was no evidence as to who recorded and uploaded the video and that there was no evidence adduced by the State to exclude the possibility of photo shopping and doctoring before the video was uploaded on to the *YouTube* platform. Mr *Chikosha* however could not concede that the appeal is merited for the reason that the respondent wanted a judgment to guide it and other players in the criminal justice system on the admissibility of and the evidentiary weight to be attached to electronic evidence.

THE ISSUES

34. The appellant’s grounds of appeal and the submissions made before this Court raise two issues for determination. The issues are these:

1. Whether or not the court *a quo* erred in not finding that the trial court had misdirected itself in convicting the appellant.

2. Whether or not the court *a quo* misdirected itself in upholding the appellant's conviction on the basis of what the appellant said after conviction in mitigation of sentence.

THE LAW

35. The admissibility and credibility of video evidence is provided for in our law under s 379E of the Criminal Procedure and Evidence Act. It provides *as follows*:

“379E Admissibility of electronic evidence

- (1) In any criminal proceedings for an offence in terms of this Act, evidence generated from a computer system or by means of information and communications technologies or electronic communications systems shall be admissible in court.
- (2) **In assessing the admissibility or evidential weight of the evidence, regard shall be given to—**
 - (a) **the reliability of the manner in which the evidence was generated, stored or communicated;**
 - (b) **the integrity of the manner in which the evidence was maintained;**
 - (c) **the manner in which the originator or recipient of the evidence was identified; and**
 - (d) **any other relevant factors.**
- (3) **The authentication of electronically generated documents shall be as prescribed in rules of evidence regulating the integrity and correctness of any other documents presented as evidence in a court of law.**
- (4) This section shall apply in addition to and not in substitution of any other law in terms of which evidence generated by computer systems or information and communications technologies or electronic communications systems or devices may be admissible in evidence.”
(Emphasis added)

36. A court confronted with electronic evidence must assess the admissibility and evidential weight to be accorded to such evidence in terms of the guidelines set out in s 379. It must be clear, from a reading of the judgment, that the court was conscious of the existence of the provision and that it engaged and applied it to the circumstances of the matter before it.

37. The factors that the court must consider are set out in s 379E (2) and para (2) (d) gives the court a very wide discretion in what it may consider as relevant factors to take into account. The admissibility and evidential weight afforded to electronic evidence has not really been explained beyond the provisions of s 379E of the Criminal Procedure and Evidence Act. However, this is an area that has been explored in other jurisdictions.

38. In South Africa, whose principles of evidence are similar to ours, it is the Electronic Communications and Transactions Act (No. 25 of 2002) which provides for the admissibility of electronic evidence.

39. The relevant provision of the Electronic Communications Act is s 15. It provides for the admissibility of data messages as well as its evidential weight. It states as follows:

“15. Admissibility and evidential weight of data messages

- (1) In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message. in evidence-
 - (a) on the mere grounds that it is constituted by a data message; or
 - (0) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) **Information in the form of a data message must be given due evidential weight.**
- (3) **In assessing the evidential weight of a data message, regard must be had to-**
 - (a) **the reliability of the manner in which the data message was generated, stored or communicated;**
 - (b) **the reliability of the manner in which the integrity of the data message was maintained;**
 - (c) **the manner in which its originator was identified; and**
 - (d) **any other relevant factor.**
- (4) A data message made by a person in the ordinary course of business or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law is admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

41. The term data message is defined under Section 1 of the Electronic Communications Act as data generated, sent, received or stored by electronic means and includes –

- i. voice, where the voice is used in an automated transaction; and
- ii. a stored record

42. The term data is also defined under the same section as any electronic representations of information in any form. This means that video recordings, being electronic representations can also fall under the scope of s 15 of the Electronic Communications Act.

43. The provisions of the above-mentioned Act were applied in the South African High Court case of *The State v Brown* (CC 54/2014) [2015] ZAWCHC 128. The court in the matter, after holding a trial within a trial to determine the admissibility of certain images found on a mobile phone, held that they were admissible. Reference was made to s 15 of the South African Electronic Communications and Transactions Act, 25 of 2002. The court held as follows at p 10:

“I agree with the observation of Gautschi AJ in *Ndlovu v Minister of Correctional Services and Another* [2006] 4 All SA 165 (W) at p 172 that sec 15(1)(a) does not render a data message admissible without further ado. The provisions of sec 15 certainly do not exclude our common law of evidence. This being the case the admissibility of an electronic communication will depend, to no small extent, on whether it is treated as an object (real evidence) or as a document.”

44. The court further stated as follows:

“As Professor J Hofman stated, in an article, (*Electronic Evidence in criminal cases*, in 2006 SACJ 257 at page 268), in motivating his contention that graphics, audio and video that are in a data message form should be treated in the same way as documents, the view that such material must be regarded as real evidence *‘is conceptually simple and appeals to those who dislike excluding any evidence. But it does not take into account the way graphics, audio and video are, to an ever-increasing extent, recorded, stored and distributed in digital form and fall under the definition of a data message. This means that graphics, audio, and video now resemble documents more than the knife and bullet that are the traditional examples of real evidence. In data message form, graphics, audio and video are susceptible to error and falsification in the same way as data messages that embody documentary*

content. They cannot prove themselves to be anything other than data messages and their evidential value depends on witnesses who can both interpret them and establish their relevance'. Given the potential mutability and transient nature of images such as the images in this matter which are generated, stored and transmitted by an electronic device I consider that they are more appropriately dealt with as documentary evidence rather than 'real evidence.'" (Emphasis added)

45. The Court also stated as follows at p 12:

"Adopting this approach, the ordinary requirements of our law for the admissibility of such evidence is that the document itself must be produced, which document, ordinarily speaking, must be the original and the authenticity of the document must be proved. These requirements are, of course, qualified by those specific provisions of the ECTA having a bearing on electronic communications."

46. In Namibia, the admissibility of video evidence was dealt with in the case of *Arangies v Unitrans Namibia (Pty) Ltd* (I 347/2013) [2019] NAHCMD 196 (18 June 2019). The court held as follows at p 3:

"It is said that we are presently in the age of the fourth industrial revolution, that is, the age of artificial intelligence and information and communication technology. A computer, as a tool, has become an indispensable part of the human endeavour. The processing power of microchip is now legendary, that, no doubt, Courts will more and more be confronted with evidence generated by computers and other electronic devices. Perhaps, it is time for the legislature to review the provisions of the Computer Evidence Act, 1985 (the Act) or to enact new legislation more suitable for what has doubtless been exponential and unprecedented developments since the Act was enacted.

[4] However prolific our use of computers might be, a computer is not a person. A computer cannot take an oath and subject itself to cross-examination, or realise its mistake mid-evidence and correct itself. It does not know right from wrong and cannot act in appreciation of such knowledge. It is not a competent and compellable witness. The outcomes of its processes are fixed and immutable. Computer generated evidence which is not properly authenticated suffers the same impediment which was pointed out in the matter of *Rex v. Trupedo 1920AD 58*, in that it is analogous to hearsay, thus offends the rule against hearsay.

[5] For such evidence to be admissible there must be compliance with various requisites of the Act. Such evidence must be authenticated by affidavit from a duly qualified and experienced person"

47. The Computer Evidence Act that was relied on in the above case was however repealed and replaced with the Electronic Transactions Act in 2019. The Electronic Transactions Act, 2019 provides for the admissibility and evidential weight of data messages and computer evidence under s 25 as follows:

“Section 25 Admissibility and evidential weight of data messages and computer evidence

- (1) In any legal proceedings, nothing in the application of the rules of evidence may be applied in such a manner that it would have the effect that computer evidence is inadmissible -
 - (a) on the sole ground that it is computer evidence; or,
 - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
- (2) **When evidence is admitted in terms of this section, the court must assess the weight to be given to that evidence.**
- (3) **In assessing the evidential weight of computer evidence, the court must have regard to -**
 - (a) **the reliability of the manner in which the computer evidence was generated, stored or communicated;**
 - (b) **the integrity of the information system in which the computer evidence was recorded, stored and maintained;**
 - (c) **the manner in which the originator of the computer evidence was identified; and**
 - (d) **any other relevant factor.**
- (4) A data message made by or on behalf of a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct, is admissible in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law, as evidence of the facts contained in such record, copy, printout or extract against any person, if -
 - (a) an affidavit has been made by the person who was in control of the information system at the time when the data message was created;
 - (b) the facts stated in the affidavit justify a finding on the reliability of the manner in which the data message has been generated, stored or communicated;
 - (c) the facts stated in the affidavit justify a conclusion on the reliability of the manner in which the integrity of the data message was maintained; and

(d) the facts stated in the affidavit justify a conclusion on the manner in which the originator of the data message has been identified if the identity of the originator is relevant to a matter in dispute.

(5) In legal proceedings all rules of evidence must be applied in such a manner that a data message tendered as contemplated in this section is admissible if documentary evidence that is similar in all material respects would have been admissible.”

48. The terms data evidence and data message are defined under s 1 of the Act and video evidence is included under data messages and is governed by the admissibility principles set out under s 25 of the Electronic Act.

49. The provision regarding the admissibility and weight to be attached to electronic evidence is found in the relevant statutes of South Africa, and Namibia and our own and is similarly worded. With South African and Namibian authorities being of persuasive value, their application and interpretation of a similarly worded provision provides a guideline on how the same provision may be applied and interpreted in this jurisdiction.

50. In Canada, whose system is based on English common law, it is the Canada Evidence Act R.S.C, 1985, C. C-5 which provides for the admissibility of electronic evidence. The relevant sections are ss 31.1 and 31.5. Section 31.1 provides as follows:

“**31.1** Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.”

51. Section 31.5 provides as follows:

“**31.5** For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.”

52. The term electronic data is then defined under s 31.8 and video recordings are covered under the relevant sections relating to admissibility of data message.

53. The principles guiding the admissibility of video evidence were explained in the Canadian case of *R v Bulldog*, 2015 ABCA 251 as follows:

“[32] There is an important distinction between recordings (video or audio) and other forms of real evidence (such as a pistol or an article of clothing found at a crime scene) which supports a test of “substantial” accuracy over the appellants’ preferred test of “not altered”. It will be recalled that “authentication” simply requires that the party tendering evidence establish (to the requisite standard of proof, which we discuss below) the claim(s) made about it. What authentication requires in any given instance therefore depends upon the claim(s) which the tendering party is making about the evidence. In the case of most real evidence, the claim is that the evidence *is* something – the pistol is a murder weapon, or the article of clothing is the victim’s shirt. Chain of custody, and absence of alteration will be important to establish in such cases. In the case of recordings, however, the claim will typically be *not* that it *is* something, but that it accurately *represents* something (a particular event). What matters with a recording, then, is not whether it was altered, but rather the degree of accuracy of its representation. So long as there is other evidence which satisfies the trier of fact of the requisite degree of accuracy, no evidence regarding the presence or absence of any change or alteration is necessary to sustain a finding of authentication.”

[33] Put simply, the mere fact of alteration does not automatically render a video recording inadmissible. It follows that the Crown’s failure to establish that this video recording was not altered should not be fatal, so long as the Crown proves that it is a substantially accurate and fair representation of what it purports to show. All this is, of course, subject to the standard framework for admission, under which a video recording may be excluded on the basis of irrelevance (*Penney*), where its prejudicial effect exceeds its probative value (*R v Veinot*, 2011 NSCA 120 at paras 24-27, 311 NSR (2d) 267), or where there is reasonable doubt that the video identifying the accused is a fabrication...

[37] While none of these authorities are specifically about video recorded evidence, we see no principled reason why it should be treated differently. **A trial judge is entitled to authenticate a video recording by using circumstantial evidence of one or more witnesses, provided such evidence establishes to the requisite standard of proof that the video in question is a substantially accurate and fair depiction of what it purports to depict.”**

54. What is coming out of the above authorities is that care must be taken in analysing and assessing the admissibility and weight to be attached to electronic evidence. Such evidence

must be treated as documentary evidence and not as real evidence. It should not be considered admissible by its mere production. Its origin and authenticity have to be established first. The evidence has to be corroborated and confirmed by other witnesses as electronic evidence is easily susceptible to manipulation. Focus should not just be on the representation of the electronic evidence but rather the degree of accuracy of its representation. The court carrying out the exercise must bear in mind the requisite standard of proof in the matter before it.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the court *a quo* erred in not finding that the trial court had misdirected itself in convicting the appellant.

55. The trial court relied, *inter alia*, on the video evidence in convicting the appellant as it found that the video produced in court was authentic and credible and was therefore safe to rely on.

56. The trial court stated the following regarding the video evidence;

” It is clear that the person in the video is the accused. It is also apparent that the video footage is not one that is photo shopped. The accused was at the scene when the video was shot. There were journalist and he was wearing an election observer bib (sic). The words uttered were inciteful

57. The origin of the video was not determined by the trial court. The only proven fact was that the video was discovered by the first State witness on *YouTube*. There is however a gap with regards to how that video ended up on *YouTube*. The trial court’s finding that the video was authentic and not doctored or photo shopped is not supported by evidence on record. It made a bold statement and did not give reasons to justify its finding. The trial court could only reach that decision after examining the requirements for the admissibility of electronic evidence which exercise it did not do.

58. Such an exercise was important in view of the appellant's defence which he had maintained from the beginning. He denies addressing a press conference and uttering the words contained in the video. He stated that the video was doctored and that this was a classic case of photo shopping. He also produced, in his defence, video evidence to support his defence of photo shopping.

59. Before this Court, counsel for the respondent conceded that there was no evidence to rebut the appellant's defence that the video was doctored and photo shopped. No evidence was led as to who recorded the video, how it was preserved and as to who uploaded the video. These are critical aspects in considering evidence of this nature, as shown by the above mentioned comparative judgments from other jurisdictions. All that the two state witnesses could testify to was the discovery of the video on *YouTube* and how it was downloaded and preserved. The second State witness even made a concession that as a cyber expert, he could not dispute that the video was susceptible to alteration before being uploaded to *YouTube*. In other words, there was no chain of evidence establishing how the video was recorded up to the time it was uploaded. It is therefore clear that in reaching its decision, the trial court did not consider the requirements set out under s 379E of Act. It therefore erred in finding that the video was credible evidence without having regard to the guidelines given in s 379E (2).

60. Guidance in dealing with such matters, on admissibility of electronic evidence, can be derived from the Act and the above cited authorities. Any party seeking to rely on electronic evidence, such as the respondent *in casu*, has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

61. Such evidence has to be treated as documentary evidence hence the rules applicable for the production of such evidence apply.
62. A trial judge is entitled to authenticate a video recording by using circumstantial evidence of one or more witnesses, provided such evidence establishes, to the requisite standard of proof, that the video in question is a substantially accurate and a fair depiction of what it purports to depict.
63. From the above analysis it is clear that the trial court did not take into account all the mandatory factors set out in s 379E of the Act for the assessment of the admissibility and evidential weight to be given to electronic evidence. The word used in s 379E of the Act is “shall”. This means all factors must be considered. That was not done by the trial court. It was not corrected by the court *a quo*. Instead, the court *a quo* abandoned the findings of the trial court and came up with its own. It related to s 379 E of the Act, not in analysing the trial court’s judgment but in coming up with its own findings. It got lost in the process and, for a moment, forgot that it was sitting as an appellate court. What both the trial court and the court *a quo* did constitute a misdirection on the part of both courts.
64. The trial court further fell in error by not considering the appellant’s defence and giving reasons why it rejected the appellant’s explanation. There were no findings on the credibility of the witnesses and no reasons given for accepting or rejecting the evidence led by both the appellant and the respondent. This was particularly important especially in light of the defence raised by the appellant and the gap in the State’s case as well as the concession made by the second State witness on the possibility of photo shopping. This was a clear misdirection on the part of the trial court which error was not corrected by the court *a quo*.

65. The need for a court to consider an explanation given by an accused person was explained in the case of *S v Kuiper* 2000(1) ZLR 113 (S) at 118D as follows:

“The test to be applied before the court rejects the explanation given by an accused person was set out by GREENBERG J in *R v Difford* 1937 AD 370. At 373, the learned judge said:

‘... no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal ...”

66. The trial court did not engage in the above stated exercise.

67. The law is very clear that, in criminal trials, the burden of proof is proof beyond reasonable doubt. If there is still some doubt on whether the accused is guilty or not then the doubt must be resolved in favour of the accused who must then be acquitted. In the case of *S v Makanyanga* 1996 (2) ZLR 231 (H) at pp 235E – H it was held as follows:

“The mistake he appears to have made is to act solely upon his belief in the truth of the matter. Whilst it is axiomatic that a conviction cannot possibly be sustained unless the judicial officer entertains a belief in the truth of a criminal complaint, still, the fact that such credence is given to testimony for the State does not mean that conviction must necessarily ensue. This follows irresistibly from the truth that the mere failure of an accused person to win the faith of the bench does not disqualify him from an acquittal. Proof beyond a reasonable doubt demands more than that a complainant should be believed and the accused disbelieved. It demands that a defence succeeds wherever it appears reasonably possible that it might be true. This insistence upon objectivity far transcends mere considerations of subjective persuasion which a judicial officer may entertain towards any evidence. If it were not so then the administration of criminal justice would be the hostage of the plausible rogue whose insincere but convincing blandishments must prevail over the stammering protestations of truth by the diffident, frightened or confused victim of false incrimination. It is precisely to protect the bench from over-reliance on the very human tendency towards belief or disbelief that there are evolved rules of evidence and cautionary rules as to the assessment of evidence.” (Emphasis added)

68. The State failed to prove its case beyond a reasonable doubt. A lot of questions, which were necessary for the conviction of the appellant, were left unanswered. No reasonable court would have come to such a decision. The court *a quo* also fell into the same error by upholding a conviction based on such weak evidence.

Having found that the appellant was wrongly convicted, we found it not necessary to consider the issue of whether the court *a quo* erred in relying on what was said by the appellant in mitigation in upholding the conviction. The issue was not properly ventilated before us and it was our view that it be reserved for determination in an appropriate case.

69. The appeal had merit hence the order made by this Court as outlined in para 1.

MAVANGIRA JA : I agree

CHIWESHE JA : I agree

L. Madhuku, appellant's legal practitioners.

National Prosecuting Authority, respondent's legal practitioners