IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., BWANA, J.A And MJASIRI J.A.)

CRIMINAL APPEAL NO. 25 OF 2011

RICHARD BUKORI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Rwakibarila, J.)

dated the 1st day of November, 2010

in

Criminal Appeal No. 27 of 2010

.....

JUDGEMENT OF THE COURT

14 & 17 February, 2012

BWANA, J.A.:

The appellant, Richard Bukori, was originally tried and convicted in eight counts and sentenced to concurrent sentences of seven years imprisonment. Before the Musoma District Court, the appellant was charged with and convicted of five counts of forgery contrary to sections 333 and 337 of the Penal Code, Cap 16 (Vol. 1 R.E. 2002). He was also charged with and convicted of two counts of uttering false documents contrary to section 342 of the said Penal Code, and one count of obtaining money by false pretences contrary to section 302 of the Penal Code. His

first appeal before the High Court was unsuccessful, hence this second appeal. Before us, the appellant was represented by Mr. Bernard Kabonde, learned advocate while the respondent Republic was represented by Mr. Castuce Ndamugoba, learned State Attorney.

The facts of the case are briefly as follows. The appellant was a treasurer of TASAF, a non governmental organization (the NGO). The appellant was its treasurer at Iringo "A" Street in Musoma town. As treasurer, he kept TASAF's books of accounts and other bank statements. TASAF had an Account No. 162570400 with CRDB BANK, Musoma Branch. The appellant was as well one of the signatories of the account, together with the chairman and secretary, respectively.

Sometime in 2007 allegations emerged that the appellant had embezzled the NGO's funds. In the course of investigation, various books of account for the NGO and specimen signatures of the key actors, such as the appellant, the chairman and secretary, were taken and forwarded to the Forensic Bureau (the FB) in Dar es Salaam for expert analysis. An expert report from the FB revealed, inter alia, that there was resemblance of writings between the appellant's specimen handwriting and the

handwriting on cheques, letters and other relevant documents used to withdraw money from account number 162570400. The appellant was arrested and charged with the offences as above stated.

The appellant denied committing the offences. In his memorandum of appeal, he raised four grounds of appeal. We are however, of the view that this appeal may be determined by considering the first ground only, namely-

> That the first appellate judge erred in law for upholding the admission of Exh. P4... albeit the same being objected and to wit:
>
> a) That the author of Exh. P.4 (FB report) was not called to adduce evidence of his finding.
>
> b) That Exh. P.4 was not accompanied by the necessary annexture and specimen signatures inclusive.

The gist of the appellant's averment on this point is that although he had opposed Exh. P4 being tendered in evidence, the same was admitted

thus prejudicing his case. He was not given an opportunity to cross examine the maker of Exh. P4.

It was Mr. Ndamugoba's submission that the appellant was given an opportunity to see the document, Exh. P4 and did not oppose to its admission in evidence. He submitted further that such handwriting expert report could be tendered in court pursuant to section 205 (3) of the Criminal Procedure Act (the CPA). There was no legal requirement, on the part of the trial court, to inform an accused person of his rights as it is, in cases of medical evidence (section 240 (3) of the CPA).

An important point for our determination is whether there was no need on the part of the court to invoke the provisions of section 205 (3) of the CPA and in the interest of justice to inform the accused person of his rights as is the case under section 240 (3) of the CPA.

The said section 205 (3) of the CPA provides:-

> "When any report under this section is received in evidence in any trial or proceeding under this Act other than an inquiry, **the Court shall, if the**

> **accused or his advocate so requests** and **may if it thinks fit, summon and cross examine** the person who made the report or make it available for cross examination." (emphasis provided).

The requirements for summoning the maker of the document under dispute/ consideration, is remarkably different from that under section 240 (3) of the CPC which provide thus

> When a report referred to in this section is received in evidence the **court may if it thinks fit, and shall, if so requested by the accused or his advocate,** summon and examine or make available for cross examination the person who made the report; **and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.**

The first appellate judge considered the two provisions (supra) and came to the conclusion that in the instant case, the court was not bound to inform an accused person of his rights to have a handwriting expert

summoned for cross examination. He concluded that Exh. P4 was therefore, properly admitted.

Technically, there is nothing unlawful about the stance taken by the first appellate Judge. However, the requirements of substantive justice and prudence has troubled our minds. It is not in dispute that the conviction of the appellant was based mainly on the findings of the handwriting expert as reported in Exh. P4. It was prudent, therefore that the appellant be given an opportunity to understand and cross-examine the maker of Exh. P4. The appellant was unrepresented during the trial stage. He had, we do note, attempted to challenge the admissibility of Exh. P4, using lay man's language. He was unsuccessful. We think he was unjustifiably denied of that basic right. Having shown that he did not agree with the contents of Exh. P4, the court was under obligation to give him an opportunity to cross-examine the maker of such a document. The trial court should have given a wider interpretation of the contents of section 205 (3) supra, as highlighted. We are convinced that failure to do so was a fatal irregularity which denied the appellant his fundamental right to cross examine the maker of Exh. P4.

While still on this point, we suggest that Parliament should reconcile the provisions of sections 205 (3) and 240 (3) of the CPA so that the former encompass the provisions of the latter. In other words, accused persons (or through their advocates) should be given opportunity to call for cross examination of makers of expert reports and that the trial court be under legal obligation to inform the accused person of that right, as is the case under section 240 (3) of the CPA.

The above considered, we allow this appeal. We quash the conviction and set aside the sentences. We make an order that unless the appellant is otherwise held, he be set free forthwith.

DATED at **MWANZA** this 15th day of February, 2012.

J. H MSOFFE
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. S. MGETTA
DEPUTY REGISTRAR