IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., ORIYO, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 285 OF 2012

THE D.P.P. .....APPELLANT
VERSUS
SHIDA MANYAMA @ SELEMAN MABUBA..... RESPONDENT

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

(Sumari, J.)

Dated 27th day of November, 2012
in
Criminal Appeal No. 81 of 2012

JUDGMENT OF THE COURT

17th & 26th September, 2013

RUTAKANGWA, J.A.:

The respondent was arraigned before the Court of the Resident Magistrate at Mwanza on two counts. These were: Forgery contrary to sections 333, 335 (a) and (d) (i) and 337 of the Penal Code (1st count) and Obtaining Property by False Pretences, contrary to section 302 of the Penal Code. He denied both counts and a full trial which, we may as well point out at the outset, was beset by undenied and undisguised attempts to dissuade some key defence witnesses from testifying, followed.

At the end of the trial, the respondent was convicted as charged in both counts. On each count, he was sentenced to six (6) years imprisonment. The sentences which, with due respect, were illegal and definitely needed confirmation by the High Court, were immediately carried into effect notwithstanding the clear provisions of section 170 (1) and (2) of the Criminal Procedure Act, Cap. 20 Vol. 1 R.E. 2002 (the C.P.A.). The section limits the sentencing powers of subordinate courts to five (5) years imprisonment.

What appears, on the surface at least, to have triggered the prosecution of the respondent was a document in the form of a letter dated 10th May, 2004 addressed to the Town Planning Officer ("Afisa Mipango Miji") of Mwanza City Council. The said document which was allegedly found in the Mwanza City Council (the City Council) land registry file in respect of Plot No. 140 Block L, Pasiansi, was attributed to the respondent. Again, we must be frank from the outset that we have used the words "allegedly found" and "attributed" deliberately for two good reasons. One, none of the 14 prosecution witnesses and 6 defence witnesses at the trial testified to have either seen the appellant write it or to have received it and/or taken any official action in relation to it. Two,

contrary to accepted normal government routine procedures, the document does not have any stamp, be it official or otherwise of the Council signifying to have been received and on what date. Further, it has no folio number, a clear indication that it was not formally in the Council's official files.

The full contents of the document which has the address of one "Selemani Mabuba P.O. Box Ilemela, MWANZA", read as follows:-

"AFISA MIPANGO MIJI
HALMASHAURI YA JIJI
P.O. BOX 1333
MWANZA

YAH: MAKUBALIANO YA KUMFIDIA
<u>NDUGU HAMISI MSUKA.</u>

Tafadhali husika na kichwa cha habari hapo juu.

Mimi ndugu Selemani Mabuba mkazi wa Kata ya Pasiansi Wilaya ya Ilemela Mkoa wa Mwanza, nimekubali kumfidia ndugu Hamisi Msuka mkazi wa kata ya Pasiansi, Wilaya ya Ilemela Mkoa wa Mwanza. Nimekubali kumfidia kwa sababu baadhi

ya kigingi cha kiwanja namba 124 block "L" kimeingia kiasi kidogo kwenye eneo la nyumba yake. Ndugu mhusika, kwa kuwa mfidiwaji yeye mwenyewe amekubali kufidiwa, mimi ninakuomba ushirikiano wako katika ujenzi wa taifa.

Makubaliano hayo yamefanyika mbele ya mwenyekiti wa mtaa.

MFIDIWAJI. *HAMISI MSUKA*

MFIDIAJI. *SELEMANI MABUBA*

Ni kweli makubaliano
yamefanyika leo hii

signed."

Briefly, the author was informing the Town Planning Officer that he had reached an agreement with Hamis Msuka to pay him compensation as one beacon in respect of Plot No. 124 Block L was inside Msuka's plot. He was, nevertheless, not seeking a Letter of Offer of Right Occupancy in respect of that Plot.

Going by the evidence on record, when this document, henceforth the disputed letter, was shown to Hamis Msuka who testified as PW4, he unequivocally disowned it. He not only denied being privy to the alleged compensation agreement but he vehemently denied signing the disputed letter. Armed with PW4 Msuka's assurances, PW14 No. 6489 D/Sgt Julius allegedly took the specimen signatures of both PW4 Msuka (an allegation not borne out by the evidence of PW4), and the respondent and specimen handwriting of the respondent relating to the disputed letter. Together with the original of the disputed letter, he sent them to the Police Forensic Bureau for examination. These documents were examined by PW8 No. C8565 S/Sgt. Othman A. Abdulla, a gazetted handwriting expert. The outcome of the one-day examination is contained in his short Report dated 9th March, 2011.

Both in his report and oral testimony, PW8 S/Sgt. Othman shows that he examined and compared the following:

(a) the handwriting on the disputed letter and its specimens,

(b) the respondent's disputed signature on the disputed letter and his specimen signatures, and

(c) PW4 Msuka's disputed signature on the disputed letter and his specimen signatures.

His findings were that the author of the disputed letter was the respondent and the signature appearing thereon was that of the respondent. However, he was of the opinion that the purported signature of PW4 Msuka on the disputed letter was not his. On the basis of these findings and the claims of PW12 Annet Rweyemanu, a Land Officer with the City Council from 2010, that without the disputed letter which, admittedly, was never addressed to her Department, they would not have issued the Letter of Offer of Right of Occupancy (Exh. P4) and the Certificate of Occupancy (CT No. 30540, Exh. D1), the respondent was charged accordingly.

In his affirmed evidence, the respondent categorically denied to have authored the disputed letter as he was the one who was supposed to be compensated. He equally disputed his purported signature on the disputed letter. Not only that. He went further and denied to have known PW4 Msuka before the day he testified in court. The respondent challenged the evidence of PW14 D/Sgt. Julius claiming that he never took his specimen handwriting and signatures.

The respondent claimed that the false accusations against him might have been instigated by one Justine Leophard Timotheo who had unsuccessfully wanted to buy him out of Plot No. 410 after purchasing the adjoining Plot No. 411 Block L from Moshi Mzungu and her relatives. The said Moshi Mzungu, we have learnt, testified as PW1. On this, the respondent was borne out by DW2 Asubuhi Otieno, a City Council official in the Lands department since 1982. This witness tendered in evidence as Exh. D1, a Contract of Sale of Plots No. 411 and 410 Block L between Moshi Mzungu and Justine Timotheo, dated 21st September, 2010. All the same, the respondent told the trial court that he had made a formal application to the City Council to be granted an Offer of a Right of Occupancy over the land situate on Plot No. 410 Block L, Pasiansi area (then Plot No. 124). His application was processed and he at first was granted the Letter of Offer of a Right of Occupancy (exh. P4) on 26th January, 2005. Eventually, he was given the Certificate of Title (Exh. D1) on 15th December, 2010. We have found it significant to mention specifically at this juncture that by this date, the respondent had already been arrested in connection with the two offences. Actually he was arrested on 15/7/2010.

The judgment of the trial court was composed by a Resident Magistrate, who took the evidence of only the last three (3) defence witnesses following the recusal of the first trial Resident Magistrate, following accusations of bias against the respondent. It has occurred to us that the succeeding magistrate had a proper grasp of the crucial issues involved in the case. After summarizing the entire evidence, he correctly, in our considered opinion, directed himself thus:-

> *"In dealing with this matter, this court would like to state that* ***what is in issue is not the possession or ownership of land but forgery and obtaining property by false pretence****. In that view the court direction is guided by the following issues:*
>
> 1. *Whether the accused forged a letter dated 15/05/2004 to the land officer.*
> 2. *Whether the accused obtained property by false pretence."*
>
> *[Emphasis is ours].*

The learned trial Resident Magistrate in resolving the first issue, relied heavily on the evidence of PW12 Annet Rweyemamu, PW4 Msuka and PW8 S/Sgt. Othman. He accepted the assertions of PW12 Rweyemamu to the effect that the respondent would not have obtained the Letter of Offer of a Right of Occupancy without compensating PW4 Msuka. In so holding, with due respect, the learned Resident Magistrate did not advert to the clear evidence of the same witness to the effect that:-

> *"According to the improvements we found therein, Selemani Mabuba was supposed to compensate Moshi Juma Nzungu. He however had compensated Hamis Msuka who had no property therein."*

The above piece of evidence, we have discovered, tallies with that of the respondent who had told the first trial Resident Magistrate that he had no cause for forging the disputed letter as he had no obligation to pay compensation to PW4 Msuka before obtaining a Letter of Offer. We are left wondering on what would have been the ultimate decision of the learned Resident Magistrate had he considered together the entire evidence before him.

The above observation notwithstanding, the learned Resident Magistrate continued to surmise that as the disputed letter was "obtained in the file of Plot. No. 410 block L Pasiansi, stored at City council," the only person who "took" it there was the one who "initiated the ownership" of the Plot process, that is the respondent. He then concluded thus:-

> *"PW12 told the Court that it was the accused who filed the letter and was when the process of making an offer started."*

We must confess forthwith that we have failed to trace an iota of cogent evidence on record to support this assertion. PW12 Rweyemamu, who joined the City Council in **2010** could not have positively and convincingly testified that the disputed letter dated **10th May, 2004,** was "filed" at City Council by the respondent. Much earlier in her evidence, we have found out, she had faithfully told the trial court that she only knew the respondent "by the information I have in my file." Relying on "the information" obtained in the said file, she further forthrightly said on cross – examination, in line with the defence evidence that:-

> *"We received a letter of application for allocation of Plot No. 124 Block 'L' Pasiansi of 18/6/2004, we*

received it on 21/6/2004. This one of compensation has no rubber of the City receiving it... By seeing them, we may not be such much clear on it..."

The above piece of evidence, which confirms that of the respondent and DW2 Otieno and was not considered by the learned Resident Magistrate, demonstrates that although the respondent's letter applying to be given a Letter of Offer over Plot No. 124 now 410 was received by the City Council, she was uncertain on whether or not the disputed letter was received by her office at all. That being the case, in our respectful opinion, it would be risk taking even to assume, let alone to positively hold as the learned Resident Magistrate did, that the disputed letter was "filed" by the respondent at the City Council's offices. Again, we are left wondering on what would have been the finding of the trial court had it considered this piece of pertinent evidence of PW12 Rweyemamu together with that of the respondent (who flatly denied being the author of the disputed letter) and DW2 Otieno.

Having conveniently and/or inadvertently left out these pieces of PW12 Rweyemamu's evidence which was favourable to the respondent, the learned Resident Magistrate relied on her (PW12) unsubstantiated

allegations taken together with the expert opinion of PW8 S/Sgt. Othman and the repudiated confessional cautioned statement of the respondent (Exh. P3), to conclusively hold that the guilt of the respondent in the first count had been proved to the hilt. We are, all the same compelled to mention, albeit in passing, that this finding was arrived at oblivious to the naked fact that the contents of Exh. P3 were totally irreconcilable with the much cherished opinion of PW8 S/Sgt. Othman. This is all because whereas the wholly embraced opinion of PW8 Othman is to the effect that the disputed letter was written by the respondent, it is stated in black and white in Exh. P. 3 that the disputed letter was written by the "Mtaa Chairman" one Iddi s/o Alfani and that the interviewee (allegedly the respondent) was required only to append his signature thereon. Mr. Marungu has conceded this fact before us.

The so-called statement was allegedly recorded on **15/7/2010** by PW7 No. D. 5438 D/Cpl. Kijazi. All the same, no efforts were made by the prosecution to verify this allegation through the said Iddi Alfani. It is increasingly obvious to us that the contents of Exh. P3 and the evidence of PW8 Othman cannot both be true at the same time. To us either one of them or both are fictitious. We have, therefore, failed to discern what the

prosecutor in the case was up to when he opted to proffer fundamentally contradictory evidence going to the root of the case, to support his case against the respondent. It is now anybody's guess what would have been the end result had the learned Resident Magistrate considered this fundamental flaw in the prosecution case.

Having found the disputed letter to be a forgery, the learned Resident Magistrate encountered no difficulties in resolving the second issue he had proposed. All things being equal, he correctly held thus:-

> *"Coming to the second issue of which need not detain this Court longer, as the court is satisfied that the accused forged the document and from the very forged document, the city land authority issued an offer and then a certificate of title, this court also convict the accused for the second count. Had he not falsely represented that he had paid compensation he could not have been issued with the offer and certificate of title."*

We are constrained to point out here that we have used the words "all things being equal" deliberately for three reasons. One, this is subject

to one being satisfied that the disputed letter was indeed a forgery. Two, we have to be satisfied beyond reasonable doubt that the City Council Land Officers actually received the disputed letter which was obviously not addressed to them. Three, evidence has to be traced on record to show that the respondent, between 10/5/2004 and 26/1/2005 had obtained CT No. 30570 (exh. D1) on the strength of the false pretences contained in the disputed letter and a letter dated "18th June, 2004", which is admittedly, not part of the evidence.

As already alluded to above, the appellant was convicted as charged and sentenced accordingly. Aggrieved by the trial court's decision, he preferred an appeal to the High Court at Mwanza. He had two grievances against the trial court's decision. These were:-

> *"(a) That, the prosecution evidence was so weak to warrant the conviction of the appellant for the offence of forgery and that of obtaining property by false pretence.*
>
> *(b) That, the prosecution side deliberately and without any colour of right did interfere with*

defence witnesses an act which resulted into unfair trial."

We take it to be our duty to point out, in the interests of the proper administration of criminal justice in our country, that the second ground of appeal was premised on the undisputed evidence on oath of DW2 Asubuhi Otieno. On 7/3/2012 while being examined by counsel for the accused/respondent, he had said:-

"On 28/1/2012, I received a summons. When I returned in the office I was called by State Attorney Incharge, he needed to see me. I found him in the office, there were two of them. As I called them they had left. Later on, the Office Attendant called us that we were needed in the office of the Director. This person here was present (pointing at the Public Prosecutor whose name we withhold). Also the other one. They consulted us on the issue of testifying. They said Rweyemanu had testified, so it was not fair we other persons from the same

office to come and testify as they would contradict each other.

So, it is the other State Attorney who was so advising us. Salva then asked our Advocate to advise us. The solicitor advised us. We left and left the matter to Mama Manzi our solicitor.

Yesterday, we were called by the Director, he advised us not to come. Mama Manzi was advised to follow up. Later evening, Salva called me that I was needed in the office of the City Director. Mama Manzi advised us to come and testify in court. We then signed the summons and came..."

The respondent's appeal to the High Court was successful. The learned first appellate judge agreed with the appellant (now respondent) that no cogent evidence had been offered by the prosecution to prove to the required standards the two counts against him. She reached this verdict after being satisfied that:-

(a) the respondent had nothing to gain in writing the disputed letter as PW4 Msuka had no right to compensation;

(b) there was no proof that the disputed letter was formally received by the City Council officials and acted upon, for no single witness testified to have received it and it had no office rubber stamp; and

(c) the expert opinion of PW8 Othman which after all, was not binding on the court, carried less weight in the peculiar circumstances of this case.

Notwithstanding the seriousness of the unchallenged allegations of the defence she, having allowed the first ground, found herself not bound to decide the second ground of appeal. She was entitled to do so. The best we can say here now is that the unchallenged evidence of DW2 Otieno speaks for itself. In our considered opinion, if that evidence is true, the conduct exhibited by the mentioned officers, save the commendable conduct of Mama Banzi, is proscribed by s. 110 (b) of the Penal Code and is punishable with five years' imprisonment, if proved.

Aggrieved by the decision of the High Court, the Director of Public Prosecutions preferred this appeal. The appellant has urged us to reverse the first appellate court's decision. The prayer is based on one grievance. This is that the High Court erred both in law and fact in quashing and setting aside the decision of the trial court "by holding that the

prosecution" had "failed to establish and prove its case to the required standard."

To prosecute the appeal, the appellant had the services of a team of three learned Attorneys. These were Ms. Jacquiline Evaristus Mrema, learned Senior State Attorney, and Mr. Paschal Marungu and Mr. Paulo Mackanja, learned State Attorneys. All the same it was Mr. Marungu, who was handed over the reins to prosecute the appeal, by his colleagues. The respondent was represented by Mr. Kassim Gilla and Mr. Steven Makwega, learned advocates.

Submitting in support of their sole ground of appeal, Mr. Marungu vehemently argued that the learned first appellate judge had no justification in reversing the sound judgment of the trial court. He was of this stance because the prosecution through PW4 Msuka, PW7 D/Cpl. Peter Kijazi, PW8 S/Sgt. Othman, PW12 Rweyemamu and PW14 D/Sgt. Julius had proved beyond any shadow of doubt that the disputed letter had been authored by the respondent and the purported signature of PW4 Msuka appearing thereon was a forgery. PW4 Msuka had proved that the signature on the disputed letter was not his, PW7 D/Cpl. Peter had proved that the respondent had confessed forging the signature of PW4 Msuka on

the disputed letter, PW8 D/Sgt. Othman had proved the respondent to be the author of the disputed letter, PW12 Rweyemamu and PW14 D/Sgt. Julius had satisfactorily proved that the disputed letter was taken or sent to the City Council by the respondent, and acting on it, the respondent had been issued with Exhibits P4 and D1, he argued confidently. He accordingly pressed us to quash the decision of the High Court and restore the decision of the trial court, as the learned first appellate judge erred in law in rejecting the evidence of PW8 S/Sgt. Othman without assigning any reason.

To Mr. Makwega, this appeal is patently wanting in merit and urged us to dismiss it. It was his strong contention that the prosecution abysmally failed to prove that the disputed letter was written and/or sent to the City Council by the respondent. Regarding PW8 S/Sgt. Othman, he argued that the expert's evidence would have carried weight if it had been proved that the respondent was the author of the disputed letter. He went on to argue that no single witness testified to have been deceived by the disputed letter. He, therefore, implored us to dismiss the appeal in its entirety.

In resolving these strong diametrically opposed submissions, we have found it apposite to adopt the approach taken by the learned trial Resident Magistrate in his judgment. Was the disputed letter proved to be a forgery? If it was, was it instrumental in enabling the respondent to obtain Exhibits P4 and D1?

The law on forgery, fortunately, is well settled. Forgery is the making of a false document with intent to defraud or deceive: s. 333 of the Penal Code. Section 335 of the Penal Code sets out a number of modes by which a person can make a false document. The prosecution, in this case, claims that the respondent committed the offence of forgery under s. 335 (a) and (d) (i) of the Penal Code, which reads thus:-

"A person makes a false document who –

(a) makes a document which is false or which he has reason to believe is untrue;

(b) – not relevant -

(c) – not relevant -

(d) signs a document –

(i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing it"

PW4 Msuka categorically denied to have signed the disputed letter. We have found no reason at all, let alone a good one, to disbelieve him on this. All things being equal, therefore, we would not have hesitated in holding outright that the disputed letter is a false document under s. 335 (d) (i) of the Penal Code. Unfortunately, however, things are not equal.

First of all, the charge of forgery against the respondent in the 1st count is patently defective. The particulars of the charge read as follows:-

"SHIDA s/o MANYAMA @ SELEMANI MABUBA on the 10th day of May, 2004 at PASIANSI, Area in ILEMELA District in the City and Region of Mwanza with intent to defraud or deceive the Land Officer of Mwanza City Council did forge a letter dated 10th May, 2004 purporting to show that he had compensated one HAMIS s/o MSUKA in reference to

Plot No. 410 Block "L" PASIANSI, while in fact it was not true."

[Emphasis supplied].

Admittedly the disputed letter, whether real or fictitious, as it stands contains blatant lies. PW4 Msuka had never been compensated by Shida s/o Manyama @ Selemani Mabuba (the respondent) in respect of anything. The respondent does not dispute this fact. But to constitute an indictable offence under s. 335 (d) (i), the particulars ought to have specifically stated that the respondent did sign the disputed letter in the name of Hamis Msuka purporting to show that he had been paid compensation. The charge in the first count, in our respectful opinion, was defective as it disclosed no known offence in law under s. 335 (d) (i) of the Penal Code and also lumped two offences under (a) and (d) (i) together. Mr. Marungu has conceded this. This defect notwithstanding, we have found it in the interests of justice to dispose of the appeal on the assumption that these defects were cured by the evidence, adduced at the trial.

To prove the charge of forgery satisfactorily, the prosecution had a duty to prove that:-

(i) the disputed letter was authored by the respondent;

(ii) the disputed letter was a false document, and

(iii) the respondent had forged the disputed letter with intent to defraud or deceive.

As already sufficiently demonstrated above, the respondent vehemently denied to have authored the disputed letter, which as it stands is a false document in terms of s. 335 of the Penal Code. The prosecution, therefore, had a duty to prove the other two ingredients. We shall of course, have to begin with the first ingredient. Was the respondent the author of the disputed letter, which was unconventionally tendered in evidence as part of the many annextures to PW8 S/Sgt. Othman's report (Exhibit P5)?

It is common knowledge that evidence of the identity of a handwriting expert receives treatment in three sections of our Evidence Act, Cap. 6 Vol. 1 R.E. 2002. These are sections 47, 49 and 75. Generally, handwriting or signatures may be proved on admission by the writer or by the evidence of a witness or witnesses in whose presence the document was written or signed. This is what can be conveniently called direct evidence which offers the best means of proof. With such evidence, the

prosecution need not waste its resources on the other methods. More often than not, such direct evidence has not always been readily available. To fill in the lacuna, the Evidence Act provides three additional types of evidence or modes of proof. These are opinions of handwriting experts (s. 47) and evidence of persons who are familiar with the writing of a person who is said to have written a particular writing (s. 49). The third mode of proof under s. 75 which, unfortunately, is rarely employed these says, is comparison by the court with a writing made in the presence of the court or admitted or proved to be the writing or signature of the person.

These relevant sections of the Evidence Act read as follows:-

> *" 47 – When a court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger or other impressions, the opinion, upon that point of persons (generally called experts) possessing special knowledge, skill, experience or training in such foreign law, science or art or question as to identity of handwriting or finger or other impressions are relevant facts.*

49 – (1) When a court has to form an opinion regarding the person by whom, any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

(2) For the purposes of subsection (1) a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

75 – (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it

purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

(2) The court may direct any person in court to compare the words or figures for the purpose of enabling it to compare the words or figures so written with any words or figures alleged to have been written by that person.

(3) This section applies also, with any necessary modifications, to finger impressions."

These three sections are identical with sections 45, 47 and 73 of the Indian Evidence Act, 1872.

It is clear that under sections 47 and 49 the evidence is an opinion, in the former by a **scientific comparison** and in the latter on the basis of familiarity as a result of frequent observations by and experience of the

witness. But as aptly held by the Supreme Court of India in **Fakhruddin v. State of Madhya Pradesh,** AIR 1967 SC 1326:-

> *"In either case the court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become an handwriting expert* ***but to verify the premises of the expert in the one case and to appraise the value of the opinion in the other case.*** *This comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in large measure in the disputed writing. In this way the opinion of the deponent whether expert or other* ***is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the court must see for itseif and with the***

assistance of the expert, come to its own conclusion whether it can safely be held that the two writings are by the same person. *This is not to say that the court must play the role of an expert but to say that the court may accept that fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witnesses."*

[Emphasis is ours].

It is in this spirit that the Supreme Court of India in **Alamgir v. State of Delhi** (2003) ISCC 21, categorically held that:-

"We think it would be extremely hazardous to condemn the appellant merely on the strength of opinion evidence of a handwriting expert. It is now well settled that expert opinion must always be received with great caution and perhaps so with more caution than the opinion of a handwriting expert."

We subscribe wholly to these holdings and we shall apply the guidelines enunciated therein, when necessary, in our determination of this crucial issue under discussion. In **State of Gujarat v. Vinaya Chandra Chhota Lal Pathi,** AIR 1967 SC 778, it was, rightly in our view, held that:-

> *"a court is competent to compare disputed writings of a person with others which are admitted or proved to be his writings... in order to appreciate the other evidence produced before it in that regard."*

There is no doubt here, that the respondent disputed the handwriting and/or signature attributed to him by the prosecution. There is equally no claim that the respondent was seen by any person writing or signing the disputed letter. Furthermore, the trial court before concluding that the disputed letter was authored by the respondent did not resort to section 75 of the Evidence Act.

As we alluded to earlier on, PW8 S/Sgt. Othman is a gazetted handwriting expert. His opinion evidence was admissible, therefore, under s. 47 of the Evidence Act. By and large, it was his evidence which was relied upon by the trial court to hold that the respondent was the author of

the disputed letter. This finding was rejected by the learned first appellate judge, who found the expert's evidence which, after all, is not binding on the court, to be inconclusive. We are being pressed by the appellant, therefore to reverse this finding by the learned judge.

There is no doubt on the fact that all laws of evidence are so designed as to ensure that the courts consider only that evidence which will enable them reach acceptable and reliable conclusions, be of fact or of law. Such evidence, therefore, must be relevant and admissible. This evidence includes opinion evidence of experts. It is trite, all the same, that before a court can act on expert opinion, say of a handwriting expert as was the case here, two conditions must be established. These are, the genuineness of the specimen or admitted handwriting of the concerned accused and the handwriting expert must be a "competent, reliable, dependable witness whose evidence inspires confidence." To have these qualities for the purpose of admissibility of his evidence the Supreme Court of India in **Romesh Chandra Aggaraval v. Regency Hospital Ltd.**, (2009) 9 SCC 709, laid down these requirements for expert witnesses, with which we are in agreement:-

(1) that the expert must be within a recognised field of expertise,

(2) that the evidence must be based on reliable principles, and

(3) that the expert must be qualified in the discipline.

Furthermore, we are alive to the universally recognised fact that Handwriting Forensics is a science involving scientific examination of disputed documents, and not cursory observations or opinions based on guess-work.

So, as aptly stated by Lord President Cooper in **Davie v. Edinburgh Magistrates**, 1953 S.C. 34 at page 40, the duty of such experts is:-

> *"to furnish the court with the necessary scientific criteria for testing the accuracy of their conclusion so as to enable the court to form its own independent judgment by the application of these criteria to the facts proven in evidence."*

See also, **R. v. Kerstin Cameron** [2003 T.L.R. 84 at p. 128, as well as. **Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee & Others,** AIR 2010 SCC 1007, (among others). In the latter case, the Supreme Court of India lucidly stated thus, in addition to the above clarification:-

"The scientific opinion evidence, if intelligible, convincing and tested ***becomes a factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions."***

[Emphasis is ours].

It must always be kept in mind that an expert is not a witness of fact and as such his evidence is really of an advisory character. It is not within his province to act as a judge, assessor or jury. His real function is to put before the court all the materials, together with reasons which induced him to reach that conclusion. It is from this data, material, reasons, etc., that the court, though not an expert, may form its own judgment by its own observation of those materials: See, **Titli v. Alfred Robert Jones**, AIR 1934 All 273.

Hanna F. Sulner in the book entitled "**Disputed Document**", 1966 Edition, Chapter 4 at page 32, observes that "the only proper presentation

of proof and the best way to demonstrate the expert's reasoning is through the use of a photo enlargement chart representing his opinion." He goes on to emphasize that:-

> *"in most of the questioned document problems it is not only advisable, but imperative to use charts with photo-enlargements because without them it is almost impossible to present the facts to the court and jury in a convincing and effective manner."*

We subscribe wholly to this thinking as science is proved by empirical evidence not bare assertions.

Supporting Hanna Sulner, another expert author, J. Newton Baker in his "**Law of Disputed and Forged Documents**", Chapter VII, Section 71 at pg. 117, observes:-

> *"The enlarged photograph provides invaluable assistance in the comparison of the various signatures, especially when the proportions of the writing are so enlarged that the faintest lines or marks, or erasures or additions, which otherwise could not be seen or were so hidden as to escape*

casual observation, can be appreciated... To proceed with the trial of a disputed signature without specially prepared and sufficient photographs is plain indiscretion and willful stupidity that usually proves very costly, and the attorney of expedience has seen reason to regret having done so."

We should hasten to point out here that we feel it expedient to record our concurrence with these observations as they are designed to further the better ends of justice. The expert has to go beyond making mere assertions, if he is to be taken seriously as "convincing and effective." It is therefore a mundane truth that:-

"Mere assertion without mentioning the data or basis is not evidence, even if it comes from an expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance arriving at the correct

value": **Romesh v. Regency Hospital Ltd.** (*supra*)

We, therefore, confidently conclude this discussion agreeing unreservedly with the holding in **Pravin Kumar Lalchand Shah v. State of Gujarat**, 1982 Cr. LJ. 763, that to be convincing, the expert has to put before the court all the materials together with the reasons supporting his/her conclusions since he/she is not a judge of fact. As held in the latter case, "If the expert has based his opinion on the strength of enlarged photographs, mere reproduction of the reasons would not be sufficient. The court also would not be able to appreciate whether the expert has given proper opinion or not without referring to the enlarged photographs and finding out the points of similarity or dissimilarity, whatever may be the case." It is for these reasons that it is now well settled that opinion evidence must always be received and entertained with great caution and if need be since it cannot take the place of substantive evidence, it would be desirable to look for corroboration (**Alamgir v. State of Delhi**). This, in our considered opinion, is unavoidable, where it is not supported by relevant data and material forming the basis of the expert's opinion. In the

case under scrutiny, did the opinion evidence of PW8 S/Sgt. Othman meet these imperative benchmarks?

To answer the above posed pertinent question, we are compelled to look at his report, on which his evidence tenuously rested. We shall let him tell himself. His short report shows thus:-

> *"2. I have examined and compared the dispute handwriting on exhibit "A' together with specimen handwriting on exhibits "B1"-B5. I have discovered similar characteristic of letters formation common to the disputed and specimen handwriting. Therefore I hereby state that in my opinion the disputed handwriting on exhibit "A" and specimen handwriting on exhibits "B1" –B5 are similar and were written by the same person.*
>
> *3.I have examined and compared the dispute signature on exhibit "A" marked letter "Y" together with specimen signatures on exhibits "C1"-C7. I have discovered similar characteristics of letters and strokes formation*

common to the disputed and specimen handwriting. Therefore I hereby state that in my opinion the disputed signatures on exhibit "A" marked letter "Y" and specimen signatures on exhibits "C"-C7 are similar and were written by the same person.

4.I have examined and compared the dispute handwriting and signature on exhibit "A" marked letter "X" together with specimen handwriting and signatures on exhibits "E1"-E7. I have discovered different characteristics of letters formation between the disputed and specimen handwriting and signatures. Therefore I hereby state that in my opinion the disputed handwriting and signature on exhibit "A" marked letter "X" and specimen handwriting on exhibits "E1"-E7 are different."

It is clear from the above, that PW8 S/Sgt. Othman made mere assertions. His reproduction of undetailed reasons for his opinions are not supported by any materials, say photographic enlargements and other

relevant data, from which the court would have formed its own judgment through its own observations of the materials and data. His evidence does not show the processes which led him to reach those conclusions. It was essential for him to elucidate on the process used to enable the defence as well as the court to satisfy themselves on the validity of those processes. It is too glaring to us, that his report and evidence do not furnish us with "the necessary scientific criteria for testing the accuracy of" his conclusions so as to enable us to form our own independent judgment by applying those criteria to the facts before us. We respectfully hold that PW8 S/Sgt. furnished the court with a tailor-made opinion. We agree *in toto*, with the holding by Creswell, J. cited with approval in **R. v. Kerstin Cameron** (supra) that:-

> *"Since the evidence of an expert is likely to carry more weight than that of an ordinary witness, higher standards of objectivity are required of him and 'should provide independent assistance to the Court by way of objective unbiased opinion in matters within his expertise.'"*

We dispassionately read the entire evidence of PW8 S/Sgt. Othman and the rest of the evidence on record. We have to confess that we have found out that his evidence, apart from not being supported by any material or scientific criteria, patently lacks objectivity. It is not even verifiable, as his evaluations cannot be verified by another expert. We have already shown that his opinion on the author of the disputed letter is irreconcilable with exh. P3 which was also relied on by the prosecution to prove authorship of the letter. Mr. Marungu has candidly admitted this before us. Furthermore, it is no secret that the alleged respondent's signatures on the disputed letter and exhibit P3 are, even to the naked eye not resembling the purported specimen signatures of the respondent allegedly submitted to PW8 S/Sgt. Othman by PW14 S/Sgt. Julius. The same applies to the specimen handwriting of the disputed letter when compared with the original disputed letter itself. We did the comparisons in Court and Mr. Marungu has again admitted these obvious dissimilarities. It is our respectful finding, therefore, that it was not judicial on the part of the trial court to reject the respondent's defence case out of hand to the effect that the prosecution case was premised on contrived evidence. It cannot be simultaneously true to assert that the disputed letter was written

by Idi Alfani (Exh. P3) and claim that it was written by the respondent (Exh. P5).

In the light of the above discussion, we are increasingly of the view that the learned first appellate judge rightly rejected PW8 S/Sgt. Othman's opinion evidence. It was not definite and no reasonable tribunal applying its mind on the law and the undisputed facts, can find it to be of a flinching nature to implicate the respondent with the disputed letter. As there is no other cogent evidence on record, apart from PW12 Rweyemamu's conjectures, we resolve the first issue in the favour of the respondent. We accordingly uphold the holding of the learned first appellate judge to the effect that the prosecution abysmally failed to prove that the disputed letter was authored and/or signed by the respondent. The appeal against acquittal by the High Court in the first count has no merit at all and is accordingly dismissed.

There is no gainsaying that the second count depended on whether or not the disputed letter was a forgery and if it was, on whether or not it was authored by the respondent. We have already held that it was a forgery. However, we have conclusively held that it was not authored by

the respondent. Furthermore, it was conceded by the appellant before us that the letter dated 18th June, 2004 was not part of the evidence. In view of the established fact that the disputed letter was not authored by the respondent and in the absence of the June, 18th 2004 letter, the second count lacks a legal leg and indeed also a factual basis to stand on. The learned first appellate judge, therefore, cannot be faulted for quashing the conviction entered on the second count.

All things considered, we find this appeal totally lacking in merit. We hereby dismiss it in its entirety.

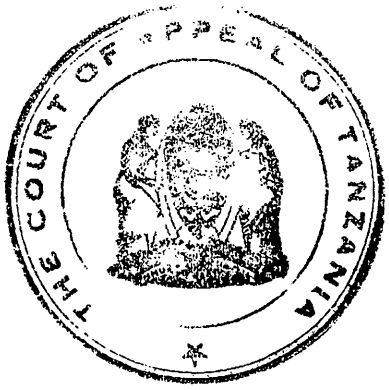
DATED at **MWANZA** this 25th day of September, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



P. W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL