IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 84 OF 2016

MUKHUSIN s/o KOMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)

(Mkasimongwa, J.)

dated the 27th day of October, 2015
in
Criminal Appeal No. 83 of 2014

JUDGMENT OF THE COURT

24th April & 08th May, 2017

MUGASHA, J.A.:

In the Resident Magistrate's Court of Kisutu, **DEVOTHA SOKO** and the appellant **MUKHUSIN KOMBO** who were 1st and 2nd accused persons at the trial, were jointly charged with three counts namely: Conspiracy contrary to section 384 of the Penal Code; Giving false information to persons employed in Public Service contrary to section 122 (a) of the Penal Code and Obtaining money by false pretences contrary to section 302 of the Penal Code. These were 1st, 4th and 5th counts respectively.

It was alleged in the 1st count that, on diverse dates between January and March, 2008, at an unknown place within the City of Dar-es-salaam, the appellant and **DEVOTA SOKO** conspired together with unknown persons to commit an offence of forgery. In the 4th count, it was also alleged that, on 15/8/2008 at Sinza Primary Court within Kinondoni Municipality in the City of Dar-es-salaam, with intent to have **DEVOTA SOKO** appointed as administrator, they both gave the Magistrate false information purporting that, Awadh Shoo died in 1986 and that he is survived by two children named Juma Ally Shoo and Asha Ally Shoo.

In respect of the 5th count, it was further alleged that, on 28/1/2011 within the City of Dar-es-salaam the appellant and **DEVOTA SOKO** with intent to defraud, they obtained from Rukia Juma Zidadu a sum of Tshs. 100,000,000/= falsely pretending to be selling their house on Plot 281 Block 46 at Kijitonyama area.

Also the appellant alone was charged with 2nd count of forgery contrary to sections 333, 335, and 337 of the Penal Code. It was alleged that the appellant with intent to defraud or deceive, forged minutes dated 25/3/2008 purporting to show that, **DEVOTA SOKO** was nominated by the

family members of the purported late Awadh Ally Shoo to be appointed as his administratrix.

DEVOTA SOKO was also charged with a 3rd count of uttering false document contrary to section 342 of the Penal Code whereby, it was alleged that she uttered forged minutes of a meeting dated 25/3/[illegible] purporting to show that, she was nominated by the family of the purported late Awadh Ally Shoo to be appointed as his administratrix.

The appellant and **DEVOTA SOKO** denied all the charges.

To prove its case, the prosecution called nineteen (19) witnesses and also tendered nine documentary exhibits including **(EXHIBIT P9)** the minutes of clan meeting claimed to have nominated **DEVOTA SOKO** to be appointed as administratrix of estate of the purported late Awadh Ally Shoo.

Going by the evidence on record, **PW1 WANDIBA SIMON SINGE,** recalled that in 2008, the appellant on two occasions went to the Bank to inquire about the title deed of Plot No. 281. He disclosed to the Bank that the house on the respective plot is owned by Tanzania People's Defence Forces (**TPDF**). However, he was informed that the respective title deed

belonged to Awadh Ally Shoo who mortgaged it to the Bank pursuant to a long term loan of Tshs. 754,000/= given to him way back in 1984. In another subsequent visit to the Bank, the appellant was accompanied by his wife **DEVOTA SOKO**. She informed the Bank Official that they reside in the house in question which belongs to her uncle Awadh Shoo who is dead and is survived by two children.

Since the desire was to retrieve the title deed in respect of Plot No. 281, **PW1** advised them to submit to the Bank a document evidencing appointment of administrator of estate of Awadh Ally Shoo. According to **PW11 SERAPHIUS NYASOMI MDAMU** an advocate, upon his advice, **DEVOTA SOKO** swore an affidavit before him deposing that her uncle Ally Awadh Shoo, died intestate and is survived with two children namely Asha Awadh Shoo and Juma Awadh Shoo.

Subsequently, **DEVOTA SOKO** successfully applied and she was appointed as administratrix of the estate of the late Awadh Ally Shoo in Probate Cause No. 60 of 2008. **PW13, JOYCE JEREMIAH SAIDI** a retired Magistrate, who presided over Probate Cause No. 60/2008, recalled that, **DEVOTA SOKO'S** respective application was accompanied by the certificate of death of Awadh Ally Shoo, minutes of family/clan meeting (**EXHIBIT**

P9), and a letter certified by the Ward Executive Officer. PW13 recounted not to have summoned any of those who attended the clan meeting at the hearing of the Probate Cause. Later, according to **PW1, DEVOTA SOKO** presented to the Bank a document showing that she is the administratrix of the estate of the late Awadh Ally Shoo. She then paid the remaining debt of Tshs. 754,000/= and the title deed was released to her and one Juma.

As administratrix, **DEVOTA SOKO** successfully requested the Registrar of Titles to change the name of the owner of Plot No. 281 held under Certificate of Title No. 186253/42 into her own name as administratrix, Asha Ally Shoo and Juma Ally Shoo in equal shares. Later, the trio sold the house to **PW2 RUKIA ZIDADU** but she was later evicted by TPDF who claimed to have purchased the house from Awadh Ally Shoo in 1980.

In his sworn evidence, the appellant denied to have authored **EXHIBIT P9** or involved in the sale of the house in question. He as well refuted to be related to Awadh Ally Shoo. He testified that, the house in question was allocated to him in 2007 for residence as TPDF's employee and he resided therein together with **DEVOTA SOKO** his former wife, until when he was transferred to Pangawe. He further told the trial court that,

the sale was conducted in his absence and when he became aware reported the matter to the Police.

DEVOTA SOKO in her defence testimony did not refute to have been formerly married to the appellant in 2000 and that they had divorced in 2012. She admitted to have sold the house in question and that the appellant got 35,000,000/ from the sale proceeds. She added that, it is the appellant who introduced her to Asha and Juma as heirs of the late Awadh Ally Shoo. She recalled to have signed the land documents before the advocate, one Mdamu but claimed that they were brought to her by the appellant. She also denied to have physically gone to court to apply to be appointed as administratrix but rather the documents were brought to her by the appellant.

The trial court convicted the appellant on the 2nd count of forgery and sentenced him to imprisonment for a term of four years. He was acquitted in the remaining counts. **DEVOTA SOKO** was acquitted in all counts.

The reasons for which the trial magistrate convicted the appellant are three fold namely: **One,** the appellant is the maker of **EXHIBIT P9**

which he prepared after obtaining advice from PW11 and thus, he had knowledge on the whereabouts of Awadh Ally Shoo. **Two,** the appellant was aware of **EXHIBIT P9** as he did not object to its admission at the trial. **Three,** the appellant did not summon any of the family members t.. disprove if there was any such family meeting or not.

The appellant unsuccessfully appealed to the High Court where the appeal was dismissed. The first appellate court upheld the conviction of the appellant due to the following reasons: **One,** the appellant chaired the meeting as indicated in **EXHIBIT P9** and did sign the minutes. **Two,** the appellant's failure to object to the tendering of **EXHIBIT P9** confirms that, he is the maker of the document in question.

Still aggrieved, the appellant has preferred this second appeal. In the Memorandum of Appeal he has raised three grounds which basically revolve around one main ground namely:

1. *The prosecution failed to prove a charge of forgery against the appellant as the appellant's conviction is hinged on weak and insufficient evidence.*

At the hearing of the appeal, the appellant was represented by Mr. Karoli Mluge, learned counsel and the respondent Republic was represented by Ms. Mkunde Mshanga, learned Senior State Attorney assisted by Ms. Lillian Lwetabura and Hellen Masululi learned State Attorneys.

Arguing the appeal, Mr. Mluge submitted that, as the prosecution did not prove the charge of forgery, the appellant's conviction is based on weak evidence. As such, he argued, the first appellate court was wrong to uphold the conviction. He pointed out that, while none of the prosecution witnesses testified to have seen the appellant authoring **EXHIBIT P9**, both courts below capitalized on appellant's not objecting to its tendering in the evidence as acknowledgement to be the maker of **EXHIBIT P9** which is not the case.

Addressing the Court that **EXHIBIT P9** was picked by PW18 from the probate case file, the learned counsel submitted that, PW18 who tendered it at the trial fell short of telling the trial court as to who tendered that document in the probate cause 60/2008.

The learned counsel also faulted the trial magistrate who shifted onus of proof to the appellant having demanded that, he ought to have brought family members at the trial to disprove **EXHIBIT P9**. He argued this to be improper because the prosecution was duty bound to prove the charge of forgery against the appellant beyond reasonable doubt. The learned counsel further argued that, the totality of evidence shows that, the appellant was not present at the time of the sale in question by **DEVOTA SOKO**.

Ms. Mkunde Mshanga did not support the appeal. While conceding that on record there is no direct evidence linking the appellant with the forgery, she was however of the view that, the circumstantial evidence points to the guilt of the appellant, to have authored **EXHIBIT P9**. She submitted that, the appellant knew about the title deed after his visit to the Bank. Thereafter, he chaired the family meeting and prepared **EXHIBIT P9** and that is what made him not to object to it's being tendered in trial court as evidence. As such, she argued that the appellant accepted the contents of that document. She added that, the evidence of PW1, PW13 and **EXHIBIT P9** as corroborated by DW1 circumstantially link the appellant to have engineered the forgery regardless of the absence of the

evidence of the handwriting expert which she claimed not to be fatal. She relied on the case of **ALLEY ALLEY AND ANOTHER VS REPUBLIC, [1973] TLR 152** where the High Court upheld the conviction of the appellants on the strength of circumstantial evidence and in the absence of proof of the handwriting expert.

In a brief rejoinder, Mr. Mluge reiterated that, failure by the defence to object to the tendering of **EXHIBIT P9** at the trial, did not absolve the trial court from weighing such evidence and the prosecution in proving the offence of forgery against the appellant. He submitted that, since the handwriting of the appellant was not subjected to test and opinion of a handwriting expert, the prosecution fell short of proving that **EXHIBIT P9** was either signed or authored by the appellant. He concluded that, the appellant was not the beneficiary to the forgery but rather **DEVOTA SOKO,** as she was the one who used **EXHIBIT P9** to be appointed as administrator and ultimately sold the house in question in the absence of the appellant.

Having carefully considered the arguments for and against the appeal and the evidence on record we are alive to the fact that, this being a second appeal, it is trite law that the Court should rarely interfere with the concurrent findings of the lower courts on the facts unless it is shown

that there are misdirections and non-directions on the evidence by the first appellate court and the Court is entitled to look at the relevant evidence and make its own findings of fact (**DPP VS JAFFAR MFAUME KAWAWA (1981) TLR. 149** and **SEIF MOHAMED E.L ABADAN VS REPUBLIC,** Criminal Appeal No. 320 of 2009 and **EDSON SIMON MWOMBEKI VS REPUBLIC,** Criminal Appeal No. 96 of 2016 (both unreported).

We are as well aware of a salutary principle of law that a first appeal is in the form of rehearing. In this regard, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it and subjecting it to a critical scrutiny and if need be arrive at its own decision. (See **D. R. PANDYA v R (1957) EA 336** and **IDDI SHABAN @ AMASI vs. R,** Criminal Appeal No. 2006 (unreported).

In view of the above, the crucial issue to be determined in this appeal is whether there are any misdirections or non- directions on the evidence by the first appellate court warranting intervention by the Court.

At page 281 of the record of appeal, it was the appellant's grounds of complaint before the High Court that, the trial court did not properly evaluate the evidence as **EXHIBIT P9** was wrongly acted upon to convict

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the appellant. In this regard, we would have expected the High Court in this case, to have re-appraised the evidence in the determination of the appellant's appeal. Therefore, in the light of what we said in **DPP VS JAFFAR MFAUME KAWAWA** (supra), we shall look into the relevant evidence adduced at the trial to determine if it establishes the guilt of the appellant or otherwise.

As earlier stated, the conviction of the appellant which was upheld by the High Court basically hinges on the **EXHIBIT P9.** For ease of reference we have deemed it worthy to reproduce it as follows:

> ***"MUHTASARI WA KIKAO CHA WANAFAMILIA WA MAREHEMU AWADHI ALLY SHOO KILICHOFANYIKA TAREHE 25-3-2008 SINZA NYUMBANI KWA MAREHEMU.***
>
> | ***A. WALIOHUDHURIA*** | ***UHUSIANO*** |
> |---|---|
> | *1. Muhsin Kombo* | *Mjomba* |
> | *2. Devotha Soko* | *Mjomba* |
> | *3. Fatuma Shoo* | *Dada* |
> | *4. Juma Shoo* | *Mtoto* |
> | *5. Asha Shoo* | *Mtoto* |
> | *6. Shaban Karwani* | *Mjomba* |
> | *7. Hanta Fuime* | *Kaka.* |
>
> ***B.*** *Wajumbe kwa kauli moja walimchagua kuwa mwenyekiti Bw. Muhsin Kombo. Mwenyekiti alifungua kikao na kueleza kuwa agenda*

kuu ya kikao hicho ni kumchagua atakayekuwa msimamizi wa mirathi ya marehemu Awadh Ally Shoo, aliyefariki tarehe 24 Agosti, 1986.

Baada ya majadiliano ya muda mrefu wajumbe walimchagua kwa kauli moja na kumthibitisha ***DEVOTA SOKO,*** *kuwa msimamizi wa mirathi ya marehemu Awadh Ally Shoo.*

Wajumbe walimtaka aende Mahakamani kuomba uteuzi wa kuwa msimamizi wa hiyo mirathi.

C. *Vilevile hapakuwa na agenda nyingine zaidi ya hiyo mirathi, kikao kilifungwa mnano saa 12.40 jioni.*

.....(sgd)
Mwenyekiti
Nathibitisha kikao hicho kufanyika hapa Sinza.
Tarehe....."

The reproduced document contains the alleged forged minutes of the purported meeting convened on 25-3-2008 at the residence of the purported late Awadh Ally Shoo. In the said document, the appellant is alleged to have chaired the family meeting which nominated **DEVOTA SOKO** to process her appointment as Administratrix of the estate of Awadh Ally Shoo.

Having revisited the entire evidence, as correctly found by the first appellate court, from the outset, we wish to point out that, neither the 19

prosecution witnesses nor the co accused **DEVOTA SOKO** testified to have either seen the appellant authoring **EXHIBIT P9** or to have been found in possession of that document. At page 334 of the record, the first appellate court in concluding that the appeal is not merited stated as follows:

> *"From the above, I find the lower court had properly evaluated the evidence that was before it and that it was proper when it accorded exhibit P.9 with requisite evidential value hence satisfied that the prosecution case was proved beyond doubt against the appellant.."*

Therefore the question to be answered is whether **EXHIBIT P9** avails conclusive proof on the guilt of the appellant or otherwise.

The law on forgery is well settled. In terms of section 333 of the Penal Code **[CAP 16 R.E. 2002],** it is making of false document with intent to defraud or deceive. To prove the charge of forgery beyond any shadow of doubt, the prosecution had a duty to prove that: **EXHIBIT P9** was authored by the appellant; it was a false document and the appellant forged it with intent to deceive or defraud.

As earlier stated, since the appellant denied the charge, the prosecution in the first place ought to have proved that **EXHIBIT P9,** was authored by the appellant. The modes of proving forgery are spelt out

under sections 47, 49 and 79 of the Evidence Act [CAP 6 RE; 2002] and were discussed in **THE DPP VS SHIDA MANYAMA @ SELEMANI MABUBA, CRIMINAL APPEAL NO 285 OF 2012 (Unreported).** We wish to repeat what we said in that case as follows:

> *"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 section 75 which is unfortunately, rarely employed these days, 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."*

Where there is no handwriting proof, sufficient factors and circumstances from which to arrive at the inference that the accused forged the

document were stated in **CHOKWE v. R. (1969) E.A.** 23. The appellant had been charged and convicted of forging by altering the excess baggage receipt at the Nairobi International Airport where he was working as a station clerk. There was no direct proof that the alterations were made by the appellant, but there was no evidence that the ticket ever passed out of the appellant's hands from the time it was completed to the time it was handed to the cashier. In dismissing the appeal Farrel Ag. C.J. held at page 28:

> *"Enough has been said to show that the evidence on this count (i.e. forgery count) was far more than the evidence of mere opportunity, and even in the absence of any proof of the handwriting in which the alteration was made, we consider that the magistrate was fully justified in inferring from the circumstantial evidence that the forgeries assigned in the particulars of the count were committed by the appellant and that the purpose was to deceive or defraud."*

CHOKWE v. R. ***(supra)*** was relied upon in **Alley Alley** *(supra)* whereby there was no proof of handwriting but the trial magistrate

convicted the appellants. On first appeal the High Court made the following observation:

> *"It is certainly true for forgery as for any other offence that if the circumstantial evidence adduced is such that it cannot be explained on any other reasonable hypothesis than that the accused person is guilty because it leads irresistibly to that conclusion, then a conviction can properly be based on such evidence.* ***Therefore where opportunity is established and the document alleged to be forged was at all times in the possession of the accused not having passed through the hands of another person or persons, then in a proper case these would be sufficient factors and circumstances from which to arrive at the inference that the accused forged the document even without proof of the handwriting.***
>
> *[Emphasis supplied]*

Therefore, in **Alley Alley** (supra) the High Court dismissed the appeal holding as follows:

> *"But in this particular case I am in agreement with the conclusion reached by the learned trial magistrate that he could not draw the inference that the appellants forged the invoices. The fact of uttering*

*alone is not enough. **There was to be something more i.e. opportunity and possession of the document at all material times. In such circumstances forgery by the appellants could be inferred even without proof of handwriting".***

[Emphasis supplied]

In the light of the two cited cases, if it is proved that a forg document was at all times in the hands of the accused and not having passed through the hands of another person or persons, in a proper case, it would suffice to arrive at the inference that the accused forged the document even without proof of handwriting.

In view of the aforesaid, we shall be guided by the stated principles to determine whether or not the prosecution did establish the appellant's guilt.

In the matter under scrutiny, it is clear that **EXHIBIT P9** and the writings or signature of the appellant for undisclosed reasons were not subjected to test by the handwriting expert as required by section 47 of the Evidence Act. Apart from lacking the evidence of handwriting proof, taking into account that the appellant was an army officer, no sincere efforts were made be it by the prosecution or investigation to compare the

signature of the Chairman on **EXHIBIT P9** with the appellant's other signatures appended on the official documents he made or signed while in the employment of TPDF. Moreover, the trial court did not invoke section 75 of the Evidence Act to require the appellant to make writings in the presence of the court so that it could compare such writings with the signature appended on **EXHIBIT P9.**

In the absence of handwriting proof, whether or not there exist circumstances or sufficient factors linking the appellant with the forgery of **EXHIBIT P9,** the cases of **CHOKWE v. R.** *(supra)* **ALLEY ALLEY** *(supra)* become relevant. None of the prosecution witnesses testified to this effect and we are satisfied that, there is entirely no evidence that the appellant was at any time found in possession **EXHIBIT P9.** As such, the case of **Alley Alley** ***(supra)*** cited by Ms. Mshanga where the appellants were found in possession of the forged documents is distinguishable from the present appeal. In our considered view, **EXHIBIT P9** was constructively found in possession of **DEVOTA SOKO** who used it to be appointed as administratrix, retrieved the title deed in question from the bank, changed ownership and ultimately sold the house in deceit to PW2.

Furthermore, Ms. Mshanga, learned Senior State Attorney repeatedly submitted that, the appellant forged **EXHIBIT P9** following his visit to the Bank to inquire about the title deed in question as per evidence of PW1, PW13 as corroborated by the co accused **DEVOTA SOKO**. With respect, we found this submission most wanting because it is settled law that, although the law does not say that conviction on uncorroborated accomplice's evidence is illegal, it is still unsafe, as a matter of practice to uphold a conviction on the uncorroborated evidence of the co-accused (See **PASCAL KITIGWA VS REPUBLIC (1994) T.L.R 65n.).**

However, despite having the status of accomplice, as rightly submitted by the appellant's counsel, **DEVOTA SOKO** did not tender any documentation evidencing the disbursement of cash money be it to the appellant or other remaining payees. Her evidence that the documents she signed before advocate Mdamu were brought to her by the appellant was countered by the prosecution evidence in the following respect: **One,** PW1 categorically confirmed that she is the one who cleared the debt at the Bank and collected the title deed in question; **Two, EXHIBIT P4** which is the sale agreement of the house in question, **DEVOTA SOKO** signed the sale agreement having been identified by one **MOSES MBUA** to advocate

MLELWA and not advocate **MDAMU** as she claimed. Besides, it is not the appellant who introduced and identified her to advocate **MLELWA.** In a nutshell, the evidence of **DEVOTA SOKO** required corroboration and in our considered view, it cannot corroborate the evidence of PW1 and PW13.

Regarding the non-objection of tendering **EXHIBIT P9**, we agree with Mr. Mluge that its admission did not absolve the trial court from weighing such evidence before concluding that it established the guilt of the appellant. We say so because admissibility cannot be challenged at this stage as it was not raised at the trial. Therefore, both the trial court and the prosecution were deprived of the opportunity to consider whatever objection the appellant may have had in terms of section 169 (2) of the Criminal Procedure Act. But certainly, the admissibility is one thing which is the domain of the trial court. The weight to be attached to the admitted exhibit is another. When it comes to evaluating the weight of any evidence properly on record, an appellate court is in just as good position as the trial court (See **NYERERE NYAGUE VS REPUBLIC, Criminal Appeal No. 67 of 2010** (unreported).

In the present case, as earlier stated, both the trial court and the first appellate court did not accord proper weight to **EXHIBIT P9** which in

any case did not add value to the prosecution case as against the appellant who was neither seen authoring exhibit P9 nor found in its possession at any time.

In view of the aforesaid, there was a serious misdirection and non direction of evaluating the evidence by the first appellate court in upholding the conviction of the appellant. We are satisfied that, the charge of forgery was not proved against the appellant and the appeal is merited.

We accordingly allow the appeal quash conviction and set aside the sentence.

DATED at **DAR-ES-SALAAM** this 4th day of May, 2017.

S. MJASIRI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S. MWANGESI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL