IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MWARIJA, J.A., WAMBALI, J.A., And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 86 OF 2017

BAKARI MWALIMU @ JEMBE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Aboud, J.)

Dated the 4th day of August, 2017
in
Criminal Appeal No. 21 of 2017

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JUDGMENT OF THE COURT

16th & 25th September, 2019.

MWARIJA, J. A.:

The appellant, Bakari Mwalimu @ Jembe and six other persons (the co-accused persons) were charged in the District Court of Korogwe with twelve counts under the Penal Code [Cap. 16 R.E. 2002] (the Penal Code). In the 1st count, they were charged with the offence of attempt to commit an offence contrary to section 381 of the Penal Code. It was alleged that on 24/12/2012 at National Microfinance Bank (NMB), Korogwe branch (hereinafter "the Bank") within Korogwe district in Tanga region, they attempted to commit the offence of stealing.

In the other seven counts, the 2nd to 8th counts, they were charged with the offence of making false document contrary to sections 333, 335 and 337 of the Penal Code. It was alleged that between 21/9/2012 and 24/12/2014 within Korogwe district, with intent to deceive, the appellant and the co-accused persons introduced false information into cheque leafs No. 000091 and 000096 to show that the same were issued by Korogwe District Council (the District Council) to Jembe Wood Works for payment of Tzs. 41,514,525.00 and Tzs. 37,953,430.00 respectively.

It was alleged further in the 3rd and 7th counts that they made false payment vouchers No. 1194 and 1190 purporting to show that the same were issued by the District Council to Jembe Wood Works for payment of the respective amounts stated above. In the 4th, 5th and 8th counts, it is alleged that they made false fund transfer requests showing that the same were prepared and issued by the District Council for transfer of the said amounts of Tzs. 41,514,425.00 and Tzs. 37,953,430.00 from the District Council's account No. 4151000065 to Jembe Wood Works account No. 41710000110.

The appellant and the co-accused persons were also charged in the 9th – 11th counts with the offence of uttering a false document contrary to sections 342 and 337 of the Penal Code. The particulars of the offence are

that on 21/12/2012 and 24/12/2012 at the Bank, they uttered to one Germanus Kasoni, the official of that bank, false payment vouchers No. 1194 and 1190, false cheque lists dated 20/12/2013 and false cheque leafs No. 000091 and 000096 for Tzs. 41,514,425.00 and Tzs. 37,953,430.00 respectively purported to have been issued by the District Council for payment to Jembe Wood Works.

Whereas the appellant's co-accused persons were in addition, jointly charged in the 12th and 13th counts with the offence of stealing by person employed in the public service contrary to section 270 of the Penal Code, the appellant was separately charged with the offence of receiving stolen property contrary to section 311 of the Penal Code. It was alleged that the co-accused persons, being the employees of the District Council, on 12/9/2012 and 2/10/2012, stole one cheque leafs No. 000091 and No. 000096 valued at Tzs. 41,514,425.00 and Tzs. 37,953,430.00 respectively, the property of their employer. On the part of the appellant, it was alleged in the 14th count, that he received the said cheque leafs while he knew that the same were unlawfully obtained from the District Council.

The appellant and the co-accused persons denied the respective counts and as a result, the prosecution called a total of 15 witnesses to testify. At the close of the prosecution case, the trial court found that the

4th accused person, Redempta Fredrick Mfuruki had no case to answer and therefore acquitted her. The rest were found to have a case to answer and proceeded to give their defence. The appellant relied on his own evidence in defence. He did not call any witness to support his evidence.

After a full trial, the trial court was not satisfied with the evidence adduced in support of all the charges against the appellant's co-accused persons who made their defence at the trial (the 2nd, 3rd, 5th and 6th accused persons). They were thus found not guilty and were consequently acquitted. On his part, the appellant was also found not guilty of all the counts with which he was jointly charged with the acquitted persons, that is, the 2nd – 8th counts. He was however found guilty of the 1st, 9th, 10th and 11th counts. Following his conviction, he was sentenced to three years imprisonment in the 1st count and seven years in each of the other counts (9th – 11th counts). The sentences in the 9th – 11th counts were ordered to run concurrently whereas the sentence of three years was to run consecutively with the sentence in the 9th – 11th counts.

Aggrieved by the decision of the trial court, he appealed to the High Court. Save for variation of the sentence, his appeal against conviction was unsuccessful. The High Court varied the sentence in the first count from imprisonment term of three years to two years. It also ordered the

sentence meted out in the first count and the 9th – 11th counts to run concurrently hence varying the order of the trial court ordering the concurrent sentences of seven years to run consecutively with the varied sentence of three years in the 1st count.

With that background, we find it instructive that, before we proceed to consider the appeal, we should state the brief facts giving rise to the appeal. The facts leading to the arrest and prosecution of the appellant and his co-accused started with the incident which occurred on 21/12/2012. On the date, one John Richard @ Ntulwe, an employee of the District Council, who was the 6th accused at the trial, went to the Bank and presented a cheque list consisting of the cheques issued by the District Council for payment to its creditors. They included the cheques which were the subject of the charges against the appellant and the co-accused persons i.e. cheques No. 000091 of Tzs. 41,514,425.00 and No. 000096 of Tzs. 37,955,553,430.00 payable to Jembe Wood Work, bank account No. 41510000565.

On 24/12/2012, the appellant went with the two cheques and presented them to one Germanus Kasoni (PW4) who was at the material time the Bank's official working as a teller. PW4 noticed that the cheques were not accompanied with payment vouchers and therefore referred the

matter to his immediate boss, one Olivo Tossi (PW5), the Bank's Customer Service Manager who advised the appellant to submit the requisite payment vouchers.

A short moment later, the appellant went back to the Bank and presented the cheques accompanied by payment vouchers. The same were formerly received by PW4 who stamped and submitted them to PW5 to continue with payment procedures. Upon examination however, PW5 doubted the genuineness of the cheques and payment vouchers which showed that they were issued by the District Council for payment of office consumables supplied to it by Jembe Wood Works. He discovered that the last four original printed numbers of the payment vouchers were cancelled and substituted with different handwritten numbers.

He thereupon communicated with the office of the Executive Director of the District Council and inquired whether the cheques and vouchers were signed by the authorized signatory, one Faraja Mlaiga. The said officer, who was the 2nd accused person at the trial, denied having signed the cheques and the vouchers. The incident triggered police investigations, the result of which, the appellant and the acquitted persons were charged as described above.

As stated above, the prosecution relied on the evidence of 15 witnesses. Both the trial court and the first appellate court were satisfied that the evidence sufficiently proved that the checklist, the payment vouchers and the two cheques were forged documents. That finding was based on the evidence of among others, PW3, PW5 and PW6. In his evidence, PW5 testified on how he came to discover that the payment vouchers were forged. He said that, he discovered so because whereas the original printed number of the voucher for Tzs. 41,514,425.00 is 001002, the numbers were altered by cancelling the last four numbers and substituted with 1190 so as to read 001190 and the voucher for Tzs. 37,953,430.00, the last four figures of the original printed number 001002 were cancelled and substituted for numbers 0090 so as to also read 001190.

With regard to the cheque list, Omari Bakari Nguluko (PW3) who was an Accountant at the time of the incident and whose functions included preparations of payment vouchers, testified that he did not sign the payment vouchers involved in this case. He supported the evidence of PW5, that the vouchers were actually forged by tempering with their original printed numbers.

The finding that the cheque leafs were also forged was based *inter alia*, on the evidence of Suzana Japhet Mwita (PW6) who was at the material time employed by the District Council as an Accountant. Her evidence was to the effect that the cheque leafs which were presented to the Bank were stolen from the District Council. She averred that the relevant cheque book from which the cheque leafs originated, shows that the same were cancelled but the same were not left intact in the book. They were removed from the book.

Another piece of evidence which was relied upon by the prosecution to prove that the payment vouchers were forged came from Flora Materu, (PW7) who was also an employee of the District Council in the capacity of Assistant Accountant working in the pre-audit section. Her evidence supported the testimony of PW5. She confirmed that the payment vouchers were forged because the same were not issued by her office.

In his defence, the appellant did not deny that he presented the cheques and the vouchers in question to the Bank. He however disputed that he did so with the intention of defrauding any person. It was his defence that he did not have the knowledge that both the cheques and the vouchers were forged. According to his evidence, he was approached by two persons who were his friends, Hamisi Golola and Hassan Saidi in

the company of two employees of the District Council and requested him to allow them to channel their payments through his bank account. He said that his friends promised him a commission of 20% of the value of the cheques as consideration for the use of his bank account. He accepted the offer and the said officials of the District Council, who were not known to him, gave him the fund transfer forms which he presented to the Bank together with the cheques and the payment vouchers. As it later turned out however, he went on to state, the documents were false. As a result, he was charged, convicted and sentenced as shown above.

Aggrieved further, the appellant has preferred this second appeal raising the following seven grounds of his dissatisfaction:-

> *"1. That, both the trial magistrate and the appellate Judge erred in law and in fact by convicting the appellant with the offence of making false document whilst the evidence of PW4, (GERMANUS KASLI @ KASONI) reveals that the 6th accused (JOHN RICHARD @ NTULWE) was the one who presented the cheque list.*
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> *2. That, both the trial Magistrate and the Appellate Judge erred in law and in fact by failing to evaluate that it is impossible for unemployed of Korogwe District Council to have access to the cheque.*

3. That, both the trial Magistrate and the Appellate Judge erroneously by ignored the evidence of forensic report (handwriting expert) against the 2nd and 3rd accused.

4. That, both the trial Magistrate and the Appellate Judge erred in law and in fact by failing to consider the evidence of prosecution witnesses which indicates that the Korogwe District Council employees were acting in consent to commit the alleged crime.

5. That, both the trial Magistrate and the Appellate Judge erred in law and in fact by failing to give due consideration to the defence of the appellant.

6. That, both the trial Magistrate and the Appellate Judge erred in law and in fact by failing to notice that the maximum sentence imposed to the appellant is manifestly excessive.

7. That, both the trial Magistrate and the Appellate Judge erred in law and in fact by failing to notice that the prosecution did not prove its case to the standard required by the law."

At the hearing of the appeal, the appellant appeared in person, unrepresented. On its part, the respondent Republic was represented by Mr. Waziri Mbwana Magumbo, learned State Attorney. The appellant, who

had filed his written submission in support of his grounds of appeal, adopted the same and opted to hear first, the learned State Attorney's reply and thereafter make a rejoinder if the need to do so would arise.

Before he proceeded to make a reply, Mr. Magumbo responded to the question put to him by the Court regarding the status of the notices of intention to appeal lodged in the High Court against the acquittal of the 4th appellant on the finding that the prosecution had failed to establish a *prima facie* case against her and the notice against the judgment of the trial court regarding the acquittal of the 2nd, 3rd 5th and 6th accused persons. He informed the Court that the notices were abandoned and as such, the Republic did not file any petitions of appeal against both decisions.

In his submission in response to the appeal, Mr. Magumbo argued together the 1st, 2nd, 3rd, 4th, 5th and 7th grounds of appeal. He contended that, from the evidence, the appellant knew that the documents which he presented to PW4 were false. This, he said, is because according to his defence, the appellant allowed his friends to use his bank account on agreement that he would be paid 20% of the amount of the money intended to be transferred from the District Council account No. 4151000065 to the account of the appellant company (Jembe Wood

Works), No. 41710000110. Relying on the case of **Bakari Mwalimu Jembe vs. The Republic**, Criminal Appeal No. 278 of 2017 (unreported) cited by the appellant in his written submission, Mr. Magumbo submitted that the prosecution evidence proved the offence against the appellant. In that case, the Court restated matters which must be proved so as to hold a person liable to the offence of uttering false document, which include having knowledge that the document is false. The learned counsel stressed that in this case, the prosecution proved firstly, that the documents were forged, secondly that the appellant knew that the same were forged and thirdly that he uttered them with intent to defraud.

On the 6th ground challenging the sentence which was imposed on the appellant, the learned State Attorney argued that the sentence passed by the trial court in the 9th – 11th counts was not illegal because the same was metted out by a Senior Resident Magistrate. He submitted further that in sentencing, the learned Senior Resident Magistrate took into consideration the mitigating factors raised by the appellant.

In rejoinder, the appellant reiterated his defence that he did not participate in the preparation of the documents involved in the transaction that led to the offences charged against him. He said that, he merely allowed his friends and the officials of the District Council to use his

account to effect the payment of his friends' cheques on consideration of 20% of the value of the cheques.

We have duly considered the submissions made by the appellant in both his written and oral submission as well as the respondent's reply submission. We wish to point out at the outset that the 1st and 3rd grounds of appeal were misconceived. The appellant was not convicted of the offence of making false document. We therefore find those grounds of appeal to be superfluous.

On the remaining grounds, in his written submission, the appellant challenged the judgment of the High Court contending that, had the learned first appellate Judge scrutinized the evidence properly, she would have found that the appellant could not have committed the offences charged because he was not an employee of the District Council and could not therefore have been able to access the documents involved in the offence. He complained that, because he did not know how the payment vouchers, the cheques and the checklist were obtained, he was wrongly convicted because he only joined the process midway without a prior knowledge that it involved illegal dealings. He stressed that his intention was to assist his friends who requested him to allow them to channel the payment of their cheques through his bank account. Relying on a previous

case in which he was charged with similar counts, the case of **Mwalimu Jembe vs. The Republic** (*supra*), the appellant argued that in that case, he was acquitted on the ground that the prosecution had failed to prove that he had knowledge that the involved cheque was forged. In that case, the Court held as follows:-

> *"In the matter under our consideration, although it was established that the cheque was forged, it was far from being established that it was the appellant who uttered the cheque to the Bank, let alone the fact that there was no material to impute that the appellant was aware of the forgery."*

The position in the case at hand is however, different. As can be discerned from the evidence, it is not disputed, firstly, that the documents were forged and secondly, that the appellant uttered them to the Bank. His main contention is that he was not aware that the same were forged. In the cited case, the allegation that the appellant uttered forged document was not proved. The prosecution case largely depended on the evidence of a cautioned statement which was expunged after being found to have been improperly admitted in evidence contrary to section 50(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA). Having expunged that statement the Court had this to say:-

"Admittedly, having done so, all what remained of the case for the prosecution are mere skeletal allegations which do not in any way point the guilty of the appellant."

In the case at hand, after having considered the appellant's defence that he did not know that the documents which he uttered to the Bank were false, like the learned trial Resident Magistrate, the learned first appellate Judge was satisfied that, according to the evidence, the appellant had that knowledge. The learned Judge observed as follows in her judgment at page 400 of the records of appeal:-

"In my view it (sic) defence is baseless because he knew from the beginning, that what he was doing was illegal by accepting his account to be used for payment while he had knowledge that had no authority to do so. Secondly, he did not bother to tell the police during investigation the address of the people who gave him the cheques and payment vouchers if it was true as he alleges."

We agree with the reasoning of the learned first appellate Judge and wish to add that the appellant's act of presenting the cheques and vouchers depicting that he supplied goods to the District Council while he did not do

so, shows that he knew that he intended to reap what he did not sow. He wanted to steal from the District Council.

In his written submission, the appellant complains that the perpetrators of the crime were set free while he was convicted of the offences he did not commit. That complaint is in our view, unfounded because he was also acquitted of the offences with which he was jointly charged with his co-accused persons. That was done because of lack of sufficient evidence to convict them. As elucidated above, his conviction on the 1st, 9th, 10th and 11th counts was based firstly, on undisputed evidence that he uttered false documents to the Bank and secondly, that the act was done with intent to defraud. His conviction on the 1st, 9th – 11th counts was therefore well founded. The 2nd, 4th, 5th and 7th grounds are therefore devoid of merit. The same are hereby dismissed.

Concerning the sentence, admittedly the punishment for the 9th – 11th counts was the maximum provided by the law. Since however, it was metted out by a Senior Resident Magistrate, under the proviso to section 170(2) of the CPA, the same was not illegal. Section 170(1) (a) and the proviso to section 170(2) provides as follows:-

"170. – (1) A subordinate court may, in the cases in which such sentences are authorized by law, pass any of the following sentences-

(a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment.

(b) N/A

(c) N/A

(2) Notwithstanding the provisions of subsection (1) –

(a) N/A

(b) N/A

(c) N/A

Provided that the section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank."

In sentencing the appellant, the trial court took into consideration the factors raised in mitigation. It found that the appellant deserved the metted out sentence. On our part, like the first appellate Judge, we do not find any pressing reasons to interfere with the sentence which was

awarded by the trial court. The 6th ground of appeal is also devoid of merit. It is similarly hereby dismissed.

For the foregoing reasons, the appeal fails. The same is hereby dismissed in its entirely.

DATED at **TANGA** this 24th day of September, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL