IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 3 OF 2015

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

1. BAHATI JOHN MAHENGE
2. MANASE HEZEKIA MWAKALE } **..... RESPONDENTS**
3. EDDAH NKOMA MWAKALE

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

(Shangwa, J.)

Dated the 6th day of October, 2014
in

Criminal Appeal No. 114 of 2013

JUDGMENT OF THE COURT

21th July & 16th September, 2020

LEVIRA, J.A.:

The appellant, the DIRECTOR OF PUBLIC PROSECUTIONS (the DPP) was a loser in Criminal Appeal No. 114 of 2013 before the High Court (Shangwa, J.) following the decision delivered on 6th October, 2014. In the said appeal, the respondents herein, Bahati John Mahenge, Manase Hezekia Mwakale and Edda Nkoma Mwakale who were the first, second and fifth accused respectively appealed against

the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu (the trial court) of 27th September, 2013 in Criminal Case No. 1158 of 2008.

Before the trial court the respondents together with other two people who are not parties to this appeal were charged on various counts; as follows: The **first count,** conspiracy to commit an offence contrary to section 384, **second count,** forgery contrary to sections 333, 335 (d) (i) and (ii) and 337; **fourth, fifth** and **sixth counts** respectively, obtaining registration by false pretense contrary to section 309 and two forgery offences contrary to sections 333, 335 (d) (i) and (ii) and 337; **eighth count,** stealing contrary to sections 258 and 265; and the **ninth count** was on obtaining credit by false pretense contrary to section 305 (1), all sections are of the Penal Code, Cap 16 R.E 2002.

At the same time only the first accused (first respondent herein) was faced with the third and seventh counts which are: The **third count,** making false statement in a statutory declaration required for purposes of section 16 of the Companies Act, Cap 212 contrary to section 335 of the Companies Act, Cap 212 and **seventh count**,

uttering false documents contrary to section 342 of the Penal Code, Cap 16 R.E 2002.

Upon full trial, the trial court acquitted all the five accused persons in respect of the eighth and ninth counts. The first and second accused persons (first and second respondents herein) were convicted and sentenced to five years imprisonment in respect of the first count; to seven years in jail on the second count; on the fourth count they were convicted and sentenced to one year in prison and each to pay back half of Tshs.1,086,534,303.72 to the Government; and on the sixth count they were convicted and sentenced to eighteen months in jail.

The first accused was also convicted and sentenced to a term of seven and five years imprisonment in respect of the third and seventh counts respectively. Furthermore, the first, second and fifth accused persons were convicted and sentenced to eighteen months in jail in respect of the fifth count. The respective custodial sentences imposed on the accused persons were ordered to run concurrently. It is noteworthy that, the third and fourth accused persons were acquitted by the trial court in respect of all counts that faced them.

Aggrieved by the decision of the trial court, the first, second and fifth accused persons (the first, second and third respondents herein) successfully appealed to the High Court as introduced hereinabove; hence, the current appeal by the DPP.

A brief background of this case is to the effect that, the prosecution alleged that between 23rd December, 2003 and 26th October, 2005 the respondents herein and other people who are not parties to this appeal agreed to steal money from the Bank of Tanzania (the BOT). In order to carry out that purpose, the first respondent signed a Memorandum and Articles of Association (the MAA) in compliance with the requirements for registration of a company by using the name of SAMSON MAPUNDA, allegedly, a fictitious name. Following the information supplied in the MAA, Changanyikeni Residential Complex Limited (the CRCL) was registered on 23rd December, 2003 by the Registrar of Companies who issued a Certificate of Incorporation, No. 47792. It was further alleged that on the same date, the first respondent signed CRDB specimen signature card, CRDB General Terms and Conditions form and CRDB Account opening form in the said name of SAMSON MAPUNDA and submitted them to

Kijitonyama CRDB Branch where Account No. 01J1013377401 for the CRCL was opened.

On 31st August, 2005 the first respondent signed a Deed of Assignment in the said name of SAMSON MAPUNGA which showed to have been executed between CRCL of Tanzania and MARUBENI CORPORATION of Japan. According to the said Deed, MARUBENI CORPORATION had purportedly assigned a debt of Japanese Yen 116, 926, 472 equivalent to Tshs. 1,186,534,303.72/= to CRCL. Subsequently, the said Deed of Assignment was presented to the BOT with a request for payment of that amount. The BOT internal procedures were followed and on 26th October, 2005 the account of CRCL was credited with the above stated amount of money. The said money was subsequently withdrawn by the first respondent and other co-accused by cheques and sometimes in cash which they distributed among themselves. As it turned out, the first respondent and his colleagues were arrested and charged as earlier on indicated. They denied all the charges. To prove the case against them, the prosecution called a total of eight witnesses and tendered sixteen exhibits. The defence side summoned eight witnesses. The probative

value and contents of the evidence adduced by witnesses of both sides; and the exhibits will be examined in the judgment as we resolve the issues herein. For the purpose of this background it suffices to state that, after the full trial, the respondents were convicted and sentenced accordingly as intimated above.

In this appeal, the appellant has raised six grounds of appeal challenging the decision of the High Court as follows:-

1. *That the Honourable Judge grossly erred in law by acquitting the respondents of all counts they were convicted of;*

2. *That the Honourable Judge erred in law and facts in finding that, there was no evidence to prove conspiracy;*

3. *That the Honourable Judge erred in law by taking into account extraneous matters hence arrived at a wrong conclusion that the 1st and 2nd respondents were not quilty for forging the Memorandum and Articles of Association of Changanyikeni Residential Complex Ltd;*

4. *That the Honourable Judge erred in law in holding that the name **SAMSON MAPUNGA** used by the first respondent is not fictitious;*

5. *That the Honourable Judge erred in law in holding that, the trial Court's reliance on the 1st respondent's cautioned statement (exhibit P7) was improper; and*

6. *That the Honourable Judge erred in law in setting aside the order by the trial Court which required the 1st and 2nd Respondents to make refund to the Government of Tanzania the sum of Tanzania Shillings One Billion, Eighty Six Million, Five Hundred Thirty Four Thousand, Three Hundred and Three and Twenty seven cents (Tshs.1,086,534,303/27).*

At the hearing of this appeal, the appellant was represented by Mr. Shedrack Martin Kimaro, learned Principal State Attorney assisted by Mr. Adolph Chundu Ulaya, learned State Attorney. The respondents had the services of Mr. Deogratias Lyimo Kiritta, learned advocate. Before commencement of the hearing, Mr. Kimaro made a prayer under Rule 77(4) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to withdraw the appeal against the third respondent on account that, she

had already served and completed her sentence. His prayer was not objected by Mr. Kiritta. On our part, we acceded to the prayer. As a result, the appeal against the third respondent was marked withdrawn in terms of Rule 77(4) of the Rules.

Mr. Kimaro abandoned the second ground of appeal. He consolidated the first and third grounds of appeal and argued other grounds separately. In his submission, he preferred to start with the fourth ground of appeal in the list in the memorandum of appeal. He submitted that, the first appellate judge erred in law to hold that, the name SAMSON MAPUNDA which was said to be of the first respondent was not a fictitious name. He argued, it was wrong for the judge to base his decision on an example of someone he knew from Muleba District in Kagera Region, whose name is Ishengoma Mjune Peter but he uses the name of Shabani Bora in his business transactions to conclude that, SAMSON MAPUNDA was not a fictitious name of the first respondent.

To bolster his argument that SAMSON MAPUNDA was a fictitious name, he referred us to page 89 of the supplementary record of appeal where the profile of project sponsors of CRCL is provided. In the said

profile, the name of the first respondent appeared as SAMSON MAPUNDA and he is among the Directors of the said company, holding 40% of the shares. Other information provided therein includes him being aged 49 years, a resident of Changanyikeni area in Dar es Salaam, the owner of five acres of land sold to Ms. CRCL and that, he is an Engineer cum Businessman.

Mr. Kimaro challenged the above profile while comparing it with the first respondent's particulars provided for in the said company's MAA and those in the Certificate of Incorporation found from pages 260 to 293 of the record of appeal. The said documents show that, the first respondent owns only one share in the CRCL contrary to what is provided for in the project profile. Thus, the learned counsel argued, it is not true that SAMSON MAPUNDA had 40% shares.

Another thing indicating that the first respondent was giving false information according to Mr. Kimaro is the MAA itself, where the first respondent signed while knowing that the information contained therein was not correct. As such, he said, it was a forged document.

For more comparison, the learned Principal State Attorney took us through the first respondent's cautioned statement (Exhibit P7) found from pages 247 to 258 of the record of appeal. It was his argument that the first respondent introduced himself as Bahati John Mahenge, as well as, SAMSON MAPUNDA. However, he indicated that by then he was 33 years old, an entrepreneur living in Ubungo NHC different form what is found in the Company's project profile. He added that, at page 251 of the record of appeal, the first respondent stated categorically that: *"BREA ndiye aliyeniambia nitumie jina la SAMSON MAPUNDA."* Meaning that, he was instructed by BREA to use the name SAMSON MAPUNDA. According to the learned Principal State Attorney, this proves that, the said name was not of the first respondent and hence, fictitious.

Another document which was referred to us by Mr. Kimaro to show that the first respondent is not called SAMSON MAPUNDA is his birth certificate (Exhibit P8) which shows that, his name is Bahati John Mitili Mahenge, born on 5th September, 1975. The information found in the certificate, he said, is contrary to what is provided in the company's profile.

Also the learned Principal State Attorney argued that, the first respondent's level of education stated in the cautioned statement (exhibit P7) is VETA certificate, while in the profile of the company's project, it is stated that he is an Engineer. He added that, the said variance meant nothing, but a proof that SAMSON MAPUNDA is a fictitious name used by the first respondent.

Another argument by Mr. Kimaro was that the first respondent failed to state the location of the company (the CRCL) which he alleged to be one of the Directors when asked in his cautioned statement. Apart from that, he argued further that, the first respondent stated in his statement that the signature he was using in cheques of the CRCL was not his.

In totality, the learned Principal State Attorney submitted that, the name SAMSON MAPUNDA appearing in all documents referred to was not of the first respondent. As such, he said, it was wrong for the High Court Judge to just look at the name as it was without considering the evidence in its totality. He submitted further that, the Judge ought to have connected that name with other facts on evidence. He cited the case of **Ntavoba & Another v. Republic** [1976 – 1985] E.A. 433

while insisting that, in Criminal justice, evidence should be considered in its totality. Thus, he concluded his submission by stating that, had the High Court Judge considered the whole evidence, he could have realized that SAMSON MAPUNDA was a fictitious name used by the first respondent to commit offences.

Submitting on both the first and third grounds of appeal, Mr. Kimaro argued that, the High Court erred in law by acquitting the first and second respondents from all counts they had been convicted of. However, in the cause of his submission, he supported the acquittal of the said respondents in respect of the first, third and fifth counts. Regarding the first count, he submitted that the prosecution failed to prove that the respondents had conspired with other unknown persons to commit an offence of stealing money from the BOT. He added that, the law cited in the third count was a dead law so the High Court was justified to acquit the respondents of that count. As far as the fifth count is concerned, Mr. Kimaro submitted that, the said count was duplex because the particulars of the offence referred to a number of documents alleged to be forged by the respondents; which he said, were supposed to be charged in separate counts. For these reasons, he

submitted, the High Court rightly acquitted the respondents of the said three counts.

In regard to the remaining counts, the learned Principal State Attorney argued seriatim that the High Court erred by acquitting the respondents of those counts. It was his submission on the second count that, the respondents with intent to defraud, forged the MAA of CRCL purporting to show that it was signed by one SAMSON MAPUNDA, an assumed Director of the said company as intimated earlier. According to him, the said document was not genuine and the second respondent was the one who directed the first respondent to open that company. This fact, he said, is found in Exhibit P7. However, he added that, since the first respondent was a co-accused, his evidence against the second respondent needed corroboration which he said, was corroborated by an expert opinion from the Forensic Bureau (Exhibit P14). He said, Exhibit P14 showed that the second respondent was the one who was signing cheques of the CRCL Company, which he was not involved in opening it. Mr. Kimaro referred to Exhibit P7 where the first respondent stated that, he was helped by the second respondent to open the Bank account and when withdrawing money he used to give

him the same. In the circumstances, it was the argument of the learned Principal State Attorney that, the first and second respondents had a common intention to commit forgery.

While concluding on this count, Mr. Kimaro stated that, there was no problem for the first respondent to call himself SAMSON MAPUNDA. But, according to him, the problem was with regard to the number of shares (40%) which he said he owned, and the fact that almost all the documents were being signed by the second respondent. This, he concluded, implies that the name SAMSON MAPUNDA was a fictitious name and therefore, the MAA of CRCL was a forged document.

Regarding the fourth count, the learned Principal State attorney submitted that the respondents were wrongly acquitted of this count because the first respondent made a false declaration to obtain registration of the CRCL as he purported to be a Director of the said company as per the Registration file (with BRELA) of the CRCL No. 47792 (Exhibit P15).

The learned Principal State Attorney submitted in respect of the sixth count to the effect that, the first respondent forged a Deed of

Assignment between MARUBENI CORPORATION OF JAPAN and the CRCL of Tanzania purporting to show that, it was signed by SAMSON MAPUNDA, a purported Director of the said company. To the contrary, he added, Exhibit P7 revealed that the first respondent denied the existence of the said company as he said in that statement that: *"Kampuni ya mfukoni".* Meaning, it was a pocket company. Besides, he said therein that he was directed on how to sign it. According to him, those false features rendered the Deed of Assignment a forged document. Thus, the High Court judge was not justified to acquit the respondents on that count, although he admitted that the prosecution had no independent evidence concerning the second respondent on that count. However, he relied on the mere fact that the second respondent assisted the first respondent in opening the bank account. Eventually, the learned Principal State Attorney changed his stance and submitted that only the first respondent is liable on this count. Therefore, the High court rightly acquitted the second respondent of it.

The Principal State Attorney's submission in regard to the seventh count was just the same as on the sixth count that the first respondent signed the Deed of Assignment and letters to the BOT Governor

purporting to be a Director of CRCL, thus the High Court erred in setting him free on the respective counts.

Submitting on the fifth ground of appeal, the learned counsel stated that the High Court erred in holding that the trial court over relied on the first respondent's cautioned statement (Exhibit P7) in its decision. The learned Principal State Attorney for the appellant argued that, it was proper for the trial court to rely much on the said exhibit because it contained detailed information on how the respondents committed the offences they were charged with. Besides, he said, the said exhibit was properly admitted in evidence so it was proper for the trial court to rely on it. He cited the case of **Michael Mgowele and Another v. Republic,** Criminal Appeal No. 205 of 2017 (unreported) where the Court stated that, there are several ways in which a court can determine whether what is contained in a statement is true. In particular, the learned Principal State Attorney said, is when the confession leads to the discovery of other incriminating evidence as in the case at hand where Exhibit P7 reveals all the steps from the registration of the CRCL, the purpose of registering it and the people who were involved.

In regard to the sixth ground of appeal, Mr. Kimaro argued that the High Court Judge erred in law in setting aside the order by the trial court which required the first and second respondents to make refund to the Government of Tanzania the sum of Tanzania Shillings One Billion, Eighty Six Million, Five Hundred Thirty Four Thousand, Three Hundred and Three and Twenty Seven Cents (Tshs.1,086,534,303.27). He argued further that, although the first and second respondents were not convicted of theft, the order for refund of money was proper because they presented documents to the BOT and the money was deposited in the CRCL account as per the Bank statement (Exhibit P16) which showed transfer of the said funds.

Mr. Kimaro contended that, the High Court ought to have found that the charges against the first and second respondents were proved to the required standard and in terms of section 358(1) of the Criminal Procedure Act, Cap 20 R.E 2002 the order to refund the money was proper. He urged us to find so, allow the appeal and restore the refund order made by the trial court.

In reply, Mr. Kiritta, commenced his submission by opposing the appeal. Arguing on the fourth ground of appeal regarding the name

SAMSON MAPUNDA, he stated that it also belongs to the first respondent as it was proved by the evidence of Kyioumi Njelembula (DW3) and Janeth Mtani (DW4), the parents of the said respondent.

He added that, when the first respondent was recording his statement (Exhibit P7) he identified himself as Bahati John Mahenge or SAMSON MAPUNDA and this evidence was not challenged during the trial. He argued that the trial court did not say that the evidence of DW3 and DW4 was not a truthful evidence, but it only said those witnesses wanted to hide something. He insisted that the name SAMSON MAPUNDA was not a fictitious name as claimed by the appellant. It was the real name of the first respondent which he used in registering the CRCL. Moreover, he argued, the appellant did not call any witness or tender any document during trial to prove that, the name SAMSON MAPUNDA was a fictitious name used by the first respondent. Instead, he said, all the documents tendered by the Republic during trial, to wit, the MAA, Company Registration forms and all correspondents with the BOT showed the name SAMSON MAPUNDA which the first respondent did not deny to be his. However, he indicated that the mere fact that the first respondent stated in his

cautioned statement (Exhibit P7) that he was asked by BREA to use the said name, does not imply that SAMSON MAPUNDA is a fictitious name. After all, he said, Exhibit P7 was involuntarily obtained and retracted during trial, so it has to be given lesser weight. The learned counsel urged us to find that SAMSON MAPUNDA was not a fictitious name.

Submitting on the first and third grounds of appeal, on the second count, Mr. Kiritta supported the findings of the High Court that the first and second respondents did not forge the MAA. He opposed the appellant's argument that, the said document was forged only because of the name SAMSON MAPUNDA appearing on the said document. According to him, the MAA was not a forged document. In addition, he argued that Exhibit P7 which was relied by the appellant as a proof of forgery was retracted, so whatever evidence contained therein needed corroboration which was not the case. Therefore, he contended that, the said exhibit cannot as well be used to implicate the second respondent on the alleged forgery. He also argued that the expert report on hand writing (Exhibit P14) relied upon by the appellant to compare the signature appearing on the MAA and cheques in connection with what is stated in Exhibit P7 cannot be used to hold the

second respondent liable. He insisted that Exhibit P7 was a statement of a co-accused which needed corroboration and the second respondent did not sign the MAA. To drive this point home, he said, even the said expert report needed corroboration, so it could not corroborate the evidence in Exhibit P7.

Regarding the third count, the learned counsel stated that since he had already shown that SAMSON MAPUNDA was the genuine name of the first respondent, there was no way the offence of making false statement in a statutory declaration and the rest of the counts (four and six) could stand. He argued further that the alleged forged Deed of Assignment in the sixth count, was not forged. Instead, it was a document prepared for transfer of debt from MARUBENI CORPORATION of Japan to the CRCL. The said Deed was signed and submitted to the BOT and PW6 stated that, it was processed according to the BOT procedures. The BOT wrote a letter to MARUBENI CORPORATION to inquire on the genuineness of the said Deed and it was confirmed that the same was genuine; and that the money should be paid to CRCL. The learned counsel highlighted that according to PW6, the correspondents between the BOT and MARUBENI

CORPORATION did not involve the first and second respondents and they were not given even copies of the letters which were exchanged between the two institutions. Therefore, he submitted, there was neither forgery nor theft and the BOT Governor having been satisfied that everything was genuine, he authorized payment to the CRCL account. In the circumstances, the learned counsel argued that it was not proper to say that there was forgery as it was impossible for the respondents to utter false document so as to be paid genuine money.

In his conclusion, Mr. Kiritta stated that, during trial there was no any prosecution witness who was called from MARUBENI CORPORATION to dispute the Deed of Assignment. Failure to call such witness, he said, is a clear evidence that the money was properly paid by the BOT to the CRCL as the Deed of Assignment was genuine.

The learned counsel's submission on the fifth ground of appeal regarding the High Court's finding that the trial court over relied on Exhibit P7 was to the effect that, the High Court was justified to find so due to the following reasons: One, the said exhibit was retracted during trial so it could not solely be relied upon as it needed corroboration which was not the case as earlier on submitted. Two, the

said statement implicated the second respondent who was a co-accused without being corroborated. Three, close reading of the contents of the said exhibit, particularly the answers provided therein by the first respondent show that, he was trying to exculpate himself from liability as he claimed that he was sent by other people to do whatever he did. He mentioned the second respondent and other people to have effective participation in registering the company and opening of the bank account. Therefore, the learned counsel argued that overreliance on such Exhibit P7 without caution was undesirable. He urged us to find just like the High Court that overreliance on Exhibit P7 by the trial court was not proper.

Replying on the sixth ground of appeal, Mr. Kiritta stated that the order of the High Court setting aside the order by the trial court which required the respondents to refund the Government the amount deposited by BOT to CRCL, was consequential after acquitting the respondents of all the counts they were charged with. He reiterated his earlier statement that, the money was not stolen and that is why all the accused persons were acquitted on a charge of stealing under count eight. In addition he said, the money subject of this appeal was not a

property of the BOT and therefore it is not supposed to be paid back. As such, he said, this ground of appeal has no basis.

Finally, the learned counsel urged us to uphold the decision of the High Court and dismiss this appeal.

In a very brief rejoinder, Mr. Kimaro insisted that the name SAMSON MAPUNDA was a fictitious name used by the first respondent to commit offences. Regarding Exhibit P7, he said, it was proper for the trial court to rely heavily on it because the same was the first respondent's confession which was voluntarily made. It was also his argument that there was no need for the prosecution to call a witness from MARUBENI CORPORATION to prove that the Deed of Assignment was forged because the evidence on record proved to the required standard that, there was such forgery. In conclusion, he said, the High Court erred in law in setting aside the refund order made by the trial court and thus urged us to allow this appeal.

We have respectfully considered submissions by both sides and the record of appeal. The following issues call for our determination: One, whether or not it was proved that the name SAMSON MAPUNDA

was fictitious used by the first respondent to commit offences; two, whether the High Court wrongly acquitted the respondents of all the counts; three, whether the finding of the High Court that the trial court over-relied on Exhibit P7 was justified; and four, whether it was proper for the High Court to set aside the refund order made by the trial court.

We prefer to start with the first issue from the fourth ground of appeal which we think forms the basis of this appeal; whether it was proved that the name SAMSON MAPUNDA was a fictitious name used by the first respondent to commit offences. It is settled position of the law that he who alleges must prove. The burden of proof in criminal cases lies on the prosecution to prove the case against the accused beyond reasonable doubt. The burden never shifts. In **Ahmed Omari v. Republic**, Criminal Appeal No. 154 of 2005 (unreported) it was held that:

> *"In a criminal case the burden of proof is on the prosecution to prove the case against the appellant beyond reasonable doubt. The burden never shifts (Section 3(2) (a) of the Evidence Act...."*

(See also **Nkanga Daud Nkanga v. Republic**, Criminal Appeal No. 316 of 2003; **Nchangwa Marwa Wambura v. Republic**, Criminal Appeal No. 44 of 2017 (both unreported)).

In the current appeal, the prosecution alleged that the name SAMSON MAPUNDA was a fictitious name used by the first respondent for the purpose of committing offences. However, having thoroughly gone through the record we discovered that, the prosecution did not summon any witness or tender document to prove that the said name was fictitious. The prosecution witnesses (PW2, PW5 and PW6) who could have proved that the said name was fictitious and that the same was used by the first respondent to commit the alleged offences, ended up stating that all the documents produced by the first respondent bearing the name SAMSON MAPUNDA for company registration and bank transactions had no problems. That the said documents were genuine and the transactions were lawful. For clarity we wish to reproduce relevant parts of their testimonies to that effect. At page 120 of the record of appeal, Suleman Hassan Zanagwa (PW2) testified as follows:

"In 2003 up 2008 I was working at Kijitonyama as CRDB Branch Manager. As a Branch Manager my duties were the overall in-charge of banking transactions at the branch. Customer care, Bank operations and supervising opening of customers' accounts....I know the Company known as Changanyikeni Residential Complex Limited. As a customer who opened an account at CRDB Kijitonyama Branch.... The procedure was followed as explained above....The directors are JOSE VAN DE MERWE, ***SAMSON MAPUNDA*** *and CHARLES MABINA. Account No. for Changanyikeni Residential Complex Limited is* ***01J1013377400.*** [Emphasis added].

At page 149 of the record of appeal, Lilian Kimaro (PW5) testified as follows:

"In 2003, I was working with BRELA as Assistant Registrar....This is a file for Changanyikeni Residential Complex. It is a Registration file. I signed the documents in the file; I worked on it. We pray to tender it in court as exhibit."

The court admitted the Registration file (with BRELA) of Changanyikeni Residential Complex Ltd No. 47792 as Exhibit P15. Thereafter, PW5 continued to testify that:

> *"The compliance form was brought by Samson Mapunda. It was brought on 23/12/2003. Form 14 contains particulars of directors. The directors were 3 (i)* ***Samson Mapunda****...(ii) Charles Mabina ...(iii)Jose Van de Merwe." [Emphasis added].*

When cross examined by Mr. Magafu at page 150 of the record of appeal, PW5 replied as follows:

> *"There were no problems in registering process of this company."*

On his part, Emmanuel Boaz (PW6), at page 152 of the record of appeal testified to the effect that:

> *"I work with the Bank of Tanzania. I am a Director of Banking. I know the Changanyikeni Residential Complex Ltd. I dealt with their payment transactions. This is a Bank of Tanzania (B.O.T) file which have (sic) Changanyikeni*

Residential Complex Ltd transactions. I pray to tender it as exhibit."

The trial court admitted file No. 6054/309 for Changanyikeni Residential Complex Ltd; BOT transactions as Exhibit P16.

Then PW6 continued to testify that:

> *"F.7 of the file is a letter dated 18th June, 2004. It is from the director* ***Samson Mapunda,*** *director of Changanyikeni Residential Complex Ltd. It is directed to the Manager of Debt Management Department of the B.O.T. The letter's subject is a request to de-pipelining a debt. They asked for USD 1,069,125 and 501,219.02....F.24 is a letter from Debt Management Department of the B.O.T. It's of 24/10/2005. It was written to the Director Changanyikeni Residential Complex Ltd. The letter informs them that the BOT has approved to transfer to them the money as approved by the Governor equivalent 116,926,476.27 (Japanese Yen). The letter asked them to bring Banking details which will facilitate release of funds....The Governor had trusted his officers."* [Emphasis added].

During cross examination by Mr. Magafu, PW6 responded as follows:

"There was no procedural irregularity. The procedure was followed. No BOT officer was connected to this charge."

It is our considered view that the above reproduced evidence from the prosecution witnesses supported the first respondent's evidence together with that of DW3 and DW4 who maintained that, the name SAMSON MAPUNDA was not fictitious but a real name of the first respondent as the same was genuinely used to make genuine transactions. It is so unfortunate that, while resolving the issue concerning the said name, the trial court relied on the defence evidence as if the burden was on that side. For clarity, at page 359 of the record of appeal the trial court which comprised of three Resident Magistrates had this to say:

"We are aware that not all names are official by way of baptismal ceremonies. Some are for whatever reasons given by parents, guardians and relatives to their young borns and we think none of them is bound to assign reasons. ***But it leaves much to be desired when one acquire names other than nick names during adulthood****....We had time to examine the demeanor of witnesses who spoke on this*

point. ***We see that DW3 and DW4 had interest to serve in the matter. They could not appear to us as speaking the truth.*** *We see the name SAMSON MAPUNDA as a fictitious name created to do an unlawful act."* [Emphasis added].

We wish to comment that the trial court shifted the burden of proof to the defence making a wrong conclusion based on DW3 and DW4s' evidence that SAMSON MAPUNDA is a fictitious name. We say so because, those witnesses testified that SAMSON MAPUNDA is the name of the first respondent given by his grandfather while he was a child. None of them testified that the first respondent acquired the said name during adulthood. Moreover, we note that although the trial court was of the view that it leaves much to be desired when someone acquires names other than nick names during adulthood, it did not give the reasons.

The first respondent elaborated before the trial court that he uses three names (Bahati John, SAMSON MAPUNDA and Angelo John) interchangeably depending on the occasion. The same was proved by

DW3 and DW4 (Pages 212-215) who are his parents as indicated above.

At page 504 – 505 of the record of appeal, the High Court Judge dealt with the fourth ground of appeal and came to the conclusion that the name SAMSON MAPUNDA was of the first respondent on account that, the MAA which PW5 said had no problem was legally used to register the CRCL. Save for the example of a businessman used by the learned High Court Judge, we do not see the reason to fault his finding that SAMSON MAPUNDA was not a fictitious name. The gist of Mr. Kimaro's submission before us was that, the first appellate judge erred in so holding because he imported extraneous matters to reach a wrong conclusion. We agree with the learned counsel for the appellant that the example provided by the High Court Judge of a businessman whom he knew from Muleba District, was given out of context. However, this fact alone does not justify a conclusion that the finding by the learned Judge that the name SAMSON MAPUNDA was not a fictitious name was wrong. The difference of particulars of the first respondent between what was provided in Exhibit P7 and the MAA together with the Deed of Assignment could not stand as a proof of the allegations of fictitious

name because the prosecution witnesses (PW2, PW5 and PW6) testified to the effect that there was no problem with the name used to register the CRCL and open Bank Account which allegedly used for illegal transactions.

In our view whether or not the first respondent said he was directed by another person (BREA) to use that name or was his choice to use the same does not relieve the prosecution's burden of proof. We do not agree with the Learned Principal State Attorney that the said fact alone was a sufficient proof that, the first respondent used a fictitious name. After all, the burden of proof was not on the first respondent as it was stated by the Court while dealing with almost similar situation as in the current case in **Juma Hamis Kabibi v. Republic**, Criminal Appeal No. 216 of 2011 (unreported) that:

> *"In the context, qulte obviously, the Judge erroneously concentrated her attention, not on an affirmative prosecution case, but, rather, on exhibiting the falsity of the appellant's account which, unfortunately, turned out to be a factor in establishing the latters' guilt.* ***With respect, a criminal accusation ultimately stands or falls on the strength of the prosecution***

> ***case. Where the prosecution case is itself weak, it cannot be salvaged from the tatters of the defence. It is quite plain that, false statements made by an accused person, if at all, do not have substantive inculpatory effect and cannot be used as a make – weight to support an otherwise weak prosecution case.*** *The fact that an accused person had not given a true account only becomes relevant, to lend assurance, in a situation where there already is sufficient prosecution material. (See* ***Pyaralal Malaram Bassan v R*** *[1960] EA 854). That was, certainly, not the case here.*"[Emphasis added].

We have demonstrated in the case at hand, that the trial court concluded that the name SAMSON MAPUNDA was fictitious having relied on what the said court found to be a weak defence evidence and not on the strength of prosecution evidence. In the circumstances we agree with the counsel for the respondents that the prosecution failed to prove beyond reasonable doubt that SAMSON MAPUNDA is a fictitious name used by the first respondent to commit offences. We therefore dismiss ground four of appeal.

In the second issue which relates to the first ground of appeal we shall determine whether or not the High Court wrongly acquitted the respondents of all the counts. Initially, Mr. Kimaro argued that, the High Court erred in law by acquitting the respondents of all counts they were convicted of. However, in the course of submission, he supported the acquittal of the respondents in respect of the first, third and fifth counts.

We observe that the formed first ground of appeal as far as the remaining counts are concerned, depended much on the outcome of the fourth ground. As we have already concluded that SAMSON MAPUNDA was not a fictitious name, forgery alleged in the second count, making false statutory declaration in the third count, obtaining registration by false pretense in the fourth count, forgery in the sixth count and uttering false document in the seventh become baseless. We agree with the line of argument taken by the counsel for the respondents regarding those counts. In passing, we wish to remark that, although the Learned Principal State Attorney argued that the MAA was a forged document, insisting that it contained false information, his argument was not supported by evidence in the record

of appeal. At page 150 of the record, Lilian Kimaro, an Assistant Registrar from BRELA (PW5) testified to the effect that, on 23rd December, 2003 SAMSON MAPUNDA presented to her the MAA of the CRCL which she evaluated and upon satisfaction, on 24th December, 2003, she registered the said company as CRCL with No. 47792. During cross examination PW5 stated that: *"There was no problem in registration process of this company."*

Regarding the Deed of Assignment, Emmanuel Boaz, BOT Director of Banking (PW6) testified that, the said Deed was genuine and all the correspondents with MARUBENI CORPORATION were done between the BOT and the said company without involving the respondents. The BOT wrote a letter to MARUBENI CORPORATION to inquire on the genuineness of the said Deed and it was confirmed that the same was genuine; and that, the money should be paid to the CRCL. Having finalized all the procedures, Governor of the BOT approved the payment to the CRCL Bank Account. In the circumstances, the learned counsel argued that, it was not proper to say that there was forgery as it was impossible for the respondents to utter false document so as to be paid genuine money. In the **D.P.P v. Shida Manyama** @

Selemani Mabuba, Criminal Appeal No. 285 of 2012 (unreported) the Court stated that:

> *"The law on forgery, fortunately is well settled. Forgery is the making of a false document with intent to defraud or deceive..."*

In the current case, the prosecution witnesses did not prove that there were forged documents presented by the respondents which amounted to commission of offences. Instead, as intimated above, the evidence of PW5 and PW6 proved the existence of the CRCL, its registration and that the money transactions were done legally. Their evidence contradicted that of other prosecution witnesses' namely, Assistant Superintendent of Police (ASP) Deusdedit Mataba (PW1) and ASP Fadhil Said Mdem (PW8) who testified to the effect that the respondents committed the offences charged with. In **Mohamed Said Matula v. Republic** [1995] TLR 3 it was held that:

> *"Where the testimonies by witnesses contain inconsistencies and contradictions the court has a duty to address the inconsistences and try to resolve them where possible or else the court has to decide whether the inconsistences and*

contradictions are only minor, or whether they go to the root of the matter."

In view of the above, we observe that the trial court did not discharge its duty to address the inconsistences found on the prosecution evidence which eroded the substance of its case. We note that although the prosecution witnesses gave a contradictory evidence, the trial court did not resolve the contradiction to see whether it went to the root of the matter which we are saying it did. The trial court relied on Exhibits P7 and P14 having made hand writing comparison concluded that the respondents committed the alleged offences. The counsel for the appellant argued that the evidence contained in the Exhibit P7 was corroborated with that of hand writing expert report, Exhibit P14. However, we agree with the counsel for the respondents that, Exhibit P7 needed corroboration because it was retracted by the first respondent and thus, could not be acted upon to convict the co-accused (the second respondent). In **Vumi Liapenda Mushi v. Republic,** Criminal Appeal No. 327 of 2016 (unreported) the Court stated that:

"The evidence which itself requires corroboration cannot act as corroboration."

In the light of the above position the evidence in Exhibit P7 could not corroborate what was said by the hand writing expert, Inspector Maria Tryfon Jenga (PW4) and the contents of Exhibit P14 to hold the second respondent liable. In fact, even the expert report on hand writing (Exhibit P14) needed corroboration.

The above position of the law notwithstanding, we had time to go through Exhibit P7, we are at one with the High Court Judge that, the first respondent did not confess in his cautioned statement that he forged the Deed of Assignment. Instead, having been satisfied that the said Deed was genuine, the BOT Governor authorized payment of the claimed amount to the CRCL Account as supported by the evidence of PW6. At page 520 of the record of appeal, the High Court Judge held that:

"... I repeat to say that had the Deed of Assignment been a forged one the Governor of the Bank of Tanzania could not have approved the transfer of the aforementioned debt to CHANGANYIKENI RESIDENTIAL COMPLEX LTD. I

hold therefore that the first appellant was wrongly charged on the seventh count."

From our deliberation above, we are settled that the first appellate court rightly acquitted the respondents of all counts as the prosecution failed to prove the charges against them beyond reasonable doubt. As shown above, the evidence on record is not sufficient to prove forgery, false pretense or uttering false documents. Therefore the first ground of appeal is baseless and we dismiss it.

Now turning to the issue which relates to ground five of appeal as to whether or not the finding of the High Court that the trial court over-relied on Exhibit P7 was justified. We wish to note at the outset that, the learned Principal State Attorney supported the acquittal of the respondents in respect of the first, third, fifth, eighth and ninth counts. Regarding the remaining counts, he argued that it was proper for the trial court to rely much on the said exhibit because it contained detailed information on how the respondents committed the offences they were charged with. He added that Exhibit P7 revealed all the steps from the registration of the CRCL, the purpose of registering it and the people who were involved. Therefore, he argued further that, the High Court

was wrong to hold that the trial court over-relied on that exhibit. His arguments were opposed by the counsel for the respondents on account that, the finding of the High Court was correct. In addition, he said which we agree that, the trial court was not supposed to rely much on that exhibit because the same was not a confession in terms of section 3 of the Evidence Act as the first respondent did not admit all the elements of the charged offences.

Our reading of the statement itself, leads us to the observation that the first respondent was trying to exempt himself from liability by mentioning other people to have effective participation in commission of the alleged offences. Moreover, the said statement was retracted and there was no corroborating evidence. We have already ruled out and we do not need to overemphasize that the alleged counts were not proved to the required standard. We have thoroughly gone through the trial court's decision and we have also noted that, the trial court relied much on Exhibit P7 to determine all the counts. In that sense, the finding of the High Court on this issue which is challenged by the appellant in the fifth ground of appeal cannot be faulted and this ground is bound to fail.

Having concluded that the charges against the respondents were not proved beyond reasonable doubt, the order of refund made by the High Court being consequential, as rightly stated in our view by the counsel for the respondents, was justified. The fourth issue is therefore answered in affirmative. Consequently, we dismiss the sixth ground of appeal.

In upshot, this appeal is without any merit. As a result, we dismiss it in its entirety.

DATE at **DAR ES SALAAM** this 10th day of September, 2020

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered on 16th day of September, 2020 in presence of Mr. Adolph Ulaya, learned State Attorney for the Appellant/Republic and Mr. Deogratius Lyimo, learned counsel advocate for the Respondents, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL