IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MMILLA, J.A., MWANGESI, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 464 OF 2017

D.P.P ..... APPELLANT

VERSUS

HANNA PONDO KASAMBALA ..... RESPONDENT

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

(Ngwala, J.)

Dated the 2nd day of August, 2017
in
Criminal Appeal No. 88 of 2017

.....

JUDGMENT OF THE COURT

12th & 19th June, 2020

WAMBALI, J.A.:

The respondent Hanna Pondo Kasambala, appeared before the Court of Resident Magistrate of Mbeya in Criminal Case No.137 of 2016, where together with Mary Pondo and Stella Shoo Kasambala not parties to the appeal, faced three counts, namely, forgery contrary to sections 333, 335(a) (d) (i) and 337; uttering a false document contrary to sections 342 and 337 and demanding property upon forged testamentary instruments contrary to sections 347 and 337 of the Penal Code Cap 16 R.E.2002 (the

Penal Code). It is noteworthy that in the first count she was charged alone; whereas in the second and third counts she was jointly charged with her co-accused named above. According to the proceedings of the trial court as found in the record of appeal, they were prosecuted as the first, second and third accused respectively. They all denied their respective allegation in all counts.

The prosecution marshaled eight witnesses and tendered twelve exhibits namely, Probate Form No. IV in respect of probate cause No 40 of 2001; the Search Order; Probate Register of Mbeya Urban Primary Court for the years 2000-2005; Probate Form No. IV in respect of probate cause No.189 of 1999 from Kinondoni Primary Court; Minutes of the deceased's clan meeting; Proceedings in probate cause No. 189 of 1999; Inventory of the deceased's estate; Sample of signatures of G. N. Mwang'ombola; Probate Form No. IV in respect of probate cause No. 59 of 2004; Probate Form No. IV in respect of different probate causes for the years 2001-2004; Document Examination Report; Certificate of Occupancy and Photographic enlargement of signatures, which were admitted as exhibits P1, P2, P3, P4, P5, P6, P7, P8, P9, P10, P11 and P12 respectively.

The respondent and the third accused defended themselves as DW1 and DW2 respectively and called two other witnesses namely, Rev. Betwel Nelson Mwasege and Amwile Kasambala who testified as DW3 and DW4.

It is not insignificant to state that although Mary Pondo, the second accused was found with a case to answer after the closure of the prosecution case; she did not enter her defence as it is in the record that she passed away before the due date. Unfortunately, as we will show later in the course of this judgment it is apparent that up to the conclusion of the trial court's proceedings, her case was not marked to have abated. Indeed, the judgment of the trial court contains the names all the three persons who were convicted as charged but only the respondent and the third accused were sentenced to save community service and three years imprisonment respectively. In that judgment there is no indication as to the fact that the third accused passed away before the same was delivered.

At the height of the trial, the learned Senior Resident Magistrate who presided over was duly satisfied that the prosecution proved the case to the hilt; hence he convicted and sentenced the respondent and third

accused as alluded to above. Both appealed to the High Court as the first and second appellants respectively.

Notably, during the hearing of their appeal before that court the Director of Public Prosecutions (the DPP) supported the second appellant's appeal but strongly objected the respondent's appeal, arguing that the case against her was fully proved with regard to the offence of forgery. Nevertheless, the learned first appellate judge allowed the appeal in respect of both appellants as she was of the firm view that the trial court lacked jurisdiction to try the case against the third accused since the alleged offence was committed outside its jurisdiction and that the prosecution did not prove the case against the respondent beyond reasonable doubt. She thus acquitted both. The DPP was seriously aggrieved, hence this appeal.

The Memorandum of Appeal lodged in Court earlier on contains the following grounds to challenge the High Court decision:

> *"(1) The trial judge erred in law and in fact for finding the court (sic) that the trial court did not evaluate and analyze the evidence properly.*

(2) The trial judge erred in law and fact for holding that the expert opinion did not prove the forgery against HANNA PONDO KASAMBALA.

(3) The trial judge erred in law and fact for failing to consider circumstantial evidence surrounding the case and in particular for the offence of forgery as against HANNA PONDO KASAMBALA."

We have to note that from the reproduced grounds in the Memorandum of Appeal, it is unfortunate that the appellant DPP makes reference to the first appellate judge of the High Court as the trial judge. This is unfortunate. To be precise, the trial was conducted by the Senior Resident Magistrate of the Court of Resident Magistrate of Mbeya. Be that as it may, for the reason which will be apparent shortly, we do not intend to consider the said grounds of appeal in the determination of this appeal.

At the hearing of the appeal, Mr. Ofmedy Mtenga learned State Attorney appeared for the appellant DPP, whereas Dr. Tasco Luambano, assisted by Mr. Kamru Habibu, both learned counsel appeared for the respondent.

As eluded to above, apart from the reproduced grounds of appeal, we also required the learned State Attorney and the counsel for the respondent to comment on the propriety of the trial court's proceedings in

view of the following apparent irregularities in conducting the case. These are; **one,** failure of the trial magistrate to mark the case of the third accused to have abated after it was brought to the attention of the court; **two,** failure of the trial court to provide an interpreter to the respondent from the earliest stage of the proceedings contrary to the provisions of section 211(1) of the Criminal Procedure Act, Cap.20 R.E. 2002 (the CPA) and **three,** failure of the trial court to record the evidence of the respondent under oath contrary to the provisions of section 198(1) of the CPA.

In response to the direction of the Court, Mr. Mtenga readily conceded that the pointed out irregularities are apparent and indeed are fatal to the proceedings. He submitted that apart from other irregularities, failure of the trial court to record the evidence of the respondent under oath alone contravened the provisions of the law and thus, it vitiated the entire proceedings as her evidence in defence was rendered valueless. In the event, he submitted that the trial of the respondent was a nullity and therefore, the proceedings of the trial court and those of the High Court on appeal should be nullified. However, he quickly, submitted that in the circumstances of the case at hand, a retrial should be ordered as the

prosecution had sufficient evidence to prove that the respondent committed the offence of forgery.

To support his submission in favour of a retrial, Mr. Mtenga strongly contended that the evidence in the record left no doubt that the respondent is guilty of forgery. The learned State Attorney submitted further that the learned first appellate judge wrongly arrived at the conclusion that the prosecution did not prove the case of forgery against the respondent despite cogent circumstantial evidence in the record of appeal. He was categorically very critical of the learned first appellate judge's conclusion that the expert witness, Insp. Joram Magoha (PW7) failed to show that the respondent forged the signature of the magistrate who presided over Probate Cause No. 40 of 2001 because he did not examine her signature. For purpose of emphasis, we deem it appropriate to reproduce the specific holding of the first appellate judge as found at page 172 of the record of appeal which attracted the learned State Attorney's criticism thus;

> *"The failure of the expert witness to take samples of the first appellant's one Hanna Pondo Kasambala ... handwriting rendered his opinion useless".*

Armed with the decision of the Court in **Nkanda Jilala v. The Republic,** Criminal Appeal No. 348 of 2017 (unreported) at pages 16 and 17, Mr. Mtenga forcefully, persistently and consistently submitted that it was not necessary to compare the sample signature of the respondent with that of Mr. Godwin Nassoro Mwang'ombola (PW3), a retired primary court magistrate who allegedly presided over probate cause No. 40 of 2001 from which exhibit P3 was produced. For his part, the examination of PW3's samples of his signature coupled with his evidence that he did not recognize the signature in exhibit P3 as his and that, he never presided over that cause was sufficient to alert the High Court, as found by the trial court that, the respondent forged the respective document. Besides, it was the firm argument of Mr. Mtenga that the respondent is the one who was found in possession of exhibit P3 and the available circumstantial evidence in the record of appeal irresistibly points to the fact that the respondent is guilty of the offence of forgery.

Based on his spirited submission, Mr. Mtenga pressed us to find that an order of retrial in the circumstances of this case will be in the interest of justice.

In his reply, Dr. Luambano joined hands with Mr. Mtenga in conceding that the trial court's proceedings were marred by fatal irregularities that impeded a fair hearing. He therefore supported the prayer for nullification of the proceedings of both courts below. However, he drastically differed with the learned State Attorney by opposing an order for a retrial. To this end, he argued that the learned first appellate judge was justified to reverse the trial court's finding that the offence of forgery was proved against the respondent. He submitted that the evidence in the record does not indicate that it was shown that the prosecution proved the ingredients of the offence of forgery. He firmly stated that in order to prove the offence of forgery the prosecution was bound to show that the respondent authored the document; that the respective document is false and that she authored or forged it for the intention of defrauding or deceiving. To support his submission he made reference to the decision of the Court in **Muhsin Kombo v. Republic**, Criminal Appeal No. 82 of 2016 (unreported).

Moreover, Dr. Luambano supported the learned first appellate judge observation that the expert witness's (PW7) failure to examine the signature of the respondent rendered his opinion useless. He argued that

PW7's opinion was not consistent with the provisions of sections 47, 49 and 79 of the Evidence Act, Cap. 6 R.E.2002 (the Evidence Act) as no examination of other handwriting and signature of the suspect were done by him in order to arrive to the conclusion that it was the respondent who forged exhibit P3. To buttress his argument, he referred us to the decision of the Court in **The DPP v. Shida Manyama @ Selemani Mabuba,** Criminal Appeal No. 285 of 2012 (unreported).

Lastly, the learned advocate for the respondent submitted that the evidence of PW2 and DW2 in the record of appeal leaves no doubt that the respondent was not found in possession of exhibit P3 as persistently argued by Mr. Mtenga. On the contrary, he submitted, exhibit P3 was found in the house and possession of DW2 and her husband.

In conclusion, he urged us to reject the learned State Attorney's prayer for a retrial arguing that it will not be in the interest of justice considering the insufficiency of the evidence against the respondent.

On our part, upon serious reflection on the irregularities stated above, we are inclined to the submission of the counsel for the parties that the pointed out errors vitiated the entire trial against the respondent, hence

rendering the proceedings a nullity. In the circumstances of this case, we think even without considering an omission of the trial court to mark the second accused's case to have abated, the remaining two irregularities which relates to the respondent's right to a fair trial suffices to dispose of the matter.

With regard to non compliance with section 211 (1) of the CPA in **Mpemba Mponeja v. The Republic**, Criminal Appeal No. 256 of 2009 (unreported), for instance, the Court stated that failure of the trial court to provide an interpreter was a fundamental breach of a party's right to understand and follow up the proceedings of the case against him. It declared that that was a fatal omission. In the case at hand, the trial court wrongly assumed that the respondent only required an interpreter at the stage of her defence while she was not so provided when she was called upon to plea to the charges and when the prosecution witnesses testified.

On the other hand, failure of the respondent to testify under oath, is an omission which was fatal to the trial court's entire proceedings in terms of section 198 (1) of the CPA. For purpose of clarity, the said section provides as follows:-

"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oath and Statutory Declaration Act."

At this juncture, it is instructive to make reference to what the Court stated in **Juma Ismail and Another v. The Republic,** Criminal Appeal No. 501 of 2015 (unreported) that:-

*"Since the law was not complied with, the evidence of all five prosecution witnesses which was given without oath or affirmation has no evidential value. See **Mwita Sigora @ Ogora v. Republic,** Criminal Appeal No. 54 of 2008 (unreported)".*

Applying that settled position of the law to the present case, it is not doubted that the evidence of the respondent in her defence that was not taken under oath has no evidential value. It follows that it is as if the respondent did not defend herself at all. That cannot be taken to have been a fair trial as what remains in the record is the evidence of the prosecution side alone. The trial court therefore, could not claim to have evaluated the evidence of both the prosecution and the respondent before it came to its conclusion. It was not without substance that the Court in

Juma Ismail and Another (supra) emphasized the following with regard to a fair hearing:

> *"In **Alex John v. Republic**, Criminal Appeal No. 129 of 2006 the Court cited with approval a passage on the concept of a fair trial from the decision of the **European Court of Human Rights in Nid Huber v. Switzerland** [1997] ECHR 18990/91 at page 23 where it was stated, we quote:-*
>
> *"...one of the elements of the broader concept of a fair trial is the principle of equality of arms, which requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent."*

In the present case, the situation could have been different if the respondent would have opted to give her defence not under oath. To the contrary according to the record of appeal at page 78 in compliance with the law she opted to testify under oath.

In the premises, we are settled that the trial of the respondent was a nullity. It is unfortunate that this matter was not noticed by the High Court on first appeal.

We therefore, accede to the counsel for the parties' prayer to nullify the invalid proceedings. Consequently, we invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 to revise, nullify, quash and set aside the proceedings of both courts below. In the result, the present appeal which emanates from nullity proceedings is incompetent.

Ordinarily, all things being equal we would have ordered a retrial. The critical issue for our consideration however, is whether a retrial will be in the interest of justice.

We have carefully gone through the evidence in the record of appeal and on a proper reflection, we are of the considered opinion that it cannot be doubted that the case was not proved to the required standard.

We respectfully agree with the learned advocate for the respondent that the ingredients of the offence of forgery were not proved. It is in the record from the evidence of PW2 and DW2 that the alleged forged document, exhibit P3 was not found in the possession of the respondent.

On the contrary, it was found in the house of DW2 and her husband. Indeed, it was DW2 and her husband who handed over exhibit P3 to PW2. Moreover, even the evidence of PW3 could not prove that exhibit P3 was a forged document because during cross examination he conceded that he could not tell for certain if it was forged as other court staff, namely, clerks had a hand in preparing it. That being the position, it was expected that the expert witness could not only have ended up in comparing the signature of PW3 against that in the exhibit P3. In our settled view, in the circumstances of this case, PW7 was enjoined to compare not only the signature but also the handwriting of suspects, including the respondent which was used in filling the relevant part of that document in order to give a fair and balanced opinion on whether it was forged or otherwise and by whom. It is in this regard that, in **The DPP v. Shida Manyama@ Selemani Mabuba** (supra) the Court made reference to the decision of the Supreme Court of India in **Fakhrudin v. State of Madhya Pradesh,** AIR 1967 SC 1326 where it was stated that:-

> *"In either case the court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the court is to apply its own observation to the admitted or proved*

writings and to compare them with the disputed one, not to become an handwriting expert but to verify the premises of the expert in one case and to appraise the value of the opinion in the other case. This comparison depends on the analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in a large measure in the disputed writing. In this way the opinion of the deponent whether expert or other is subjected to scrutiny and although relevant to start with becomes probative. Where an expert's opinion is given, the court must see for itself and with the assistance of the expert, come to its own conclusion whether it can safely be held that the two writings are by the same person. This is not to say that the court must play the role of an expert but to say that the court may accept that fact proved only when it has satisfied itself on its own observation that it is safe to accept the opinion whether of the expert or other witnesses".

It is noteworthy that in the same case of **the DPP v. Shida Manyama@ Selemani Mabuba**, the Court yet made reference to the decision of the Supreme Court of India in **Malay Kumar Ganguly v. Dr.**

Sukumar Mukherjee and Another, AIR 2010 SCC 1007, where it was held that:-

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

Applying that sound observation of the Supreme Court of India which was acknowledged by this Court, we are compelled to state that most of the criteria in handling the evidence of a handwriting expert and the data and the material which were placed before the trial court did not meet the requirements of the law, that is, the Evidence Act. Besides, it is not shown in the record of appeal that the trial court applied its own initiative to come to the conclusion that what was stated by the expert was to be fully believed and relied upon to ground the respondent's conviction. In the event, with profound respect, we do not think the criticism of the learned State Attorney concerning the holding of the first appellate judge on this issue is justified.

We are settled that in view of the evidence in the record of appeal, the prosecution did not prove the ingredients of the offence of forgery against the respondent. It was not satisfactorily shown that exhibit P3 was authored by the respondent; that the said exhibit was a false document and that she knew it to be so and that she forged it with intent to defraud or deceive [See **The DPP v. Shida Manyama@Selemani Mabuba** (supra) and **Bakari Mwalimu Jembe v. The Republic,** Criminal Appeal No. 278 of 2017 (unreported)].

In the final analysis, considering what we have stated above with regard to evidence that was paraded by the prosecution at an invalid trial against the respondent, we are settled that in the circumstances of this case, a retrial will not be in the interest of justice. As it was stated among others, by the erstwhile East African Court of Appeal in **Pascal Clement Braganza v. R** [1957] E.A. 15,

> *"...an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to an accused person".*

In the result, we respectfully decline the prayer of the appellant the DPP to order a retrial. As the respondent is neither in custody nor serving a community service sentence, we make no order as to her release there from.

DATED at **MBEYA** this 18th day of June, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 19th day of June, 2020 in the presence of Mr. Shindai Michael, learned State Attorney and Mr. Kamru Habibu, learned counsel for the respondent is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL