IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CONSOLIDATED CRIMINAL APPEAL NO. 376 OF 2020 & 276 OF 2020

1. MICHAEL MWAKALULA NJUMBA
2. ALEX KAJUNA RUTTA ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlyambina. J.)

dated the 12th day of September, 2019
in
Criminal Appeal No. 259 of 2018

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JUDGMENT OF THE COURT

8th & 21st July, 2022

KITUSI, J.A.:

The two appellants were jointly charged with forgery contrary to sections 333, 335 (a) and 337 of the Penal Code as revised, the prosecution alleging that on unknown dates between 8th October 2007 and 16th August 2011 in Dar es Salaam Region, with intent to defraud or to deceive, the appellants jointly and together forged a document dated 8th October, 2007 purporting to be a Loan Agreement between Consolidated Investments (T) Limited and Mugisha Enterprises Limited, knowing the same to be untrue.

In the second count, the first appellant was also charged with uttering a false document, contrary to section 342 of the Penal Code. It was alleged in respect of this count, that on 16th August, 2011 at the Resident Magistrates' Court of Dar es Salaam at Kisutu, knowingly and fraudulently, the first appellant uttered the said forged Loan Agreement to the said court.

At the core of the facts leading to this case are two protagonists, that is, the first appellant, owner of Consolidated Investments (T) Ltd being one party in the disputed Loan Agreement, and Abiah Charles Basasingole (PW1), owner of Mugisha Enterprises Limited, the other party in the disputed Loan Agreement. These two companies had a business relationship and had a written Memorandum of Understanding (MOU) signed by them to demonstrate it.

There are two contending versions as to what took place prior to the institution of the case that gave rise to this appeal. The prosecution led evidence, chiefly that of PW1, that apart from the MOU, she never signed any loan agreement with Consolidated Investments Ltd, and which was presented by the first appellant to the court. There was also evidence from one Juma Abdallah Shita (PW3), a former employee in the first appellant's company as General Manager of that company, that the signature on the Loan Agreement purporting to be his signature as

General Manager of Consolidated Investments Ltd is, actually, not his. Then there was ASP Chrisantus Kitandala (PW7), a handwriting expert who testified in support of PW1 and PW3 that they did not sign the Loan Agreement, tendered as part of Exhibit P10.

The appellants adduced evidence in rebuttal. According to them, PW1 had secured a contract for supply of diaries, and she needed TZS. 50,000,000 to execute that contract. She approached the first appellant as per the MOU and the latter extended to her a loan of USD 31,000 to enable her carry out the contractual obligation. It is the first appellant's case that this agreement between him and PW1 was reduced into writing by the second appellant who runs a consultancy company. The result was the Loan Agreement (Exhibit P10).

Skipping other details at the moment, two actions were taken in relation to the alleged Loan Agreement. When Mugisha Enterprises Limited failed to pay the loan, the first appellant's company successfully sued that company for recovery of the alleged loan. On the other hand, PW1 set in motion criminal proceedings, alleging that the Loan Agreement had been forged by the appellants, hence the criminal case leading to this appeal.

The Resident Magistrate (Kiswaga, RM) before whom the appellants stood trial acquitted them, holding that the evidence led by

the prosecution did not prove their guilt to the required standard. On appeal to the High Court by the Director of Public Prosecutions (the DPP), upon "a careful exhaustive examination," the learned judge found the evidence on record sufficient to prove the appellants' guilt beyond reasonable doubt. It therefore quashed the judgment of the trial court and set aside the order of acquittal. It convicted the appellants "as charged" and sentenced them to 5 years imprisonment, ordering the "sentence" to run concurrently. At an appropriate time, the issue of conviction "as charged" and sentence shall be a subject for discussion.

The appellants preferred separate appeals which were, however, consolidated. Although separate memoranda of appeal were filed, they raise the following major complaints against the judgment of the High Court:-

1. That there was no proof of the offence of forgery.
2. That the court wrongly relied on the evidence of PW1 and PW3 who were not credible witnesses.
3. That it was wrong to convict the second appellant on the offence of uttering a forged document while he was not charged with that offence.
4. That the High Court did not consider the defence case.

Messrs. Timon Vitalis and Jeremiah Mtobesya, learned advocates who jointly represented the appellants addressed us generally instead of submitting on each ground of appeal. The respondent Republic enjoyed services of Ms. Janeth Magoho, learned Senior State Attorney and Ms. Ashura Mnzava, learned State Attorney. They were opposed to the appeal.

Mr. Vitalis took the mantel and addressed us first. On forgery, the learned advocate pointed out three essential elements which must always be proved. These are falsity of the document, authorship and intent.

Submitting on falsity and authorship of a document generally, the learned counsel suggested that there are eight modes of proving a signature or handwriting. In support he referred us to the cases of **Amos Mwaipaja v. Republic,** High Court Criminal Appeal No. 69 of 1981 and **DPP v. Shida Manyama @ Selemani Mabuba,** Criminal Appeal No. 285 of 2012 (both unreported), as well as **Sarkar, Law of Evidence** 19th Edition at pages 1376-1284. He went on to argue that the prosecution used two modes to prove that the Loan Agreement was forged. They called PW1 and PW3 to dispute or deny signing the Loan Agreement and secondly, they called PW7 to give his opinion on the handwriting and signatures purporting to be of PW1 and PW3.

The learned advocate argued that PW1 and PW3 could not be witnesses of truth. He wondered for instance, why PW1 who allegedly became aware of the alleged forgery on 16/8/2011 when the Loan Agreement was allegedly uttered had to wait until 5th December 2014 to report it to the police. As for PW3, he submitted that there was evidence of DW1 and Exhibit D6 that he no longer saw eye to eye with his former employer because of an unpaid debt that was a subject of a suit in court.

Incidentally, the suit that was instituted by the first appellant's company to recover the debt from PW1 was decided in favour of the plaintiff which is the first appellant's company, and against PW1. In assessing the credibility of PW1, the learned trial magistrate raised an almost similar question as Mr. Vitalis, questioning the delay in reporting the alleged forgery. He found PW1 not entitled to credence. The argument by the appellant's counsel before us is that the learned judge who sat on first appeal did not assign reason for taking a different view on PW1's credibility.

As for PW3, the trial court considered his credibility to have been marred by two factors. One, he had an axe to grind with the first appellant for the latter refusing to allow him to linger on as General Manager at Consolidated Investments Ltd. Two, he had his interest to

serve because he was also in the list of first appellant's debtors. Again, the complaint is that the learned High Court judge did not rationalize his taking a different view on PW3's credibility.

Ms. Magoho submitted in defence of the credibility of PW1 and PW3 inviting us to consider a rhetoric, why did these witnesses not deny existence of the MOU too if they were disposed to lie against the appellants.

We have to decide on the credibility of PW1 and PW3 right away because these witnesses are key to the determination of other complaints. We appreciate the learned High Court judge taking the following approach in resolving the pertinent issues that were placed before him for determination, when he stated: -

> *"It is the duty of this Court to subject the evidence tendered before the trial court to a careful exhaustive examination in order to reach at its own conclusion on the facts because it did not have an advantage of observing the demeanor of witnesses."*

With respect, such careful examination is however, hardly forthcoming especially on the credibility of PW1 and PW3. As we stated in the case of **Idd Mohamed v. Republic**, Criminal Appeal No. 376 of 2018 (unreported) a judgment of a court of law has to be reasoned. In

that case we reproduced the following paragraph from **Ikundila Wigae v. Republic** [2005] T.L.R 365:-

> *"It cannot be doubted that reasons enhance public confidence in the decision-making process. If a judge or magistrate were to decide a matter before him by tossing a coin, it is quite possible that his decision would be correct, but neither a lawyer nor a layman would regard it as being acceptable."*

Since the learned High Court judge did not subject the evidence of PW1 and PW3 to scrutiny as he had earlier undertaken, nor did he make any specific findings as to their credibility, the doubts identified by the learned trial magistrate in relation to their testimonies, remain uncleared.

On our own gauging of the testimonies of PW1 and PW3 we find them glibbery, and it does not take a Sherlock Holmes to see the reason. The first appellant had a decree against PW1 involving a claim of payment of the same amount of money as that in the disputed Loan Agreement. Why PW1 was half-hearted in defending that case is beyond us. There was a case instituted by the first appellant involving an unpaid loan by PW3. Obviously, under those circumstances, the relationship between PW3 and the first appellant was bruised and there was no

more love lost between the two. Had the learned High Court judge tested the testimonies of PW1 and PW3 along those lines, he would not have taken their word hook, line and sinker as he did. In the absence of a suggestion that the MOU had, on PW1, the same legal consequences as the disputed Loan Agreement, Ms. Magoho's argument that PW1 and PW3 are credible witnesses because they did not dispute existence of the MOU, is not good enough. For those reasons, we endorse the finding of the trial court on the credibility of PW1 and PW3 and find merit in the second ground of appeal.

Back to the first complaint regarding proof of forgery. Having made a finding that PW1 and PW3 were not credible witnesses, it follows that the first mode of proving handwriting and signature rested on weak incredible evidence of those witnesses. The second mode of proof presented by the prosecution was expert opinion of PW7. PW7 stated that having made scientific analysis of specimen signatures collected from PW1 and PW3 and having compared them with the signatures purporting to be of PW1 and PW3 on Exhibit P10, he concluded that the said signatures on the Loan Agreement were not made by PW1 and PW3.

Mr. Vitalis attacked PW7's testimony from three fronts. First, he submitted that it is required of an expert witness like PW7 to

demonstrate in court on how the enlarged images made him to arrive at his conclusion, and he cited the case of **Shida Manyama** (supra) in support. He further submitted that the evidence of PW7 is rendered worthless without those demonstrations. Secondly, he attacked the chain of custody of the specimen signatures, pointing out that PW2, a police officer, testified that he is the one who submitted them to PW7 but in his evidence PW7 said he received the specimen from one Migera. Thirdly, the learned counsel submitted that Exhibit P10 was not read over in court after admission, therefore it should be expunged from the record.

Ms. Magoho did not give in. She responded that once PW7 proved that PW1 and PW3 did not sign Exhibit P10 it was then assumed that the appellants who had custody of that document were the ones who forged it. She cited the case of **Alley Ali & Another V. Republic** [1973] L.R.T. 43. On that basis she submitted that there was no need for PW7 to demonstrate the enlarged images. On the chain of custody, she referred us to the evidence of PW7 who said he received the specimen from the office of the DCI. The learned Senior State Attorney conceded to the omission to read Exhibit P10 but submitted that it was not fatal because the appellants were represented by an advocate and that in any event, we may always invoke the overriding objective principle

introduced by section 3A of the Appellate Jurisdiction Act Cap 141 R.E. 2002 (AJA), to cure the omission.

Before determining this complaint, we intend to refer to the defence case alongside it and in that way, we shall have dealt with the fourth complaint alleging that the defence case was not considered.

Mr. Vitalis submitted that the defence also used two modes to prove the handwriting and signatures with the view of establishing the fact that PW1 and PW3 signed the disputed Loan Agreement. First, he submitted, there was evidence of DW1 and DW2 that they saw PW1 and PW3 sign the Loan Agreement. Secondly, there was the evidence of DW3 and DW4 who were acquainted with the signatures of PW1 and PW3. On the second mode, Mr. Vitalis cited **Joseph Mapema v. Republic** [1986] T.L.R. 148; **Amos Mwaipaja v. R** (supra) and **Sarkar's Law of Evidence**.

In terms of findings, the trial court first doubted the conclusions reached by PW7 without demonstrations, then the learned magistrate went on to state:-

> *"Furthermore, if the prosecution relies their evidence on the report of a handwriting expert under section 47 of the Evidence Act then DW1, DW3 and DW4 evidence is also relevant under*

section 49 of the Evidence Act since they clearly identified signatures of PW3 loan agreement when compared it with other PW3 signatures on exhibit P1 and D3 tendered in Court..."

In his finding on this aspect, the learned High Court judge cautioned against "brushing away" expert evidence simplistically. Then stated the following on the evidence of DW1, DW3 and DW4:-

"I must observe that working with someone at the same office at any time length, be it a decade or a century cannot be a justification of stating with certainty that one becomes conversant with co-worker's signature. Doing so is assuming expertise without going to the college for such scientific training."

Mr. Vitalis faulted the learned judge for not considering the defence case and for not assigning reasons for disbelieving DW3 and DW4. He submitted that the appellants were only supposed to raise reasonable doubt, which he said, they did. Mr. Mtobesya chipped in by submitting that on the authority of the case of **Robinson Mwanjisi and others v. Republic** [2003] T.L.R 218 Exhibit P.10 should be expunged for not being read out after admission. He submitted that as the evidence of PW1 and PW3 has been discredited and Exhibit P10 expunged, there is nothing left to sustain the prosecution case.

Having considered the evidence and arguments in relation to proof of forgery, we consider it very pertinent to preface our discussion and findings with a few reminders. One, it is always the duty of the prosecution to prove the case against the accused, who is under no duty to prove his innocence. This is too common a principle and too elementary to require citing of any authority. With respect however, the way the learned judge considered the evidence of both sides before him gave an impression that he placed the evidence of PW7 on the same balance with that of DW3 and DW4 as if the appellants had an obligation to disprove the allegation. We think this is quite unorthodox because as submitted by learned counsel for the appellants the duty of the accused is merely to raise reasonable doubt. Two, is the evidence of a person who is acquainted with another's handwriting but who has not attended training on handwriting, worthless? With respect, that is incorrect because it goes against section 49 of the Evidence Act cited by the learned trial magistrate in his decision. See the case of **Joseph Mapema** (supra) cited by the learned counsel and **Happy Kaitira Burilo t/a Irene Stationery and Another v. International Commercial Bank (T) Ltd,** Civil Appeal No. 115 of 2016 (unreported). In both cases, relevance of familiarity of handwriting as a means of identifying it was appreciated because that is what is provided under

section 49 of the Evidence Act. Three, there are instances where oral evidence of a person who prepared a document may suffice to prove the facts detailed in the document even if that document is expunged. See **Chrisant John v. Republic**. Criminal Appeal No. 313 of 2015 (unreported).

We now begin our deliberations on this complaint, beginning with Exhibit P10. There is no dispute that the said report was not read over in court, an omission which is fatal. The settled law in the case of **Robinson Mwanjisi v. Republic** (supra) cited by Mr. Mtobesya leaves us with no option but to expunge it. Neither section 388 of the Criminal Procedure Act, nor the overriding objective principle cited by Ms. Magoho can salvage the situation in such clear infractions. We therefore expunge it.

We have pondered over the next question whether the oral evidence of PW7 is sufficient to prove the alleged forgery. We think the handwriting report in this case cannot be fully explained orally. Leave alone the fact that the appellants had demanded more demonstrations on the report even if it had not been expunged, some of the conclusions made by PW7 do not appeal to simple logic. For instance, while PW3 did not dispute the signature on the Loan Agreement to be his, and only said it had been scanned and superimposed, PW7 testified that his

scientific analysis led him to conclude that the signature was not appended by PW3. This is curious, to say the least.

On this, we wish to emphasize the known principle, that evidence of an expert is in a form of opinion and it would be wrong for the court to surrender to such scientific experts, its duty of evaluation of evidence even on aspects that they may be challenged by ordinary observations, like when it comes to one's handwriting. In **Republic v. Agnes Doris Liundi** [1980] T.L.R. 38 the High Court held that the court could reject expert medical evidence if there was reason for doing so. That has been the correct position of the law. Yet in holding No. (vii) in **Republic v. Kerstin Cameron** [2003] T.L.R 87 the High Court stated:

> *"When facts in question upon which an expert testified are dependent upon ordinary human powers of perception, an expert may be contradicted by lay witnesses."*

We find PW7's conclusions susceptible to errors and we reject them on the ground, among others, that his conclusion on PW3's signature for instance, surprisingly contradicts even the maker's own admission.

Since PW7's testimony is doubtful, it cannot redress the expunged Exhibit P10. We are satisfied that the evidence of DW3 and DW4 which

the learned judge rejected, sufficiently challenged the expert opinion of PW7, and they demonstrated their familiarity with the signatures of PW1 and PW3. Or rather, if considered, the evidence of DW3 and DW4 introduced reasonable doubt as to who signed the Loan Agreement.

Had the learned judge evaluated the evidence of PW1, PW3 and PW7 properly and considered the defence case, he would have concluded, as did the trial court, that the prosecution had not proved the offence of forgery beyond reasonable doubt. We therefore find merit in the first and fourth grounds of complaint.

We turn to the third ground of appeal, which faults the learned judge for entering conviction against the second appellant for the offence of uttering a false document, an offence with which he had not been charged. There is no dispute that the charge of uttering a false document was preferred only against the first appellant. While Mr. Vitalis complained that the learned judge convicted the second appellant on the second count as well, Ms. Magoho maintained that the learned judge convicted the appellants "as charged" which she argued, should be taken to exclude the second appellant from the second count which he was not charged with.

With respect, Ms. Magoho cannot be right on this. What appears obvious to us is that probably out of inadvertence, the learned judge did

not write what he had in mind and left some matters open to speculation. We gather this from the style of sentencing, which we had earlier promised to discuss at an appropriate stage. First, the learned Judge sentenced the appellants to five years imprisonment without specifying the offence. Assuming that sentence was for forgery, then what was the sentence for uttering a false document? Then again, the learned judge ordered the "sentence" to run concurrently, which begs the question; concurrent with which sentence?

It is difficult to figure out from the record what the learned judge had in mind. While it cannot be said with certainty that the judge convicted the second appellant on the second count as suggested by the learned counsel, it cannot also be said with certainty that he did not. This state of things makes the third grievance to be justified, in our view. As it is not possible for us to decide this point one way or the other, and since the appeal turns on other points, we shall leave it there and conclude our determination on this complaint by reiterating the principle against omnibus sentencing. See **Malick Kassim Titu and Another v. Republic**, Criminal Appeal No. 169 of 1994 and **Richard Athanas v. Republic**, Criminal Appeal No. 115 of 2002 (both unreported). The learned judge should have entered sentence for each

count separately, and that would have avoided the confusion, the subject of the third complaint. This ground has merit to that extent.

For all the reasons we have endeavoured to show, the appeal has merits and we allow it. Consequently, we quash the conviction entered by the High Court and set aside the sentences. We order the immediate release of the appellants unless they are otherwise lawfully held in prison.

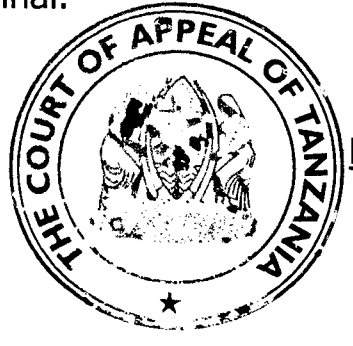
DATED at **DAR ES SALAAM** this 15th day of July, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 21st day of July, 2022 in the presence of Mr. Timon Vitalis, learned counsel for the 1st Appellant and the 2nd Appellant present in person via video conference and in the absence of the respondent/Republic, is hereby certified as a true copy of the original.



C. M. Magesa
DEPUTY REGISTRAR
COURT OF APPEAL