IN THE HIGH COURT OF TANZANIA

AT MBEYA

DC. CRIMINAL APPEAL NO. 20 OF 2015

(From the Resident Magistrate's Court of Mbeya, Original Criminal Case No. 30 of 2014).

PATRICK s/o MWAKABENGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 13/7/2015
Date of Judgment: 15/07/2015

A.F.NGWALA, J.

The Appellant, PATRICK MWAKABENGA, was charged with the offence of being in possession of forged bank notes, contrary to Section 348 of the Penal Code, CAP 16 R.E. 2002. On being found guilty as charged, he was sentenced of five (5) years imprisonment. Aggrieved by the conviction and sentence. He has now come to this court.

The Appellant was unrepresented. The Republic, Respondent was represented by Mr. Rogers, learned State Attorney. At the hearing of the Appeal, the Appellant, a lay person, prayed the court to adopt all the eight grounds which he had written in the Petition of Appeal.

In reply to the 1st ground of Appeal Mr. Rogers, the learned State Attorney, submitted that, under Section 127 of the Tanzania Evidence Act, CAP. 6 R.E. 2002, it is clear that, any person can testify in court. PW1 was competent witness who had no disabilities or was not incapacitated to testify. He, therefore, prayed the court to dismiss the said ground because the Appellant collided with witnesses. On grounds No. 2, 3 and 4, the learned State Attorney, submitted that, PW3 D.6888. D/C Ebenezer stated that, the Appellant was arrested by the Village Chairman. When PW3 interrogated the Appellant, he admitted to have been found with those two false notes, each valued at Tshs.10, 000/=. The expert on Bank Notes PW4 from the Bank of Tanzania (BOT) explained how he inspected the notes and certified that, they were "fake notes". It is from the exparte opinion that, the said exhibit P1 was proved to be false.

On the 5th ground regarding the person who tendered the said exhibit (P1) who was PW2. Mr. Rogers submitted that, the ground was baseless because PW2 found the Appellant, with the said two fake notes. In support of his contention the learned Attorney cited Section 173 (1) of the Tanzania Evidence Act, CAP. R.E. 2002, which provides that:-

> *"A witness summoned to produce a document shall, if it is in his possession or power bring it to court notwithstanding any objection which there may be to its production or to its admissibility, but the validity of any such objection shall be decided on by the court".*

On ground No. six the learned State Attorney confirmed that, PW4 the Bank Manager of Tanzania (BOT) had received the four notes from the Police for investigation. In his investigation, he detected that, those notes exhibit PI were forged because, he is an expart in that field of Bank notes. More so, the appellant did not dispute that the same were fake notes.

With regard to grounds Nos.7 and 8, the learned State Attorney submitted that, the appellant was properly convicted. The court had considered both the prosecution side and the defence case. The trial Magistrate had proved the case beyond reasonable doubt, because PW1 was given the fake note of Tsh.10,000/= denominations by the appellant accused person. After, she suspected that, the note was fake. She called PW2 who arrested the Appellant, at the scene of the crime where the accused was found with the fake notes of Tsh.10,000/=.

Mr. Rogers submitted further that, the Appellant confessed before PW3 the Police Officer, that, he was found with said fake note as shown clearly in the court proceedings. As the case was proved beyond any reasonable doubt, and the Appellant, did not raise any shadow of doubt against the prosecution case. Mr. Rogers prayed for the dismissal of the Appeal.

In the present case, the evidence on record clearly shows that, the Appellant was found in "flagrante delicto" with the fake notes. PW1 and PW2 were credible witnesses. The learned trial Magistrate properly relied on the evidence of PW1, PW2, PW3 and PW4 to find the Appellant guilty of the offence charged. In this particular, reference is made to the case of **OMARI AHMED Versus Republic [1983] TLR. 52,** were it was held that:-

> *"The trial court's finding as to credibility of a witness is usually binding on an Appeal Court".*

As regards the sentence, the entire evidence on record, clearly show that, the Appellant was convicted and sentenced five (5) years imprisonment for the offence charged. The only thing to be determined by this court is whether the sentence of five (5) years imprisonment, was properly meted, in the circumstances of the case at hand. In my considered view, the sentence of five (5) years imprisonment is too excessive to apprehend to a first offender. The learned Magistrate had the power to sentence the Appellant, as provided for under Section 248 of the Penal Code, CAP. 16. R.E. 2002. This provision reads that:-

> *"Any person who, without lawful authority or excuse, the proof of which lies on him purchase or receives from any person, or has in his possession, a forged bank note or currency note, whether filled up or in blank, knowing it to be forged he is liable to imprisonment for seven years".*

On this aspect of the sentence, imposed by the learned Resident Magistrate, this court makes reference to the decision of the Court of Appeal of Tanzania, in **BERNARD KAPOJOSYE VERSUS CRIMINAL APPEAL NO.411 OF 2013** (Unreported) which held that:-

> *"In sentencing, the court has to balance between aggravating factors, which tend towards increasing the sentence factors, which tend towards exercising leniency".*

It must be understood that, the Appellant in that case was found with the fake notes, that, lacked important labels. It was lacking the hidden face of Mwl. Julius Kambarage Nyerere. The exparte from Bank of Tanzania (BOT) proved to the satisfaction of the court that they were not original bank notes. The learned Magistrate, appears to have imposed a severe sentence because he entertained the view that, the offence was rampat in the region (Mbeya) and the country as whole, people do manufacture forged notes, and put them in circulation an act, which hinders the economic growth.

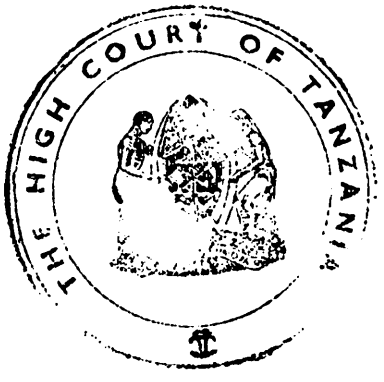
With respect, in my opinion, the learned Magistrate, ought to have exercised his reasoning, in accordance with what was stated by the Court of Appeal of Tanzania, in **JULIANA MOCHA versus REPUBLIC CR. APP. No.364 OF 2013** (Unreported), the court observed that:-

"Sentencing is a balancing act; it is not mechanical particular with regard to those offences which are not governed by mandatory provision of the law. The sentencing court, therefore, takes into consideration all factors relevant to the case. It should consider the prosecution view on the case, on one side. And on the other side, before sentencing the convict, the court must consider his or her mitigation including particular circumstances that led to commission of the crime".

Applying the principle to the case at hand, I am quite satisfied that, wherever a first offender is concerned, the emphasis should be on the reformative aspect of punishment. It is quite clear from the records that, the learned trial Magistrate, considered the mitigation factors by the Appellant. The existence of strong mitigation factor in the case, being a first offender with family, and two children who depends on him. I am decisively of the opinion that, the sentence of five (5) years, meted out to the Appellant, is too excessive to apprehend. The cases of **KATINDA SIMBILA versus Republic CR. APP. NO. 15 OF 2008** (Unreported) and **MASANJA CHARLES Versus Republic CR. APP. NO. 219 OF 2011** (Unreported). Support my findings that, the sentence meted out, were too excessive to apprehend.

In the circumstances of this case, I am inclined to agree with the Appellant, that, the sentence of five years imprisonment was too excessive, and therefore the Appellant, is entitled to a lesser sentence, taking into consideration that, he is a first offender, of thirty (30) years of age, and is the one who support, his family and his two young children, Indeed, Such punishment, in my observation, will neither benefit the Appellant nor the Republic.

For the foregoing reasons, I allow the Appeal to a limited extent, by reducing the sentence of five (5) years imprisonment, to such term of two (2) years imprisonment, with effects from the 29th day of May, 2014. When he was sentenced by the learned trial Magistrate.



A.F.NGWALA
JUDGE
17/07/2015