

**IN THE HIGH COURT OF TANZANIA**  
**DAR ES SALAAM DISTRICT REGISTRY**  
**AT DAR ES SALAAM**  
**CRIMINAL APPEAL NO. 201 OF 2018**

*(Origin; Criminal Case no. 119 of 2013 Kisutu Resident  
Magistrate's Court)*

**DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT**

**VERSUS**

**ALLY BARUHANI MACHO.....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 04/9/2019*

*Date of Judgment: 31/12/2019*

**S.M. KULITA, J.**

The Respondent, **ALLY BARUHANI MACHO** was arraigned before the Resident Magistrate Court of Dar es Salaam at Kisutu for the offence of ***Forgery*** contrary to sections 333, 335(a) and 338 and ***Uttering False Document*** contrary to Section 342 of the Penal Code [Cap. 16 R.E 2002].

The Respondent herein was found to have no case to answer and consequently was acquitted. Dissatisfied with that order the Director of Public Prosecution herein refer to as "DPP" appealed before this court on the following grounds.

1. That, the Honourable trial Magistrate erred both in law and fact by completely ignoring the weight of prosecution's evidence against the accused person and therefore proceeds to rule out on a no case to answer and acquit the accused person.
2. That, the Honourable trial Magistrate erred in law and fact by ignoring the evidence of PW.2, PW.4 and PW.5 whose evidence managed to prove the case beyond all reasonable doubts.
3. That, the Honourable Magistrate erred on acquitting the accused person and failed to draw adverse inference on the prosecution's exhibits tendered which corroborate the prosecution evidence against the charge.
4. That, the Honourable Magistrate erred in law by saying that the prosecution failed to prove the case against the accused person beyond reasonable doubts.

Before discussing the ground of appeal it is appropriate to give a brief account of what led to the Respondent's acquittal. That, for the first offence, on the unknown date and time within the city and region of Dar es Salaam with the intent to defraud or deceive the accused person (appellant) did forge a letter of offer No. LD/150335/5/JKD dated 17<sup>th</sup> day of July, 1991 in the name of HAIDARI N. KABIPA purporting to show

that it was genuinely issued by the Ministry of Land and Human settlement the fact he knew to be false. As for the 2<sup>nd</sup> count it was particularized that on unknown date and time at the Ministry of land and Human settlement within Ilala District in Dar es Salaam Region the accused person knowingly and fraudulently did utter a forged letter of offer No. LD/150335/I/JKD dated 17<sup>th</sup> day of July, 1995 in the name of HAIDARI N. KAVIPA to the Principal Land Officer one Joseph Shenga Batinamani purporting to show that it was lawfully issued by the Commissioner for Land the fact that he knew to be untrue. Upon analysing the evidence and exhibit tendered by the prosecution side the trial court was satisfied that no prima facie case has been established against the accused and therefore he has no case to answer. Consequently the appellant was acquitted.

At the hearing of this appeal Ms. Monica Ndakidemu, learned State Attorney appeared for the appellant (Republic) while Mr. Frederick Oduda, learned Advocate appeared for the Respondent.

In support of the appeal Ms. Monica Ndakidemu submitted that the appeal originates from Kisutu Resident Magistrate's Court filed by the DPP. It is against the ruling of a Criminal Case No. 119/2013 where it was ruled out that the Respondent

herein had no case no answer. The prosecution side called upon five witnesses whereas PW.2 who is a Land Officer testified to prove forgery of a title deed. The counsel further submitted that PW.1 had a letter of offer for Plot No. 894 Block G Tegeta, Dar es Salaam issued in 2010 by the Commissioner for Land and the said Plot was the property of the victims' late Father namely Haidary Nassoro Kavira. Later on they come to note that the said plot was developed by somebody else who was constructing thereon. Upon complaint by the victim over the said land at the land office the ministry consequently stopped the construction and ordered parties to submit their documents in respect of ownership of the plot. Mr. Joseph Batinamani (PW.2) in his investigation did notice that there were two letters of offer and Exchequer receipts from PW.1 and the Respondent each. Further the document supplied by PW.1 matches with the documents available in their records at the Ministry of Land and he also noted that the offer of PW.1 had some typing error which were rectified and the name "KAVIRA" was written "KAVIPA" and the Alphabet "P" looks to be cancelled and the alphabet "R" was inserted to make it read "KAVIRA" and the said corrections were signed and further the said typing error is minor and it cannot make the offer to be regarded defective. He therefore assured the court that those documents were genuine and admitted in court as Exh. P.1.

However the Respondents letter of offer and receipt (ERV) do not match with the record of Ministry of Land. The witness further testified to the effect that those documents were not issued by the Ministry of Lands. The counsel contended that for the evidence of PW.2, PW.4 and PW.5 it was wrong for the trial Magistrate to find the case has not been established against the accused person.

The counsel also pointed that the fact that the holder of the document had reasons to believe that the document is forged, it is a sufficient ground to constitute forgery offence. Also there was sufficient evidence by PW.2 that the said forged documents were in possession of the Respondent. Though, there was no evidence of handwriting expert, the fact that those documents were in possession of the Respondent it is enough to find him answerable. Ms. Ndakidemu further stated that in view of fact section 333 and 335A the prosecution had a duty to prove the document in possession of the Respondent were forged or that the Respondent is the one who made those forged document or he had reasons to believe that were false/forged; generally the trial Magistrate failed to grasp this contention. Since the Respondent was found in possession of those forged document it was upon him to prove the genuineness of those documents or how the same came into his possession.

He was therefore not supposed to be acquitted for no case to answer.

Counsel for the Respondent Mr. Frederick Ododa submitted that among the document that the respondent had submitted to the Ministry of Land had no name of the Respondent nor his signature. He added that he was also never been looked forging. The counsel further submitted that at Kinondoni Primary Court the Probate and Administration Cause No. 187/2008 was filed on 11/06/2008 the Respondent was appointed to be the administrator of Estate of Saada Ally Buguruni which he had to make follow up on the deceased's estate including the plot in dispute. Therefore the Respondent believed that those document were genuine that's why he did take them to the Ministry of Lands. The counsel is of the view that the issue of forgery cannot be fall under him as his is not the one who prepared the documents and never signed anything on that, hence he cannot be blamed as to whether the document is genuine or not. In cementing his submission the counsel invited this court to Section 110(1) of the Evidence Act [Cap 6 RE 2002] which is to the effect that the wrong doer must aware that he was doing wrong, the fact which neither of the prosecution witness had proved. He further submitted that it is nowhere testified by Prosecution as to who did cancel the stealing "P" and substituted with "R". He said that the

difference on two documents could be resolved by the prosecution side by taking them to the expert of the handwriting to verify their authenticity.

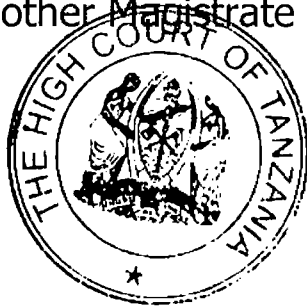
The counsel for the Respondent noted the discrepancy of witness as to who forged the document, he further cited the case of **CHRISTIAN KAALE & ANOTHER V.R. (1992) TLR 302** where it was held that the discrepancies in the evidence of prosecution cannot sustain conviction.

In rejoinder submission the State Attorney submitted that this matter involves forgery and uttering false document and not land matter as submitted by the counsel for Respondent. However, the counsel further cited the provision which is irrelevant, therefore section 335 of the Penal Code does not make him safe even if he is not the one who signed the document.

Having gone through the submission by both parties in support and against the appeal and submission without hitting into the bush and dwelling much in discussing the grounds of appeal I am of the settled view that since the Respondent is the one who was found in possession of the document alleged to have been forged the said respondent is the right person to prove the genuineness of the said document. It was not proper for the trial Magistrate to acquit the accused on a case to

answer. The submissions by the Respondent's Counsel that his client had submitted those documents to the Ministry of Lands in good faith and he had no knowledge that the same were forged are the stories that the Respondent is supposed to narrate at the trial court during the defence, and the said court will weigh its credibility. The same applied to the allegations that those documents have ever been tendered and admitted before the Primary Court for Probate and Administration cause. All those can be submitted by the respondent before the trial court during the defence.

Therefore the decision of Kisumu Resident Magistrate's Court is hereby quashed and the matter be remitted back thereto for the Respondent to defend his case. The same should proceed before another Magistrate with competent jurisdiction.



A handwritten signature in black ink, appearing to be "S.M. Kulita".

**S.M. Kulita**

**JUDGE**

**30/12/2019**