IN THE HIGH COURT OF United Republic of TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 271 OF 2018

(Originating from Criminal Case No. 138 of 2018 from the Resident Magistrate's Court of Dar es Salaam Kisutu, the decision by the Hon. K.T. MUSHI -RM date on 25th July, 2018.

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT
VERSUS
WENG TAK FUNG.....RESPONDENT

JUDGMENT

MASABO, J.L.:-

The Respondent in this case was acquitted of the offence of forgery contrary to sections 333, 335(b) and 337, and the offence of uttering false document contrary to section 342 of the Penal Code Cap 16 RE 2002 which were marshaled against him in Criminal Case No. 138 of 2018 in the Resident Magistrate Court of Dar es Salaam at Kisutu. It was alleged that on unknown dates in the year 2015 with intent to defraud or deceive he forged the signature of one KUANG JIAN BIN purporting to transfer shares owned by the said KUANG JIAN BIN in Fortune Cement to KANAK INDUSTRIES DMCC and that on 30th September 2015 he fraudulently uttered the above documents to the Business Registration and Licensing Agency (BRELA) while knowing that the same is not true. Being dissatisfied by the acquittal the DPP has filed petition of appeal under Section 378(1) of the Criminal Procedural Act (Cap 20.R.E. 2002)]. His complaint is that the trial court erred in law in not evaluating if the elements of the offence of forgery; in holding that

forgery can only be proved by the evidence of a hand writing expert; devaluating the evidence of the prosecution; ignoring the fact that the transfer documents/transaction took place when the PW3 was outside the country; ignoring the testimony of PW2 a Representative of Kanaak industries who testified that it was the Respondent who negotiated the price of shares and presented the transfer forms which were already signed; ignoring the caution statement in which the Respondent admitted to have signed the signed the forms in his capacity as General manager; and in holding that the prosecution did not prove their case beyond reasonable doubt.

Upon the appeal been filed in this court on 12th September 2018 efforts to serve the Respondent turned fertile as he was nowhere to be found. On 29th May 2019, this court issued an order for substituted service which was effected in *Mwananchi* News Paper of 31st May 2019, Daily News of 17/6/2019 and *Habari Leo* newspaper of 1/7/2019 at no fruition. On 10th July 2019 this an order to proceed with the hearing of the appeal expert the Respondent was issue and the appellant Republic was granted leave to argue the appeal in writing.

Submitting in support of the appeal, the Appellant started by consolidating the first eight grounds of appeal and proceeded to argue them as one ground. He submitted, in respect of the consolidated ground, that the trial magistrate erred in having clearly analyzed the evidence adduced in court in page 6 of the judgment it proceeded hold erroneously that, the prosecution

side has failed to prove their case beyond reasonable doubt on the reason that there was no evidence to link the accused person with the offences charged. He reasoned that the trail court misdirected itself in thinking that the only evidence to prove the offence of forgery is the opinion of handwriting expert. In this context, he reasoned that this trial Magistrate failed to appreciate the elements of the offence of forgery or uttering false documents.

Moreover, it was submitted that in considering whether the Prosecution had proved its case in a required standard, elements of the offence are of utmost important to be considered and that since the accused was charged with two counts, each count ought to have been argued separately to establish whether the prosecution managed to prove their case beyond reasonable doubt in each of the respective ground and that the prosecution ably It was submitted further that, in respect of the 1st count under section 333 of the Penal code, the prosecution was required to prove existence of three elements namely, that there was a false document; it is the accused made such a document, and lastly, that, the accused made such document with intent to defraud or deceive. That in respect of the first element above, the Prosecution side did manage to prove the first element through the testimony of their 4 witnesses and exhibits p1. He also argued that, the second element was also proved beyond reasonable doubt by leading evidence that links directly the Accused person with the offence charged in that it was the Respondent who negotiated the transfer of the share and he was the one in possession of the documents. In support the Appellant cited

the case of **Chokwe V.R.** (1969) E.A. 23 among other things, it was held that if it is established that the Accused Person had opportunity and that the documents alleged to be forged was at all material times in the possession of the Accused Person not having passed through the hands of another Person or Persons, the fact and Circumstance could well be sufficient from which to draw an inference that the Accused forged the document even without the proof of handwriting. He further argued that the third element was proved as the transfer was made with intent to defraud the complainant who was at the material time not aware of the transfer and was not in the country as he had travelled to China on the material dates when the purported forged transfer was taking. On the 9th ground it was submitted that the trial court ignored the second count completely in that it did not address itself to the evidence adduced by Prosecution side in proof of the 2nd count although it is obvious from the records that the evidence adduced by the prosecution side proved the second count beyond reasonable doubt.

I have carefully considered the submission by the Appellant. Before I proceed with determination of this appeal, I wish to state that my duty as a Judge of the first appellate Court is to evaluate the record and see whether there was any error on the trial court's judgment. As rightly submitted by the Appellant the burden of proof in criminal cases lies on the prosecution and the standard of proof is beyond reasonable doubt.

Considering that the charges facing the Respondent had two counts, it was important that each of the counts be considered separately to determine if it has been successfully proved or not. It is in this context that the trial court at page 6 of the judgment framed two issues, the first one being on the offence of forgery (falsification of the document) and the second being on the offence of uttering false document (making use of the forged document). However, it is noticeable that the trial magistrate did not accord considerable weight on the second count during the evaluation of evidence and the findings thereto. Having stated that, I now proceed to determine whether or not the magistrate erred in its holding that the two counts were not proved beyond reasonable doubt.

The offence of forgery is defined under section 333 of the Penal Code to mean the making of a false document with intent to defraud or to deceive. As rightly argued by the appellant, for the prosecution to establish the offence of forgery there must be three fundamental elements namely, there is a false document; it is the accused made such a document, and lastly, that, the accused made such document with intent to defraud or deceive.
With regard to the first element, I have found that the prosecution through the testimony of PW3 and Exhibit P3 ably established the complainant was not in the country when the transfer documents were signed. According to exhibit P3, PW3 had a 90 days visa allowing him to stay in Tanzania from the 4/2/2015 to 4/5/2015 whereupon he left the country and did not return until 7/5/2017 when he once again obtained a 90 days visa whereas the transfer of 20,000 shares worth one billion Tanzania Shillings was executed

on executed on 30th September 2015 (as per Exhibit E5. Hence, he could not have signed the transfer documents. The fact that PW3 was not in the country at the material time was further corroborated by the testimony of DW1 who testified that in the course of exculpating himself he argued that the transfer was confirmed in June 2015 '[but at the material time, he did not know the whereabouts of PW3. To exculpate himself he testified that PW3 signed the transfer before he left but the forms shows that they were signed on 30th September 2015 when PW3 was out of the country.

Regarding the third element is a mental element, namely intent to defraud. The term defraud was defined by this court in **Jones Ndunguru V Republic** [1984] TZHC 20 where the court quoted with approval the following decision of BUCKLEY, J in **Re London and Globe Finance Corporation**, [1903] 1 Ch. 728.

> "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

Also illuminating is the definition provided by Humphreys J, in **R v. Sullivan** (1945) 30 Cr App R 132 pages 134 – 136 where he stated that:

> In order that a person may be convicted of that offence [i.e. "false pretenses" it has been said hundreds of times that it is necessary

> for the prosecution to prove to the satisfaction of the jury that there was some misstatement which in law amounts to a pretence, that is, a misstatement as to an existing fact made by the accused person; that it was false and false to his knowledge; that it acted upon the mind of the person who parted with the money, and that the proceeding on the part of the accused person was fraudulent. That is the only meaning to be applied to the words "with intent to defraud". [...]

Thus it is important to show that the maker of the document/statement made the representation while knowing it to be false or did not believe it to be true. In the instant case, the prosecution case established that the forgery was intended to make PW2 believe that it was PW3 who executed the transfer and the person who did so, was fully aware that PW3 did not execute the forms.

Having found the first and third element to be in the affirmative, the second element is who exactly committed the forgery or was it the accused who made the document/signed the document. Agree with the trial court that there is no direct evidence to show that it was the Respondent who forged the signature, all what is present is circumstantial evidence to that effect as can be inferred from the testimony of PW2. The testimony of PW3 is corroborated by the testimony of PW2 Gaga Goth, Chairman of Kanack Group a company on whose favor the shares were transferred. In his testimony he accounted that it was the Respondent who approached him

and negotiated the transfer of 20 shares of Fortune Cement Company to their company, and that after the negotiation the Respondent brought the transfer documents for signature and that on the said date they signed the transfer forms in the presence of the Respondent and other person by the name of David. PW2 never had contact with DW1 as all the correspondences were between him and the Respondent. This testimony suggests clearly that DW1 being in charge of the transfer knew the originator of the documents

In the foregoing, while I agree with the trial magistrate that there was no direct evidence linking the respondent to the crime, I am of the view the circumstantial evidence above stated adequately link the Respondent to the crime. I alive to the fact that conviction should not be based on circumstantial evidence except where the circumstantial evidence irresistibly leads to the conclusion that it is the accused and no one else who committed the crime or where the inculpatory facts are not capable of any other interpretation than that the person in the dock is guilty of the offence charged that is, it is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt (**Bahati Makeja v. The Republic**, Criminal Appeal No. 118 of 2006, CAT (unreported); **Mathias Bundala v. The Republic**, Criminal Appeal No. 62 of 2004, CAT (unreported); **Wallii Abbdallah Kibutwa, Kadili Ahmad and Happy Balama v. The Republic,** Criminal Appeal No.127 of 2003, CAT). When this test is applied to the above facts, it is vivid the evidence available on record resistibly point to the guilty of the Respondent. Asas held in in **Chokwe V.R.** (1969) E.A. 23 the fact that the

documents were at all material times in the possession of the Respondent is sufficient to draw an inference that the Respondent forged the document even without the proof of handwriting. Accordingly, I find the prosecution to have proved their case in the first count.

As regards the second count, although it is true that the trail court did not address itself to resolving the issue it had framed in relation to this count, it will not labour me much as there was no evidence to show that indeed it was the Respondent who fraudulently uttered the transfer documents to the Business Registration and Licensing Agency (BRELA). The only witness who testified in this respect was PW4 Seka Isaya Kasea an Assistant Registrar at BRELA who fraudulently uttered the above documents to the Business Registration and Licensing Agency (BRELA) while knowing that the same is not true testified that the forms were filed at BRELA on 6/10/2015 ans were signed by the Respondent as General manager of Fortune Cement but she did not know who submitted the forms. She also testified that normally the forms are filed by company secretary and since the Respondent was not a company secretary it can be assumed that it is the one who filed the same at BRELA. It should be noted that the two counts are separate and the fact that the Respondent forged the forms does not necessary mean that he was the one who fraudulently uttered the same before BRELA someone else could have uttered the same. The appeal on this ground therefore fails.

In view of what I have demonstrated above, I allow the appeal to that extent, quash the discharge in respect of the first count and substitute it

with a conviction. Considering that the Respondent is not in court hence there is opportunity for mitigation, I proceed to sentence him to 7 years imprisonment.

DATED at DAR ES SALAAM this 9th day of October 2019.

J.L. MASABO

JUDGE