**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO 42 OF 2019**

(*Originating from the District Court of Simanjiro at Orkesumet Criminal case no. 139 of 2017)*

**ABAYO S/O ISAYA ABAYO .....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

**K.N. ROBERT, J:**

The appellant ABAYO S/O ISAYA ABAYO and another person called DAVID S/O ONDIEK JOHN were charged in the District Court of Simanjiro at Orkesumet with three counts namely: Forgery contrary to sections 333, 335(a), 337 of the Penal Code (Cap. 16 R.E 2002); Forgery of Stamp contrary to section 340(1)(2)(a) of the Penal Code (Cap. 16 R.E 2002); and Uttering False Document contrary to sections 342 and 337 of the penal Code (Cap. 16 R.E 2002). The Appellant was the second accused in the original case, according to the charge sheet dated 20th September, 2017 and DAVID S/O

ONDIEK JOHN was the first accused. It was alleged by the prosecution that on the unknown date of the year 2014 at Mirerani area within Simanjiro District, the accused persons forged a Sale Agreement dated 1/5/2014 and a Ward Executive Officer's Stamp and later on the 8th day of June, 2017 they uttered the forged document purporting to show that it was genuine.

When the charges were read over and explained to the accused persons at the trial court, they both entered a plea of not guilty. After the hearing the Court acquitted the 1st accused person of all counts and proceeded to convict the Appellant in absentia in respect of the 1st and 2nd Counts and imposed on him a custodial sentence of three (3) years for 1st count and two (2) years imprisonment for the 2nd count, the court ordered the sentences to run consecutively. The court found that the 3rd Count was not proved. Aggrieved, the Appellant appealed to this court against conviction and sentence.

In brief, facts of the case are that, on 8th June, 2017 the first accused person DAVID S/O ONDIEK JOHN went to the office of Mirerani Ward Executive Officer in the escort of two people who are James Silla and Benard Orondo while carrying a Sale Agreement "HATI YA MAUZO YA PLOT/NYUMBA". He asked the Ward Executive Officer to help him use that agreement as a bond to the loan of TSH. 1,130,000/- he was about to be

given by his fellow, Benard Orondo. The said Sale Agreement indicated to have been prepared and stamped at the office of the said Ward Executive officer. The Ward Executive Officer, Mr. William Steven Wanga crosschecked the said Sale Agreement and suspected it to be a forged document. Based on that, he decided to put the first accused in custody and reported the incident at Mirerani Police station. The first accused was then taken to Mirerani Police station where he recorded his cautioned statement and admitted to have produced the allegedly forged sale agreement to the Ward Executive Officer. He said the sale agreement was given to him by the Appellant for purposes of valuation of an area mentioned in that sale agreement. He claimed that he didn't know if it was a forged document.

On 22nd June, 2017 the Appellant was arrested and taken to Mirerani Police Station where he recorded his cautioned statement and denied to have committed the offence charged.

Handwriting samples of the 1st Accused, Appellant and Mirerani Ward Executive Officer were collected together with the stamp of the Mirerani Ward Executive Officer and sent to the Forensic Bureau Northen Zone (Arusha). The results revealed that the Appellant's samples were the same as the handwriting in the forged sale agreement.

The Appellant and the first Accused person were taken to court for charges of Forgery contrary to sections 333, 335(a), and 337 of the Penal Code (Cap. 16 R.E 2002); Forgery of Stamp contrary to section 340(1)(2)(a) of the Penal Code (Cap. 16 R.E 2002); and Uttering False Document contrary to section 342 and 337 of the penal Code (Cap. 16 R.E 2002). When the charges were read over and explained to the accused persons they entered a plea of not guilty.

After hearing the prosecution witnesses, the court proceeded to hear the testimony of the first accused person and acquitted him of all charges having found him not guilty of the charges filed against him. The case against the Appellant proceeded in his absence under section 226 of the Criminal Procedure Act, (Cap. 20 R.E 2002) having failed to appear before the court for the hearing of the defence case.

In convicting the Appellant the trial court considered the evidence of the four prosecution witnesses (PW1 – PW4); the exhibits tendered, that is, the Forensic Bureau Report which was admitted as exhibit P1; Covering letter from forensic Bureau which was admitted as exhibit P2; the sale agreement (Hati ya Mauzo ya Plot/Nyumba) which was admitted as exhibit P3; Samples of handwriting of the first accused, his signature and stamp which were

PW3 informed the court that he made investigation of the exhibits sent to their office. These were samples of handwritings, signatures, and stamp. That upon investigation the results revealed that the forged document related to the handwriting of the Appellant.

PW4 informed the court that he investigated this case, collected samples and sent them to the Forensic Bureau for analysis.

Having been convicted of the first and second counts, that is, Forgery contrary to section 333, 335(a), and 337 of the Penal Code (Cap. 16 R.E 2002) and Forgery of Stamp contrary to section 340(1)(2)(a) of the Penal Code (Cap. 16 R.E 2002) respectively, the Appellant was sentenced to serve three years imprisonment for the first count and two years imprisonment for the second count. Further to this, the trial court ordered the Appellant to return Tsh. 5,000,000/= to the first accused within a year from the date of his arrest. The court decided that the third count of Uttering False Document contrary to section 342 and 337 of the penal Code (Cap. 16 R.E 2002) was not proved against the Appellant.

Aggrieved by the judgment of the trial court, the Appellant appealed to this court against the conviction, sentence and order of the trial court on nine (9) grounds of appeal which I have taken the liberty to reproduce as follows: **One**, That the trial court erred in law and in fact for convicting the Appellant despite the failure by the prosecution to abide by the principles governing the chain of custody and preservation of exhibits. **Two**, the trial court erred in law in convicting the Appellant while the charge sheet was defective. **Three**, the trial court erred in law and in fact when it failed to notice the variance between the charge sheet and the evidence on record. **Four**, the trial court erroneously admitted exhibits P1, P2, P3, P4, P5, P6, and P7 as the same were not read over in court. **Five,** the trial court erred in law and in fact by failing to comply with the mandatory provisions of section 226(2) of the Criminal Procedure Act, Cap. 20 R.E. 2002. **Six,** the trial court erred in law and in fact by convicting and sentencing the Appellant herein based on the defense of the first accused person. **Seven**, the trial court erred in law and fact for failure to scrutinize the evidence tendered before it consequently holding the Appellant criminally liable. **Eight,** the trial court erred in law and in fact for not affording the Appellant the right to be heard. **Nine,** the trial court erred in law in holding that the evidence

tendered by the prosecution witness proved the charge laid against the appellant beyond reasonable doubt.

When the appeal was called on for hearing on 12th March 2020 the Appellant was present in person and the respondent was represented by Alice Mtenga, state Attorney.

During the hearing of this appeal, the appellant highlighted on grounds No. 1, 2, 3, 4, 5, and 8 and prayed for the court to consider ground No. 6, 7 and 9 as they appear in the petition of appeal.

Amplifying on the first ground of appeal, the Appellant submitted that the court failed to consider the requirement guiding the police officers to seize, keep and submit exhibits in court. No chain of custody was tendered regarding the sale agreement from the custodian of exhibits to PW4 who tendered it in court.

On the second ground the Appellant submitted that there were shortcomings in the charge sheet used by the prosecution to file charges against him. He argued that the said charge sheet does not indicate the date or month of the forgery and the place where the documents alleged to be forged were made.

On the third ground the Appellant submitted that the trial magistrate failed to note the contradiction between the charge sheet and the evidence of PW1 who testified that the contract took place at Mererani.

Submitting on the fourth ground, the Appellant argued that the exhibits P1, P2, P3, P4, P5, P6 and P7 were not read after being admitted by the court while the law requires the documents admitted to be read so that both parties may hear what is written in those documents.

Lastly, submitting on the 5th and 8th grounds jointly, the Appellant argued that the trial Court denied him the right to be heard and to defend himself. He stated that on the date of the hearing he sent his surety to inform the court that he would not be able to appear in court because he was bereaved, later on he went to the court with a burial permit but the court insisted that he should submit the original permit which ordinarily remains with Registration Insolvency Trusteeship Agency (RITA). When he went to pursue the original permit the court proceeded with the hearing thereafter convicted and sentenced him in his absentia.

He went on stating that, the requirement of section 226 (2) of the Criminal procedure Act (Cap R.E 2002) were not followed. He also cited the case of

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He went on stating that, the requirement of section 226 (2) of the Criminal procedure Act (Cap R.E 2002) were not followed. He also cited the case of

Christopher Olaisi v. Republic Cr. Appeal No. 296 of 2011, CAT, (Unreported), Pages 11-15 in support of his submission.

In response, the Respondent's counsel, Ms. Alice Mtenga, State Attorney opted to support the Appellant's appeal. The Learned state Attorney submitted that although she agrees with all grounds of appeal, she opts to support the appeal based on the weight she attaches to grounds No. 4, 5 and 8 of the Appellant's petition of appeal.

Starting with the 4th ground, the learned State Attorney submitted that exhibits P1 –P7 having been admitted by the trial court the said documents were not read in the court to enable parties to hear and understand the documents as required by the law. She made reference to the case of **Robinson Mwanjisi & three (3) others vs. Republic, TLR (2003) page 218** in support of her admission. She argued further that when this is not done it becomes hard for the court to rely on those documents and they must be expunged from the court records. Since the alleged forged document was one of the exhibits admitted without being read loudly in the court, she argued that the said document cannot be relied to prove the offence.

Submitting on the 5th and 8th grounds jointly, the learned State Attorney argued that the requirements of section 226 (2) of the Criminal Procedure Act, (Cap. 20 R.E. 2002) were not followed. She argued that the Appellant was not given an opportunity to be heard on why he failed to appear in court nor given an opportunity to mitigate before he was sentenced to jail. He was never informed that he was convicted and sentenced due to his absence in court. She cited the case of Olongo Lemuna & Another vs Republic (1994) T.L.R pg 50 in support of her submission.

Based on the reasons adduced in her submission the learned State Attorney prayed for the court to allow the appeal.

The Appellant did not have any rejoinders.

Having carefully considered submissions of the parties, I will now deliberate on the parties' submissions on the grounds of appeal. I will start with the 1st, 2nd 4th, 5th and 8th grounds of appeal which deals generally with the issues of charge sheet and procedural irregularities then I will look jointly at the 3rd, 6th, 7th and 9th grounds of appeal which faulted the weight of evidence used to convict the Appellant.

Starting with the first ground of appeal, the Appellant is faulting the trial court for convicting him despite the failure by the prosecution to abide by the principles governing the chain of custody and preservation of exhibits. The question for consideration is whether the document tracking the Chain of custody and preservation of exhibits was tendered before the trial court. The importance of the Chain of Custody has been stated and emphasized in a number of decisions. In the case of **PAULO MADUKA & OTHERS V. REPUBLIC, Crim. App. No. 110 of 2007 (Unreporeted)** which was quoted in the case of **SAHI MAULID JUMANNE V. THE Republic, Crim. App. No. 292 of 2016.** In that case it was held that:

> *"... the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody ... is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected its very transfer from one person to another be documented and that it be provable that nobody else could have accessed it .. "[Emphasis added].*

The above position was echoed by the Court in **ZAINABU D/O NASSORO @ ZENA V. REPUBLIC, Criminal Appeal No. 348 of 2015 (unreported)** as it was reported in the case of **SLAHI MAULID JUMANNE V. THE REPUBLIC, Crim. App. No. 292 of 2016** that the underlying rationale for ascertaining a chain of custody is:

> *"to show to a reasonable possibility that the item that is finally exhibited in court as evidence/ has not been tampered with along its way to the court."*

As the chain of custody was not clearly shown to establish that the exhibits tendered in court were not tampered with, I find this ground to have merit and sustain it.

On the second ground, the appellant herein submitted that, the charge was defective because it did not indicate the date or month of the allegedly forged document or the place where it was made. Upon reading the said charge sheet I found that all the three counts indicated that the alleged crime took place within Simanjiro District. With regards to the date of the alleged crime, the third count indicated the date of the alleged crime while the first and second counts indicated that the crime took place at unknown

dates. It was therefore not true that the Charge did not indicate the place and date of the alleged crime as alleged by the appellant. Having said that, I find this ground of appeal to lack merit and I dismiss it accordingly.

On the 4th ground, the appellant submitted that, the first to seventh exhibits were not read out after being admitted by the court as exhibits. The respondent' counsel also agrees with the appellant that it was against the law for the documents which were admitted as exhibits not to be read out for the parties to understand the contents of the documents.

In the case which was cited by the respondent's counsel of **ROBINSON MWANJISI AND OTHERS vs REPUBLIC, TLR (2003) P. 218**, it was held;-

> "Wherever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out....."

The same was also decided in a case of JUMANNE MOHAMED & OHERS vs REPUBLIC, Crim. App. No. 534 of 2015, where it was held:-

> "It is necessary to read the document to the accused person after its admission as exhibit. In all fairness an accused person is entitled to

know the contents of any document tendered as exhibit to enable him marshal a proper defence wherever they contain any information adversely affecting him."

Having read the proceedings of the trial court it is crystal clear that those alleged documents (exhibits P1 – P7) were tendered before the trial court and admitted as exhibits but they were never read out so as to enable the parties to know the contents of those documents. For this reason I find this ground of appeal to have merit.

Coming to the 5th and 8th grounds of appeal, the appellant submitted that he was not given the right to be heard as he was convicted and sentenced in absentia which is c/s 226 (2) of the CPA (Supra). The respondent's counsel also in supporting the appeal agrees with the appellant regarding this issue. Section 226 (2) of cap. 20 (Supra) reads as follow:

*"If the court convicts accused person in his absence, it may set aside such conviction, upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merit."*

After perusal of the proceedings of the trial court, I have noticed that it is not true that the appellant was not given a right to be heard. The trial court's order dated 10th January, 2018 instructed the appellant to bring original burial permit to the court on 18th January, 2018 to establish the reasons for his previous absence in the court. However, the appellant and his surety never appeared before the court on the subsequent dates scheduled for hearing, and the court proceeded with the hearing of the case in his absence.

A year later the appellant was arrested and he was taken to court where he was questioned why he jumped bail and his reasons were not enough to convince the court that it was a probable defence. Then the trial Magistrate proceeded to read the judgment to the accused person. In the case of **MARWA MAHENDE VS REPUBLIC, TLR (1998) p. 249** it was held that:-

> " ...a proper construction of section 226(2) of CPA, Cap 20 R.E 2002, is that, upon apprehension of a person convicted and sentenced in absentia, he should not be taken straight to serve his sentence but should be brought before the trial court to enable the court to exercise the discretion to set aside the conviction or not."

As long as this requirement was met by the trial Magistrate, the appellant's fundamental right to be heard was respected and fully granted. I therefore find the 5th and 8th grounds of appeal to lack merit and I dismiss them.

Having faulted the manner in which the exhibits were admitted in court in the fourth ground of appeal, I find that the said exhibits could not be relied by the court to prove the offences charged and must be expunged from the court records. In the absence of the exhibits used to prove the case against the Appellant, the Appellant's arguments in the 3rd, 6th, 7th, and 9th grounds are found to have merit and they are hereby sustained.

All said, I allow this appeal for the reasons given, quash the conviction and set aside the sentence and orders of the trial court. The appellant should be released forthwith from prison unless he is otherwise lawfully held.

It is so ordered.

**K.N.ROBERT**

**JUDGE**

**22.05.2020**