IN THE HIGH COURT OF TANZANIA
IN THE DISRTICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO.33 OF 2020

(Original Criminal Case No.23 of 2019, the District Court of Kahama)

HASSAN MANYANGALI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

31st August & 16th October,2020

Mdemu,J.;

In the District Court of Kahama, the Appellant, who was the 1st accused person together with Abdalah Luhanga, the then 2nd accused person got charged jointly and together with three counts to wit; conspiracy to commit an offence contrary to the provisions of section 384 of the Penal Code, Cap.16; forgery contrary to the provisions of section 333,335 and 337 of the Penal Code, Cap. 16 and uttering false document contrary to the provisions of section 342,335 and 337 all of the Penal Code, Cap.16 in the 1st, 2nd and 3rd counts respectively.

According to the charge, on or about the 16th of February, 2016 at Kahama Ward Land Tribunal, the Appellant and his colleague fraudulently and with intent to defraud, presented a forged judgment of land case No.3 of 2016 indicating that the said judgment was dully delivered by the said tribunal, a fact which was not true.

In the prosecution case led by Maisala Kasonga, Steven Magala, Ashura Ally and E.2544 D/C Emmanuel testified as PW1, PW2, PW3 and PW4 respectively, indicated that, the Appellant had once involved in land dispute No.56/2012 in

that tribunal where the then 2nd Accused person was a Chairman. That case was concluded. The Appellant then did conspire with the then 2nd accused and forged a judgment having land case No. 3/2016 purporting to be a genuine one. In his defense, the Appellant testified to have filed that case, thus it is not a forged one.

The trial was concluded, in which, on 20th of January, 2020, the trial court found the Appellant liable in the 3rd count of uttering a false document. The court acquitted both the Appellant and the then 2nd accused for the offence of conspiracy and forgery fourth with. The Appellant was not happy with the finding of the trial court thus preferred an appeal to this court on the following ground:

1. *That, the trial Magistrate erred in law and fact in convicting the Appellant for the offence of uttering a false document under section 342 and 337 of the Penal Code.*
2. *That, the trial Magistrate erred in law and fact in relying on exhibit P1 while the same was not read out to the Appellant in court.*
3. *That, the trial Magistrate erred in law and fact in convicting the Appellant basing on the prosecutions' evidence which was week, contradictory, doubtful and unreliable.*

On 31st of August, 2020, I happened to hear Mr. Bakari Muheza, learned Advocate who represented the Appellant and Mr. Nestory Mwenda, learned State Attorney for the Respondent Republic. Mr. Mwenda declined to support the appeal. Mr. Bakari who fended for the Appellant argued each ground of appeal seriatim as hereunder:

Submitting in the 1st ground of appeal Mr. Bakari had an observation that, it was wrong in the conviction of the Appellant to omit section 335 of the Penal

Code providing for categories of uttering false document. In his view, the omission is incurable in two senses; one because the Appellant was charged under section 342, 335 and 337 all of the Penal Code and two, with such an omission, it will not therefore show how the offence was committed. He thought the judgment be nullified.

As to the 2nd ground of appeal, it was his submission that, it was illegal to deploy in evidence exhibit P1 while the same was not read in court after it has sought admission. He cited in this, the case of **Robinson Mwanjisi v. R (2003) TLR 218** to bolster his averment. In his view, as the said exhibit was not read in court, then it be expunged from the record.

Mr. Bakari also submitted in the 3rd ground of appeal such that, besides exhibit P1, there is no evidence to connect the Appellant with uttering of the false document. He commented also in the evidence of the prosecution that, the evidence that Hussein Rashid (deceased) never participated in land case No.3/2016 because he was sick is lacking. There is no any document tendered to that effect, or even indicating that, PW1 was nursing Hussein Rashid. The learned counsel added.

He also commented on the evidence of PW2, PW3 and PW4 such that, land case No.3/2016 was filed without following proper procedure. If this is the case, according to Mr. Bakari, then criminality won't be determined merely because the procedure has not been followed. He also commented on the evidence of PW2 that, land case No.3/2016 existed, only that it was forged. The learned counsel wondered on that assertion on how it could happen. He thus thought to be relevant for the prosecution to have tendered the case file in court for proof thereof.

As to forgery of the judgment, he submitted that, it may not be correct to peg forgery on merely not signing the judgment because, even exhibit P2 which is said to be a genuine one, was not signed by the Chairman, (PW3). Again, he thought, failure to sign the judgment in itself may not constitute evidence of forgery. It is upon those premises the learned Counsel for the Appellant thought that the appeal has merits thus, urged me to allow it.

Replying to the 1st ground of appeal. Mr. Mwenda submitted that, there was nothing like illegality committed in the conviction because sections 342 and 337 of the Penal Code are on general punishment and therefore the omission to specify section 335 of the Penal Code is curable under the provisions of section 388 of the Criminal Procedure Act, Cap.20

With regard to the 2nd ground of appeal, he conceded that, at page 16 of the proceedings, exhibit P1 was not read after it was admitted in evidence. He however observed that, even when the said evidence is expunged, yet the evidence of PW1 is relevant in so far as uttering of false document is concerned. To bolster this argument, the learned State Attorney cited the case of **Anania Clavery Balele v. R Criminal Appeal No.355/2017** (unreported)

Turning to the 3rd ground of appeal; his view was that, the evidence of the four prosecution witnesses was consistent and if any contradiction got noted, then, it has not touched to the root of the matter. He noted also that, the central issue at trial was not presence of the deceased at the trial tribunal but rather on whether or not the impugned judgment was a forged one. He said so, as in his view, there is evidence that when the matter took shape at the trial ward tribunal, the said Hussein Rashid (deceased) was no more thus, the need to have medical evidence became of no relevance.

In addition, PW3 who was the chairman of the Ward Tribunal refuted to know existence of Land Case No. 3/2016 which evidence, got collaborated by the evidence of the investigator (PW4). He therefore trusted this evidence, more so because, the Appellant never cross examined the prosecution witnesses. Under such circumstances, Mr. Mwenda did not see the need of having a case file in evidence as the prosecution witnesses were trusted and managed to prove the offence. he thus cited the case of **Mathias Bundala v R. Criminal Appeal No.62 of 2004** (unreported) that, it is the duty of the court to trust witnesses in their testimony. He could therefore attach no weight to the appeal, thus urged me to dismiss it.

In rejoinder, the learned counsel left the 1st ground for the court to determine. In the 2nd ground, his rejoinder revolved around the fact that, as the evidence indicates that Hussein Rashid died in May, 2016, the need to ascertain his absence in the trial tribunal in February, 2016 remain inevitable. He distinguished the case of **Mathias Bundala v. R** (supra) that, a witness must be credible, of which he did not see any, for him to be trusted by the court. Specific to PW3, the learned counsel rejoined that, he should not be trusted because of his statement that he doesn't remember the case. Parties ended here.

I think, I have heard enough from the two counsels. As it is, there is no dispute that the Appellant was once involved in land case No.56/2012 and also that, there existed another land case No.3/2016 in the same Ward Tribunal. The two cases involved the same parties. The controversy revolves around the fact that, land case No.3/2016 had its decision (exhibit P1) forged. In it, as per the record, there are two facts need be cleared by the record. One is on forgery of the judgment and two on existence of the case itself.

In this, the prosecution has three versions. One, is belief that the decision is forged for want of the signature of the chairman and two, there exists a land dispute in the ward tribunal, but its decision has been forged. Last, is that, all along, never existed a land dispute registered as land case No. 3/2016. All these must be cleared by evidence. For clarity, I think better these be resolved through going seriatim in the grounds of appeal.

In the 1st ground, the issue is on omission in the conviction to cite the provisions of section 335 of the Penal Code. As argued by the parties, the Appellant was charged under the provisions of sections 342, 335 and 337 of the Penal Code for having uttered a false document. Parties also agreed, which I concur that, the convicting magistrate omitted to cite section 335 of the Penal Code. At page 7 of her judgment, Kyaruzi, Senior Resident Magistrate stated as follows:

> *"The first accused person is declared not guilty and acquitted for the second count but declared guilty and convicted for the third count for the charge of uttering false document contrary to section 342 and 337 of the Penal Code, Cap.16 R.E 2002"*

This being the position, the magistrate entered conviction. Parties are not at variance regarding this. The question is whether this irregularity is fatally incurable. In this, I tend to agree with Mr. Mwenda that, in terms of the provisions of section 388 of the Criminal Procedure Act, the illegality is curable as it has not been stated on how the Appellant was prejudiced by the irregularity. The section reads as follows:

> "388(1) *Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable."*

With that legal position, Mr. Bakari labored to convince this court to accept that, illegality is incurable but, has not shown how did the omission occasioned failure of justice to the Appellant. I have not seen any merit to this ground and is accordingly dismissed.

In the 2nd ground, the main complaint is on reliance of exhibit P1 by the trial Magistrate without reading the same in court after it was admitted in evidence. Mr. Mwenda conceded to the irregularity but cited the case of **Anania Clavery Balele v. R,** (supra) that, the evidence of prosecution witnesses was sufficient even when the document is expunged. At page 13 of that case, the court of Appeal stated as follows regarding this point:

> *"We would emphasize that failing to read out the document that was cleared for admission and then actually admitted in evidence is wrong and prejudicial. In consequence, we find merit in the second ground of appeal and proceed to expunge exhibits P.2, P.3, P.6, and P.10.*

However, we wish to interject our agreement with Ms. Mkunde that, even without these four discounted exhibits, their contents, as we shall demonstrate herein below, were sufficiently covered by the testimonies of PW2, PW3, PW5 and PW6."

From the above position, and as was in the case of **Robinson Mwanjisi v R** (supra), exhibit P1 which was not read in court, after it was admitted in evidence, is hereby expunged. The unresolved question is whether there is other evidence indicating that the said exhibit was a forged one. As will be demonstrated in the 3rd ground of appeal, there is none and accordingly this ground of appeal is allowed.

In the 3rd ground, the Appellant's complaint is that, the prosecution evidence was contradictory, weak and doubtful such that it was not supposed to be relied in basing conviction of the Appellant. Here is where the crux of the matter rests. This is what I said earlier, on belief that, the decision is forged for want of the signature of the chairman; existence of a land dispute in the ward tribunal, but its decision has been forged and non-existence of a land dispute registered as land case No.3/2016.

To come to the resolution of all those, first, there was a need to have evidence on record that, land case No.3/2016 never existed. I am saying so because, the Appellant does not dispute to have filed that case. Under the circumstances of this case, we may not determine existence of the case by looking at the judgment alone which is also suspected to be forged. It be also known that, judgment was reduced from the collected evidence of witnesses on matters of fact. I hasten to agree with Mr. Mwenda that, the need to have the original record may be differed because the prosecution witnesses were trusted by the court.

Resolving what Mr. Bakari termed as contradiction, a need to analyze areas of contradiction is inescapable. As a matter of fact, PW2 had his version of evidence that the complaint before him was on the act of the tribunal to decide the matter which was already decided by the same tribunal. It is at this point when they showed him two decisions in land case No.56/2012 and 3/2016. In my view, PW3 do not dispute both the judgment and therefore existence of both cases. The problem comes with PW3 whose reasons for the forged judgment rests on the fact that it was not signed. As submitted by Mr. Bakari, this is not sounding because even exhibit P2 claimed to be a valid one, has not been signed.

Yet, in another attempt, PW4 who investigated the case provides little help. May be, I should first reproduce part of his evidence at page 28 of the proceedings as hereunder:

> *"I made a follow-up of this decision at the ward tribunal. I noted that, civil case No.3/2016 was not officially filed at the tribunal. I also noted that there was a time Abdallah Luhanga and Hussein Rashid had a case at the tribunal, it was civil case No.56/2012. In that particular case, the tribunal issued a decision in favor of Hussein Rashid. I seized civil land Case No.56/2012 and that of 3/2016 which was not properly registered."*

In the above evidence, one can hardly underscore the bench marks used by the investigator to determine which between the two cases was a fake one. Again, as it is, there is what the witness stated as improper registration of the case. In my view, under the circumstances of this case, and also as submitted by Mr. Bakari, criminality of the Appellant may not be determined on improper

registration of the case. The Appellant may not be blamed because any impropriate committed is with the tribunal officials and not the Appellant.

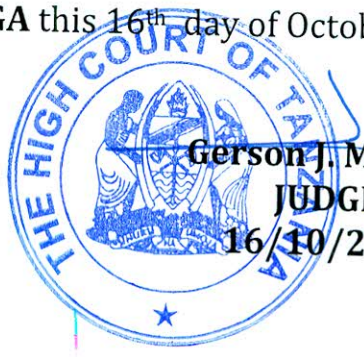
What may be concluded is that, whether or not the decision was forged, or whether or not it did not exist, or whether or not the case existed, a need to have the record from the tribunal may not be casually avoided. In it therefore the argument that evidence of the prosecution was suspect, cannot be easily dismissed. In that, I agree with Mr. Bakari when distinguishing the case of **Mathias Bundala v. R**(supra) for a reason that credence must first be attached to the witness before he/she is trusted. At page 12 of the judgment, the Court of Appeal made the following observation:

> *"In short, as this court held in **Goodluck Kyando v R., Criminal Appeal No.118 of 2003** (unreported) it is trite law that, every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reason for not believing a witness."*

I have stated why the prosecution witnesses should not be trusted. On that account, the prosecution case was not proved at the standard required as to require sustenance of the said conviction and sentence. Accordingly, the appeal is hereby allowed. Conviction and sentence met to the Appellant is thus quashed and set aside. The Appellant should therefore be relieved from the community service undertaking wherever he is serving. It is so ordered.

Gerson J. Mdemu
JUDGE
16/10/2020

DATED at **SHINYANGA** this 16th day of October, 2020.



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