IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 61 OF 2020

(Arising from the decision of the District Court of Temeke at Temeke in Criminal Case No.962 of 2016 dated 25th July, 2019 before Hon. K.T. Mushi, **RM**)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

PETER SAIMON MAPUNDA ..... RESPONDENT

JUDGMENT

28th Sept 2020 & 30th Oct, 2020.

E. E. KAKOLAKI J

In this appeal the chief prosecutor in the country (DPP) is challenging the decision of the District Court of Temeke at Temeke in Criminal Case No.962 of 2016 dated 25th July, 2019, that acquitted the respondent of the charges he stood charged with. He has registered his dissatisfaction canvassed with the sole ground of appeal going as follows:

1. That, the Honourable magistrate misdirected himself by failing to consider the evidence of Prosecution side which was strong enough to prove the case beyond reasonable doubt.

Before the trial court the respondent was booked with a charge of Personation; Contrary to section 369 of the Penal Code, [Cap. 16 R.E 2002] styled in two counts. On the first count, it was alleged on diverse dates between the year 2010 – 2011 at the District Land and Housing Tribunal for Temeke in Land Application No. 15 of 2010 with intent to defraud, falsely represented himself as an advocate for the respondents before the said tribunal the fact he knew to be false. In the second count, the same accusation was levelled against him in that in the year 2013 he personated himself as advocate at the High Court of Tanzania, Land Division at Dar es salaam, in the Land Appeal No. 87 of 2013. When the respondent was called to answer his charges before the trial court, denied them all the result of which moved the prosecution to call in court four (4) witnesses and tender five (5) exhibits in a bid to prove its case.

It was prosecution's case through Rafii Said Mpendu (PW1) who was the applicant before the District Land and Housing Tribunal (DLHT) for Temeke in Land Application No. 15 of 2010 that, the respondent presented himself as an advocate the fact he knew to be false. This witness said, the respondent christened himself as an advocate and represented the respondents in that suit who were Abdulmaliki Ally, Ally Mkalapema, Frank Maletu and Dastan Fabian who eventually defeated him before he appealed to the High Court Land Division where he further represented them as advocate. He tendered the proceedings of DLHT of Temeke and the judgment of High Court Land Division concerning the respondent accusation as exhibits P1 and P2 respectively. In his evidence PW1 went further to inquire from the Registrar of the High Court of Tanzania and the Tanganyika

Law Society administration of the existence of the names of the respondent in the roll of advocates but the response was that none was existing. He tendered the two letters from both authorities as exhibits P3 and P4 respectively. One of the respondents in the suit before DLHT of Temeke was Abdulmali Ally who also testified as PW2 and confirmed that the respondent appeared and assisted them in their suit before the DLHT for Temeke. He qualified his testimony that, he did so for the purposes of assisting them to explain some issues before the Tribunal and they won the case. He said, in the appeal stage were represented by another advocate called Mapunda different from the respondent.

It appears when arrested the respondent underwent interrogation process and eventually recorded his cautioned statement which was tendered in court by the investigator (PW3) as Exh. P5 where the respondent confessed to have appeared before both courts to represent the respondents in those matters but acting under power of attorney.

During the defence, in his sworn evidence, the respondent denied to have represented the respondents in the alleged two cases before the DLHT for Temeke District and the High Court of Tanzania, Land Division Dar es salaam as an advocate but rather assisting one of the parties who was living at Katavi through legal advice. He added that, he was the legal officer of Tazara by that time, so he never appeared in court as advocate as alleged by prosecution. At the conclusion of the case the accused person was found not guilty of the offence charged with and finally acquitted the decision which dissatisfied the DPP hence this appeal.

The appeal was disposed by way of written submissions. The respondent proceeded unrepresented whereas the appellant enjoyed the services of Mr. Adolf Kisima, learned State Attorney. Submitting on the sole ground of appeal Mr. Kisima, contended that the trial magistrate ought not to have acquitted the respondent in the abundant and cogent prosecution evidence to prove the case beyond reasonable doubt. He said, PW1 had it all that, the respondent presented himself as advocate and represented the respondents in both matters before the DLHT for Temeke District and High Court Land Division. And further that in so proving Exh. P1 and P2 were tendered in court which evidence was further supported by Exh. P3 and P4 letters from the Registrar of High Court and Tanganyika Law Society administration disclaiming any knowledge of the respondent as an advocate.

Mr. Kisima argued that, PW1 whose evidence was never challenged by the respondent during cross examination deserves credence as what is important is witness's credibility and reliability and not a number of witnesses called to testify. He relied on section 143 of the Evidence Act, [Cap. 6 R.E 2019] and the cases of **Nyerere Nyague Vs. R**, Criminal Appeal No. 67 of 2010 (Unreported) and **Goodluck Kyando Vs. R**, Criminal Appeal No. 118 of 2003 (unreported). He went further to submit that, the evidence of PW1, who also identified the respondent in court is corroborated by that of PW2 who testified to the effect that, the respondent was assisting them in the tribunal proceedings. And that, PW1 is corroborated further by PW4 through the cautioned statement Exh. P5 proving that the respondent purportedly represented PW1's opponents under power of attorney. For the foregoing evidence and submission Mr. Kisima implored this court to allow the appeal

and depart from the trial court's finding by concluding that the prosecution case was proved beyond reasonable doubt, thus convict and sentence the respondent accordingly.

Submitting against the appeal the respondent prefaced his submission by noting that someone who signed the appellant's submission referred him/herself as **RESPONDENT** instead of the **APPELLANT** thus inviting the court to dismiss the appeal for want of prosecution. That notwithstanding the respondent responded to the appellant's submission in chief in support of the ground of appeal. He said, the charges against him were not proved beyond reasonable doubt by the prosecution. Citing the provisions of section 369 of the Penal Code under which the charges against him were preferred, he argued, to prove the offence of personation the prosecution has to prove that the accused with intent to defraud presented himself to any of the prosecution witnesses to be *"some other person"* regardless that the said other person is living or dead. In this case he submitted, PW1 cannot claim that the respondent presented himself to him as an advocate as the proper person to so allege would be the chairman of Temeke DLHT (PW4) or the respondents to the Land Case No. 15 of 2010 in which he is accused to present himself as the advocate. Though denying commission of an offence, to him, to introduce yourself as an advocate is not personation under the meaning of section 369 of the Penal Code, as the advocate is an officer of the court who cannot be termed as "other person." So it was wrong to charge him under that section and he cannot therefore be convicted for personation, the respondent contended.

Citing the case of **Nguza Vicking @ Babu Seya and 3 Others Vs. R**, Criminal Appeal No. 56 of 2005 (unreported), the respondent went on to submit, the burden of proof in criminal case lies on the prosecution side and not on defence side, and the standard of proof remains beyond reasonable doubt. He said, in this case prosecution witnesses are so weak with full of contradictions. He referred the contradictions to be in the evidence of PW1 when said the respondent represented PW2 and his colleagues in both courts' as advocate whereas PW2 contradicted him when testified that, there were two different Mapunda who used to assist them in both DLHT and High court. That, when cross-examined PW2 denied the assertion that the respondent introduced to them as the advocate. He added, even in PW3's evidence and Exh. P5 where it is alleged he represented PW2 and his fellows in two court which he strongly disputes, it is stated that they granted him a power of attorney to so do. To him with all these contradictions, prosecution never proved their case that he impersonated himself the advocate, therefore he should benefit from the weaknesses. He cited the case of **Chukudi Denis Okechukwu and 3 Others Vs. R,** Criminal Appeal which he failed even to give its citation and supply its copy for this court to refer to. Lastly the respondent stated, even the tribunal proceedings and High Court Judgments Exh. P1 and P2 do not specify the alleged named Mapunda who appeared in courts as PW4 said there are three Mapunda she knows, thus it is difficult to tell who amongst the three represented PW2 and his colleagues as advocate in both DLHT and the High Court as alleged, hence no proof of the offence of personation. He therefore invited the court to dismiss the appeal for want of merits.

Having dispassionately considered the contesting submissions of both parties let me start with the issue raised by the respondent concerning the use of the term **"Respondent"** in the signature part of the appellant's submission hence a prayer for dismissal of the appeal for want of prosecution. I think this point need not detain me as the respondent has failed to state how he was affected with the use of such term which to any reasonable man appears not to be a calculated mistake but rather typographical error. I therefore dismiss the respondent's prayer to dismiss the appeal and proceed to consider the merits and demerits of the appeal.

It is Mr. Kisima's submission that the prosecution through the evidence of PW1 corroborated by that of PW2 and PW3 and exhibits P1,P2,P3,P4 and P5 managed to prove its case beyond reasonable doubt that the respondent impersonated himself as advocate while knowing that fact to be false. In response the respondent submits that, the prosecution failed to so prove as the prosecution witnesses are so weak and the ingredients of the offence under section 369 of the Penal Code were not proved to the required standard. In responding to these rival submissions it is instructive to this court to quote the section in which the charges against the respondent are premised. Section 369 (1) of the Penal Code reads:

> *369-(1) Any person who,* ***with intent to defraud any person, falsely represents himself to be some other person, living or dead,*** *is guilty of an offence.* (emphasis supplied)

The respondent submitted that any introduction by someone as an advocate does not mean impersonation to be *"some other person"* living or dead

within the meaning of the above cited section. With due respect I do not buy the respondent's interpretation of the term *"some other person"* as used in the section above. The term in my considered opinion has no any other meaning than referring to another person as interpreted in the Black's Law Dictionary Black's Law Dictionary, Bryan A. Garner (8th ed. 2004) when defining the term impersonation. At page 2201 it defines impersonation to mean:

> *"The crime of* ***falsely representing oneself*** *as* ***another person.***"

With that definition I have no doubt in interpreting the provision of section 369(1) to mean that, the offence of personation is committed when one person who with intent to defraud another person goes further to execute his intention by falsely representing himself to be another person while in fact he knows not to so be. So the offence can be committed to any person whom the accused presents himself to, to be *"another person"* who is either living or dead. Having so found there are two issues to be determined by this court. The first one is, whether the respondent appeared in both DLHT and High Court as alleged, if answered in affirmative and secondly, whether he presented himself as the advocate.

To start with the first issue, PW1 testified to the effect that the respondent appeared in the DLHT and represented PW2 and his fellows as an advocate. PW2 is supporting PW1's evidence in that the respondent appeared in the DLHT as their friend but he never introduced to him as an advocate. There is also uncontroverted evidence in Exh. P5 (Respondent's cautioned

statement) which its admission was not contested by the respondent containing respondent's admission that he represented PW2 and his colleagues in both DLHT and High Court though claiming to be under power of attorney. With all this credible evidence I am satisfied and therefore agree with Mr. Kisima's submission that the respondent appeared before both DLHT and the High Court, thus the first issue is answered in affirmative.

With regard to the second issue, there is no dispute that the respondent is not an advocate as exhibited by exhibits P3 and P4 and confirmed by the respondent himself in his defence. Having traversed through the DLHT proceedings and the High Court judgment exhibits P1 and P2 respectively there is also no dispute the name of Mapunda appears in both documents. In the DLHT proceeding dated 27/07/2010 when the Tribunal was framing up issues for determination of land dispute in Land Application No. 15 of 2010, Mapunda signed as respondents' advocate. He continued to enter appearance and actively participated in the proceedings including conducting cross-examination for and on behalf of the respondents as an advocate. Likewise the judgment of the High Court disclosed the name of the advocate who represented the respondents to be Mapunda. There is nowhere in the DLHT and High Court Judgment it is indicated that this Mapunda had power of attorney to represent any of the respondents in that matter. Since I have already found in the first issue that the respondent appeared in both courts, and since the record of both DLHT and High Court confirms that he appeared as the advocate, I have no doubt in making a finding in the second issue that, the respondent presented himself to both the DLHT and High Court as

well as to PW1 to be an advocate and made them to so believe, something he knew to be false. Thus the second issue is resolved in affirmative as well.

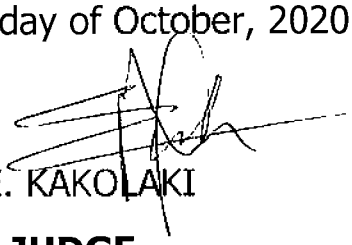
Having so found let me further consider the respondent's submission. The respondent is submitting that there was contradiction between PW1 and PW2 when PW2 said the respondent never introduced to him as advocate whereas PW1 says he did. To me this is not a contradiction as it might be possible the respondent never told PW2 that he was an advocate but that does not contradict PW1's evidence as even the court records of DLHT and High Court Judgment betrays him for proving that he presented himself as an advocate. With regard to the evidence by PW4 who said there is three Mapunda who used to appear before him thus difficult for him to recognise whether it was the respondent or not who appeared before her, with such evidence I don't find any doubt created against the prosecution case. There being three Mapunda who used to appear before her (PW4) and her failure to identify the respondent as a person who appeared before her for the reason of lapse of time does not displace credible evidence of PW1 and PW2 who proved to the court beyond reasonable doubt that the respondent appeared before the DLHT. As it was rightly decided in the case of **Goodluck Kyando** (supra) every witness deserves credence, to me I find PW1, PW2 and PW3 to deserve credence. For those reasons, I disagree with the respondent's submission that there was contradiction, and if any existed, I hold it was so minor and did not go into the roots of the case to affect the prosecution case.

In view of the foregoing, I am satisfied that, the respondent's charges on both two counts were proved by the prosecution beyond reasonable doubt.

I therefore quash the acquittal order entered by the trial court and in lieu thereof proceed to find him guilty on both counts as charged. I further proceed to convict him with the offence of Personation; Contrary to section 369(1) of the Penal Code, [Cap. 16 R.E 2002] on both counts as charged.

It is so ordered.

DATED at DAR ES SALAAM this 26th day of October, 2020.



E.E. KAKOLAKI

JUDGE

26/10/2020

Judgment delivered at Dar es Salaam this 26th day of October, 2020 in the presence of Mr. Adolf Kisima, State Attorney for the Appellant, the respondent and Ms. Monica Msuya, court clerk.

Right of appeal is explained.

Sgd:

JUDGE

26/10/2020

CONVICT'S PREVIOUS CRIMINAL RECORDS

Mr. Kisima (SA) – My lord, we have no previous criminal records concerning the respondent. We pray that let him be sentenced as charged.

MITIGATION

Respondent: My Lord, the following are my mitigation factors. I am 62 years old with a family to take care of.

COURT

I have considered the submission by the Republic/Appellant as well as the respondent's mitigation factors that he has a family to take care of plus his age. Being a first offender I think he deserves a lenient sentence. Since the provision of section 369(1) of the Penal Code does not provide sentence, then section 35 of the same Code has to come into play. I would have preferred custodial sentence only but for the reasons alluded herein above fine will be the first option.

Sgd:

JUDGE

26/10/2020

SENTENCE

The respondent is sentenced to pay fine of Tanzanian Shillings Two Million on each count or serve two years imprisonment in default for each count. Should he fail to pay the fine then custodial sentence to run concurrently.

It is do ordered.

Right of appeal explained.

E. E. KAKOLAKI

JUDGE

26/10/2020