IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

CONSOLIDATED DC CRIMINAL APPEALS N0. 36, 55 & 98 OF 2020

[Originating from the decision of the District Court of Dodoma at Dodoma dated 17th March, 2020 in Criminal Case No. 14 of 2018, Hon. D.J. Mpelembwa, RM]

NSUBI JAMSON MWASAMBUGU AND 2 OTHERS ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

6th of August, 2020 and 16th November, 2020

M.M. SIYANI, J.

The three appellants herein; Nsubi Jamson Mwasambungu, Maneno Peter Mlewa, and Lusajo Jamson Mwasambungu, were arraigned at the District Court of Dodoma at Dodoma with the offences of conspiracy to commit an offence contrary to section 384 and obtaining money by false pretences contrary to section 302 both of the Penal Code Cap 16 RE 2002. Nsubi Jamson Mwasambungu was also charged and convicted with an offense of

Personation contrary to section 369 (1) (2) and Uttering false documents contrary to section 342 of the Penal Code Cap 16 RE 2002.

Evidence led by the prosecution indicates that in divers dates the appellants herein conspired to obtain money from one Happy Allex Mshana by selling to her a piece of land located at Plot No. 75 Block "B" Ndachi "B" center in Dodoma Municipality which essentially is owned by Edina Hyera. It was the prosecution's case that in order to fulfil their evil plan, the 1st appellant personated herself to be the owner of the said plot (Edna Hyera) and uttered false documents in respect of it, something which induced the later to pay them the sum of Tshs 3,000,000/= as the purchase price.

At the conclusion of the trial, the appellants were convicted and sentenced to serve a prison term of seven years for conspiracy and another term of six years was awarded in respect of obtaining money by false pretences. Nsubi Jamson Mwasambungu was also sentenced to serve two years imprisonment for an offence of personation and uttering false documents. Dissatisfied with both the conviction and sentences imposed, each of them filed a separate appeal to this court. However, considering the fact that the

three appeals are against the same decision in Criminal Case No. 14 of 2018, I ordered consolidation of the filed Appeals. As such this Judgment is now in respect of Criminal Appeal No. 36 of 2020 filed by Nsubi Jamson Mwasambungu; Criminal Appeal No. 55 of 2020 by Maneno Peter Mlewa and Criminal Appeal No. 98 of 2020 by Lusajo Jamson Mwasambungu. For record purposes therefore, in this Judgment, Nsubi Jamson Mwasambungu will be referred as the 1st appellant, Maneno Peter Mlewa as the 2nd appellant and Lusajo Jamson Mwasambungu as 3rd appellant. Although as noted each of the appellants filed his/her own memorandum of appeal, the following grounds were common in all petitions:

1. *The trial Magistrate erred in law and facts by convicting appellants without considering their defense evidence when evaluating and analyzed the whole evidence given by both sides.*
2. *That, the trial court erred in law and facts by convicting the appellants while the offenses were not proved beyond reasonable doubts.*
3. *That, the evidence in respect of the offense of conspiracy against the appellants was mere suggestive than reality and prosecution failed to*

prove that appellants conspired to commit an offense.

4. *That, the statement of an Advocate which was admitted as exhibit P.10, was admitted contrary to section 34B (2) (e) of the Evidence Act Cap 6 RE 2002.*
5. *That, the 1st appellant was convicted on uttering false document without putting in mind that the prosecution failed to prove that the documents were false, and the 1st appellant made such documents with intent to defraud or deceive.*
6. *The trial court erred in law and fact by convicting the appellants without any evidence which prove that they received the said amount of money by false pretense.*
7. *That, trial magistrate erred in law and facts by admitting the statements of an Advocate as P8 without accord the said document to be read loudly before appellants.*
8. *That trial magistrate erred in law and facts by admitting the caution statement of 2nd appellant without regards the provision of section 50 and 51 of the Criminal procedure Code.*

At the hearing of the appeal, the appellants appeared in persons and had no legal representation. The respondent on the other side was represented by Ms Magoma, learned Senior State Attorney. Given a chance to address the court, the appellants opted to adopt the contents of their grounds of appeals to be their submissions. On her party, Ms Magoma contended that both the appellant's conviction and sentences were proper. She submitted that evidence adduced against them proved beyond doubts that the appellants conspired to commit the offences charged. According to the learned State Attorney, such evidence clearly established that the first appellant pretended to be Edna Hyera who is the legal owner of the said plot. She signed the sale agreement as Edna Hyera and so successful induced the purchaser to pay them. It was argued that the appellants prepared false documents of ownership of the plot which were also used to persuade the purchaser and confessed so, when arrested.

Ms Magoma went on to submit that in reaching its decision the trial court considered evidence tendered by both sides and therefore in her view, the conviction and sentence imposed were proper and justifiable.

I had an ample time to go through the record of appeal and what was submitted to me during the hearing of the instant appeal. Among the grounds raised by the appellants is that their defense was not considered by the trial court. Apparently, it is an established principle of law that in composing judgments, Judges and Magistrates are duty bound to weigh evidence of both sides and that failure to do so is a serious error. In the case of **Yusuph Amani Vs Republic**, Criminal Appeal No. 255 of 2014 (unreported) the Court of Appeal of Tanzania underlined the consequences of failure to consider evidence by stating the following:

> *It is the position of the law that, generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In that regard, failure to consider defense evidence is fatal and usually vitiates the conviction.*

In the present case, the learned magistrate summarized the evidence of both prosecution and defense. However, in evaluating the same he did not at all touch on the appellants' defense. His evaluation based entirely on what was stated by the prosecution witnesses. As normally stated by the

courts, it is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation. The Court of Appeal of Tanzania in the just quoted decision above, quoted with approval the decision in the case of **Leonard Mwanashoka Vs Republic,** Criminal Appeal No.226 of 2014 (Unreported) thus observed:

> *It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis*

Nevertheless, this being the first appellate court I am duty bound to re-evaluate and re-consider the appellants' defense which was not considered by the trial court. *Ipsa jure*, this is the duty of the first appellate court. I have a number of decisions in mind including the case of **Armand Gueh Vs Republic**, Criminal Appeal No. 242 of 2010 whereby the Court of Appeal of Tanzania stated:

Before we embark on discussing the above referred doctrine however, we once again wish to reaffirm our stand that we are desirous to be guided, where circumstances may so demand, by the principle that this being a first appellate court, it has a duty to reconsider and evaluate the evidence on record and come to its own conclusion bearing in mind that it never saw the witnesses as they testified. See the cases of ***Audiface Kibala Vs Adili Elipenda & others,*** *Civil Appeal No. 107 of 2012, and* ***Maramo Slaa Hofu & others Vs Republic,*** *Criminal Appeal No. 246 of 2011, (both unreported).*

Guided by that authority, I am now in a position to evaluate and consider the entire evidence of both sides adduced in the trial court. As noted, the charge which arraigned the appellants at the trial court, contained four counts. While the first appellant was indicated in all of the said four counts, the 2nd and 3rd appellants were only charged for the first and fourth counts which contained conspiracy and obtaining money by false pretenses.

I have revisited the entire trial court's record and it is quite evident that the 1st appellant signed the transfer document (Exhibit P2) before advocate Shukuru Mlwafu on 5th June, 2017. The signature appended in that

documents, indicates the name of the signee (transferor) as Edina Hyera. Similarly, the name and signature appended in the sale agreement (Exhibit P3) indicates the seller is Edina Hyera and the signature bears those names. Through her cautioned statements (Exhibit P8) the 1st appellant admitted to have signed the two documents above but alleged that she was not accorded a chance to read its statements. For easy of reference, the 1st appellant stated the following in her cautioned statement when confessing to sign the sale agreement:

> *Ninakumbuka mtu wa mwisho kufika alikuwa mke wa Maneno Happy Allex na alipofika ndipo tukasaini sahihi zetu. Mimi nilisaini nakala nne juu ya zile picha ambazo nilikuwa nimempatia Maneno.*

As prior noted, when signing the document, the 1st appellant did not use her signature which she used in her cautioned statements. She signed both the transfer document and sale agreement using initials of the name Edina Hyera. Therefore, her signatures in exhibits P2 and P3 differs with her signature in exhibit P8. Through her defense testimony during trial of the instance case, the 1st appellant again admitted to have signed the sale

agreement (exhibit P3). In my considered view, by signing in exhibit P2 and P3 using initials of the name Edina Hyera, the 1st appellant knew that she was not the said Edina Hyera and therefore intended to mislead the purchaser by personating herself as Edina Hyera.

The 3rd appellant's cautioned statement (Exhibit P7) also shows that, she introduced the 1st appellant to 2nd appellant, so that she could act as a seller of the plot. In her owned words, the 3rd appellant stated the following:

> *Nikiwa mitaa ya CDA nafuatilia shamba la baba, ndipo nikakutana na Maneno. Tukasalimina ndipo akaniita pembeni tukiwa pale pale CDA na wakati huo allikuwa na bahasha ameshika mkononi ndipo baada ya kuniita pembeni akaniambia kuwa ametoka ndani CDA kuna kazi mtu anatakiwa kusimama na kazi hiyo ya kuuza kiwanja. Ndipo nikamuuliza atatasimamaje kuuza kiwanja ambacho hakimuhusu naye akasema ni viwanja vya wafanyakazi wa CDA ambavyo walijipa majina wakajimilikisha wao kwa hiyo wameamua kujitoa kwa kuwasimamisha watu badala yao ili wawauzie*

kisha na wakisha wauzia mtu akayesimama na kuuza atapewa pesa kidogo au kiwanja nje ya mji.....baada ya hapo nikaona kwa nini nimtafute mtu wa mbali hivyo nikaamua nimtafute mdogo wangu ili tupate pesa wote.

The above piece of evidence shows the 3rd appellant was aware that the transaction would require someone acting as the owner of the plot who would go on to sell the same and, in the end, they would get money. Therefore, when the 3rd appellant called her young sister, (the 1st appellant) she knew what was to be done and having been informed, the 1st appellant agreed to play that role. It was obvious that when signing through Edina Hyera's initials instead of her signature (which of course she used in her cautioned statements) or her own initials, the 1st appellant merely executed a pre-arranged plan agreed with his sister.

The 1st and 3rd appellants did not object admissibility of their cautioned statements. It is a well-established principle that the best evidence in a criminal trial is a voluntary confession from the accused himself and that a confession or statement will be presumed to have been voluntarily made

by an accused person until an objection to it is made by the defense on the ground, either that it was not voluntarily made or not made at all. I find support in this stance from the Court of Appeal of Tanzania decisions in **Selemani Hassani Vs Republic,** Criminal Appeal No. 364 of 2008 and **Paulo Maduka and 4 Others Vs Republic,** Criminal Appeal No. 110 of 2007.

Similarly, there was no objection from the 1st appellant as to admissibility of the letter of allocation, sale agreement and transfer documents. Both the 1st and 3rd appellant did not cross examine anything regarding the contents of these documents. Such failure meant they accepted the incriminating evidence in those documents as it was observed in **Nyerere Nyague Vs Republic,** Criminal Appeal No. 67 of 2010, where the Court of Appeal of Tanzania stated the following:

> *As a matter of principle, a part who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said.*

Since the appellant did not object the admissibility of the documents tendered, then the court was justifiable to assume that they have admitted the facts in respect of the evidence tendered and correctly relied on the same.

The above said, the appellants were also charged for obtaining money by false pretences. A sale agreement between the 1st appellant and PW1 shows, the later agreed to purchase the plot for the sum of Tshs 3,000,000/= and that Tshs 2,000,000/= as part payment, was paid to the 1st appellant on 5th June, 2017. By such uncontroverted piece of evidence, it was immaterial whether the remain sum was settled or not. The effect of such evidence in my view is that the 1st appellant received an amount of Tshs 2,000,000/= in relation to the sale of a plot which did not belong to her.

The appellants also challenged the trial court for admitting exhibit P10 contrary to section 34B (2) (e) of the Evidence Act Cap 6 RE 2002 and

faulted the court for convicting them with the count of uttering false document without there being and evidence that the said documents were false and that they were made such documents with intent to defraud or deceive.

I will start with admission of exhibit P10. Section 34B (1) (b) (supra) makes it possible for a written statement to be admissible even where the maker of the said document has not been procured in court as a witness for reasons such as death or mental health if such statement was purportedly signed by that person. Exhibit P10 was a statement made to the police by an advocate who allegedly witnessed the sale of a plot to PW1. Both the police officer who recorded the statement and the respective advocate, signed the same. Indeed, there was no objection from the appellants as to the admission of the statements when tendered by PW8. The time to object an admission of a document is always when the same is tendered in court and not during appeal. The appellant's concern on admissibility of such document at this appeal, is therefore baseless.

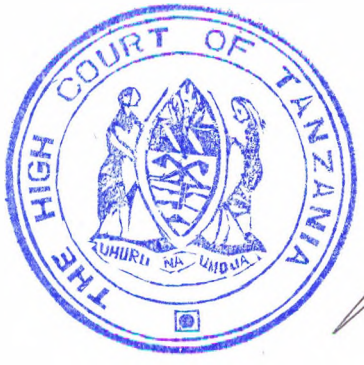
With regard to false uttering statements, evidence tendered indicates that the 1st appellant issued to PW1 documents which persuaded her to believe that she was dealing with a real owner of the plot. According to PW1, the 1st appellant gave her an allocation letter in respect of the plot. The 1st appellant also tendered a transfer document purporting to show that she was the owner of a piece of land located on plot No. 75 Block "A" Ndachi area Dodoma. As said before, the 1st appellant did not deny to have signed that particular document. In my view, by signing and issuing exhibits P2 and P3 to PW1 while knowing that she was not the owner, the 1st appellant uttered false documents intending to mislead the buyer after conspiring to do so with the 3rd appellant.

In the fine, apart from incriminating evidence from co accused, the prosecution side did not tender any evidence against the 2nd appellant. Indeed, it was PW1's evidence that the 2nd appellant was not aware of her dealings with the rest of the appellants herein until when she had already purchased the plot. Apparently, as a matter of practice, a conviction should not be based solely on the co-accused statements. A confession by an accused person can only be used as lending assurance to other evidence

against the co-accused and that it cannot be used as the basis for the prosecution case. See **Selemani Rashid and Others Vs Republic,** (1981) TRL 252, **Goca Vs Republic** (1993) 20 EACA 318. Since there was no any evidence implicating the 2nd appellant (Maneno Peter Mlewa) from the charges except, the confessions by the co accused persons, I find that the trial court wrongly convicted him with the charged offences of conspiracy and obtaining money by false pretenses. Without much ado, both his conviction and sentence imposed to him is therefore quashed and set aside.

The above said, save for an appeal by the 2nd appellant one Maneno Peter Mlewa which is now allowed with an order for his immediate release from prison, I find the 1st and 3rd appellant's appeal, of no merits and I according dismiss the same in its entirely. It is so ordered.

DATED at **DODOMA** this 16th November, 2020



M.M. SIYANI

JUDGE