IN THE HIGH COURT OF TANZANIA

AT MOSHI

CRIMINAL APPEAL NO. 41 OF 2019

(Originated from Criminal Case No. 336 of 2015 at District Court of Hai at Hai)

1. ASSERI ALIWARIO MUSHI

2. LATIFA MMARI.....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

06/10/2020 & 20/11/2020

MWENEMPAZI, J

The appellants were arraigned in the District Court of Hai for an offence of forgery contrary to section 337 of the Penal Code (Cap. 16 R.E 2002). The particulars were that between 06/12/2007 and 28/01/2008 at an unknown time and place within Hai District in Kilimanjaro Region, knowingly and fraudulently the appellants forged a judicial document namely judgment of the Civil Case No. 82/2007 of 06th day of February 2007 in order to acquire a piece of land illegally. The appellant denied the allegation and the prosecution called seven witnesses and tendered two exhibits.

Brief facts of the case were that the 1st appellant and the complainant Jacob Nicholas (PW1) had a long land dispute over a piece of Land situated at Kikavu Chini area. It was the prosecution case that on

30/02/2008 the appellants went to the farm of PW1 with papers with intent to execute a decree which shows he won the land dispute. The papers were from the judgment of Civil Case No. 82 of 2007 where the 1st appellant sued the two brothers Issa Jumanne (PW2) and Ramadhani Jumanne. PW1 got suspicious and referred the matter to District Land and Housing Tribunal where he alleged to open Civil Case No. 69 of 2009. According to PW1, the tribunal summoned the parties and the 1st appellant claimed to obtain a judgment and decree (exhibit P.1) at the Machame Kusini Ward Tribunal. Then the District Land and HousingTribunal called for the record at Ward Tribunal but those records were non existent. PW1 doubted the decision and reported the matter to the police station. The case was investigated by PW4 who testified that according to his investigation he found out that the judgment was made by the 2nd accused who was a Ward Tribunal Secretary and it was forged. His testimony was supported by the members of that tribunal (PW5 and PW6) who said they have never attended or been involved in the resolving that matter.

In their defence both appellants denied the allegation and maintained that the judgment was genuine. At the end of the contested trial, the appellants were found guilty and convicted. They were sentenced each one to pay a fine of Tshs. 1,000,000/= or to serve two years imprisonment. The appellants were aggrieved and filed their appeal to this court which comprised of the following grounds:-

1. That the trial Court erred in law and fact in admitting judgment of Land Case No. 82 of 2007 Massama Kusini Land Ward Tribunal as an exhibit by the prosecution side.
2. That the trial Court erred in law and fact in weighing evidence of both sides and entered judgment in favour of the respondent as

ingredients of forgery were not proved against the appellants beyond reasonable doubts.

3. That the trial court erred in law in recording evidence of both sides and delivery of the judgment.

At the hearing, the appellants were represented by Gabriel Shayo, Advocate and the respondent was represented by Ms. Grace Kabu, State Attorney. The parties were ordered to argue the appeal by way of written submissions. Unfortunately, it is only the 1st appellant who complied with the scheduling order.

In his written submission, the 1st appellant submitted that exhibit P.1 is a Judicial Award from Masama Kusini Ward tribunal which was wrongly admitted by the trial court. He further contended that he was charged under the wrong provision of the law as exhibit P.1 was not just a document but a judicial record therefore he ought to be charged under section 338 and 339, and not section 337 of the Penal Code.

On the second and third ground of appeal, the 1st appellant submitted that there is no evidence presented before the court that he forged the alleged judgment. He maintained that as far as the award was signed by the chairman and members of the tribunal is a judicial decision and there is nowhere he signed on that document or altered it to make that decision to be forged. He submitted that there was no evidence of a handwriting expert to prove that the document was forged by him. He prays for the conviction and sentence to be set aside and be refunded the money he paid as a fine.

I have taken into consideration the submission of the first appellant together with the trial court record. This being the first appellate court, I

must analyse and re-evaluate the evidence before the trial court and come to my conclusion. Starting with the first ground of appeal, the charge sheet reflects as follows:-

"STATEMENT OF OFFENCE

Forgery contrary to section 337 of the Penal Code cap. 16 VOL 1 of the Laws (R.E 2002)

PARTICULARS OF OFFENCE.

That ASSERI S/O ALIWARIO MUSHI AND LATIFA D/O SAID MMARI jointly and together charged between 6/12/2007 and 28/01/2008 unknown time and place within Hai District in Kilimanjaro region, knowingly and fraudulently did forge a Judicial document namely Judgment of the Civil Case No. 82/2007 of 06th day of February 2007 in order to acquire a piece of land illegally."

Since the appellants were facing a charge of the forged judicial document, then they ought to have been charged under section 339 of the Penal Code which states that:-

"Any person who forges any judicial or official document is liable to imprisonment for seven years."

The issue now is whether such wrong citation prejudices the accused person. In the case of **Frank Kanani vs. The Republic, Criminal Appeal No. 425 of 2018 TZCA at Bukoba registry** (www.tanzlii.org) the Court was faced with a similar situation and held that:-

"In a situation where an accused is charged under a wrong provision of the law with insufficient particulars of the offence, such deficiency denies him the right to a fair trial because he will not be in a position

to know the nature or seriousness of the offence he was charged with."

The Court of Appeal Judges went further and quoted the holding in the case of **Abdallah Ally V. Republic, Criminal Appeal No. 253 of 2013 (unreported)** where they stated that:-

"...being found guilty on a defective charge based on wrong and or non-existent provision of the law, it cannot be said that the appellant was fairly tried in the below courts."

I subscribe to the above position and find that the appellants were charged with the wrong provision of the law which renders the charge to be defective. Furthermore, the particulars of the offence did not specify to which court/tribunal the judicial document was forged. It is trite law that the charge sheet must disclose the essential elements of the offence. (**See**: section 132 of Criminal Procedure Act, Cap. 20 R.E. 2002 and the case of **Mussa Mwaikunda v R [2006] TLR 387** and **Isidori Patrice v R, Criminal Appeal No. 224 of 2007(**unreported).

That being the position the question now is whether such defect is curable under section 388 of the Criminal Procedure Act. In the case of ***Alex Medard vs. The Republic*, Criminal Appeal No. 571 of 2017, TZCA at Bukoba registry** (www.tanzlii.org) the Court was encountered with a similar situation and held that:-

"As to whether the defective charge could be salvaged, we do not agree with Ms. Maswi's stance that the defect can be cured under section 388 of the CPA. To the contrary, we think, as was argued by Mr. Kabunga, it cannot be cured as the appellant did not receive a fair trial. This position was stated in a number of cases decided by

this Court. Just to mention a few, they include Isdori Patrice vs. Republic, Criminal Appeal No. 224 of 2007; Khatibu Khanga v. Republic, Criminal No. 290 of 2008; Joseph Paul @ Miwela v. Republic, Criminal Appeal No. 379 of 2016; Maulid Ally Hassan v. Republic, Criminal Appeal No. 439 of 2015 (all unreported); and Mussa Mwaikunda v Republic, [2006] TLR 387."

Given the above position, it is my finding that the appellants were charged with the wrong provision of the law which does not tally with the particulars of the offence. In that view, this finding is enough to dispose of this appeal on merit.

On other hand, even if we assume that they were properly charged, still the exhibits which the court relied on to convict the appellants were not properly admitted to accord any weight. According to the evidence on record exhibit P.1 was admitted in evidence without its contents being read out as required by the law. Also, exhibit P.2 was not admitted as an exhibit by the trial court in the proceedings but the same was marked as exhibit P.2 without being read out in court. In the case of ***Robert P. Mayunga and Another vs. The Republic*, Criminal Appeal No. 514 of 2016, TZCA 487** (www.tanzlii.org) it was held that:-

"It is settled law in our jurisprudence which is not disputed by the learned Senior State Attorney that documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being expunged from the record of proceedings. There is a plethora of decisions expounding that stance."

Based on the above position exhibit P.1 and P.2 are expunged from the record. Now what is left on the record are mere testimonies of the witnesses which cannot by themselves hold a conviction against the appellants.

For the above reasons, this appeal is allowed. The benefit of this appeal is visits also to the 2nd appellant. I quash the conviction of both appellants and set aside their sentences. As to the fine that the appellants paid on 26/01/2018 through exchequer receipt No. 16859620 and No. 16859619 of Tshs. 1,000,000/= each, I order that sum be refunded to the appellants.

It is so ordered.

T. MWENEMPAZI

JUDGE

20/11/2020

Judgement delivered in court in the presence of the 1st appellant and Mr. Gabriel Shayo, Advocate for the appellants. And the rights to appeal explained.

T. MWENEMPAZI

JUDGE

20/11/2020