

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 6 OF 2019

(Arising from Criminal Case No. 51 of 2017 in the District Court of Tabora
at Tabora)

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

ELIAS S/O DAUDI @ SUMBUKA RESPONDENT

JUDGMENT

KIHWELO, J.

This matter was initially assigned to my late Brother Bongole J. who owing to his sudden death he could not live to compose the Judgment and subsequently the matter was re-assigned to me.

In the District Court of Tabora, the respondent herein was arraigned for three counts which were all predicated under the relevant provisions of the penal code, chapter 16 of the laws, R.E 2002 (the Code). More particularly, on the first count, the arraignment was for obtaining credit by false pretence contrary to section 305 (a) of the Code. The particulars were that sometimes in 2015 at CRDB Bank area within the Municipality and region of Tabora with intent to defraud the respondent herein deposited a

Letter of Offer over a house on Plot No. 848 Block "A" Hanihani area Igunga District in Tabora region pretending to be his property while he had already sold to one Lameck Mushishi and thereby obtaining a loan of Tshs. 45,000,000/= the property of CRDB Bank.

On the second count, the statement of the offence was forgery contrary to sections 335(a), 336 and 338 of the Code. The particulars were that sometimes in November 2015 at the CRDB Bank within the Municipality and Region of Tabora with intent to defraud the bank the respondent herein did make a Letter of Offer of Right of Occupancy over Plot No. 848 Block "A" at Hani Hani area within Igunga District in Tabora Region to show that the said title belongs to him so as to secure and obtain a loan of Tshs. 45,000,000.00 from CRDB Bank.

The third count was forgery contrary to sections 335(b), 336 and 338 of the Code, the particulars of which were that sometimes in November 2015 at CRDB Bank within the Municipality and Region of Tabora with intent to defraud the bank the respondent herein did alter a Letter of Offer of Right of Occupancy over Plot No.848 Block "A" at Hani Hani area within Igunga District in Tabora Region to show that the said title belongs to him so as to secure and obtain a loan of Tshs. 45,000,000.00 from CRDB Bank.

Throughout the trial proceedings, the respondent herein stood as the sole accused because he was charged alone. I shall henceforth refer him as "the respondent". When the charge was read over and explained to the respondent at the commencement of the trial, the respondent denied the

charge whereupon the prosecution featured 7 witnesses and a host of documentary exhibits.

Upon a full trial, the court was satisfied that the prosecution did not prove the case against the respondent beyond reasonable doubt in respect of the 1st count and he was found not guilty and subsequently acquitted. For no apparent reason the trial magistrate did not address the fate of the other two counts which the respondent stood charged as well.

Aggrieved with the whole decision of the trial court, the Director of Public Prosecutions (henceforth "the appellant") preferred this appeal which is comprised of three points of grievance, namely:-

- 1) That, the trial magistrate grossly erred on point of law for its deliberate failure to convict the respondent as the prosecution had proven(sic) the case beyond reasonable doubt.*
- 2) That, the trial magistrate grossly erred on point of law for failing to evaluate the evidence in record as far as the alleged charges before the court were in favour of the Republic.*
- 3) That, the trial magistrate grossly erred on point of law for relying on the Respondent's exhibits that was a correspondence that the respondent was dealing to mitigate the debt after the commission of the offences so charged."*

At the hearing before this Court, the appellant Republic had the services of Ms. Upendo Malulu Senior State Attorney whereas the respondent appeared in person. With the permission of the court the

appeal was disposed by way of written submissions which were dully filed in compliance to the schedule given by the Court.

Ms. Upendo forcefully argued that the respondent was arraigned before the District Court of Tabora for three counts and which were all proved by the appellant Republic beyond any reasonable doubt by producing evidence which sufficiently proved all elements of the offences charge.

The learned Senior State Attorney strenuously went to argue that PW1 through his testimony proved that the respondent being their customer at CRDB Bank Tabora Branch borrowed Tsh. 45,000,000/= and that before securing and obtaining the said loan amount the respondent supplied to the bank documents, to wit; business licence, tax payer identification number, offer of right of occupancy, bank statement. She alluded that the respondent's failure to repay the scheduled amount monthly, that is Tsh. 1,741,951/47 monthly to the CRDB Bank compelled the bank to make follow up.

The learned Senior State Attorney went to strongly submit that, it came to the CRDB's knowledge that the respondent submitted an offer of house on Plot No. 848 Block "A" Hani Hani area as collateral, but in fact that house did not belong to the respondent but rather PW3 – Lameck Mpumbile Mshisha who previously bought from the respondent, before the respondent had applied for the loan. According to the learned Senior State Attorney PW3, tendered exhibits in respect of the said house to wit, a house purchase contract, (exhibit P1) as well as Offer of Right of

Occupancy (exhibit P12) and that PW5 who was the Land Officer confirmed that (exhibit P3) which was submitted to the CRDB as a loan security was not genuine but a purported offer and it was forged by the Land Officer one Mr. Mkono Lihango.

The learned Senior State Attorney vehemently added that the trial court grossly erred on point of law for failure to evaluate the evidence on record. That the argument that there was no evidence from document examination experts – was wrong since the evidence from PW5 was sufficient enough to prove the offence that Plot No. 848 Block "A" Hanihani area was transferred to Mr. Lameck (PW3) as a result the offer bearing the respondent's name was cancelled as per (exhibit P.14).

The fact that the respondent showed the bank as well as the valuer Plot No. 749 Block "A" Hanihani Igunga and submitted documents relating to Plot No. 848 Block "A" as collateral is relevant as per section 8 of the Tanzania Evidence Act, Cap 6 R.E. 2002 (Henceforth "the Evidence Act) which provides;

Section 8. "Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and place"

To hammer home his argument the learned Senior State Attorney further referred this Court to section 10 of Evidence Act which provides;

Section 10 (1). "any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact"

She argued that the above quoted provisions clearly demonstrate the relevancy of facts in respect of the respondent's conducts which are sufficient enough to prove crime against the respondent.

The learned Senior State Attorney further went to submit that, it is not true as the trial court asserts in its judgment that PW4 and the respondent shows that the mortgaged house was Plot No. 749 Block "A" Hanihani area. PW4 was clear at page 41 of the typed proceedings that because the loan increased to Tsh. 60,000,000/= they pleaded for house No. 749 Block "A" to be handed to CRDB for sale and eventually recover the loan.

In reply, the respondent strongly submitted that the prosecution miserably failed to prove their case beyond any reasonable doubts as the evidence presented before the court on their side was full of contradictory and casted a lot of doubts the fact which led the learned trial magistrate to acquit the respondent.

He went further to submit that the appellant charged the respondent to have obtained credit by false pretence and forgery that the respondent forged a Letter of Offer for Plot No. 848 of a house situated in Igunga Town Council in Hanihani area pretending to be his as a result he obtained a loan facility of Tsh. 45,000,000/=. The appellant prosecuted their case by relying on some documentary and oral testimonies of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 the evidence which the respondent challenges to be contradictory and full of doubts.

According to the respondent PW1 admitted before the trial court a picture of a house in the valuation report referring to a house built on Plot No. 749 the house which DW1 in his defence as reflected at page No. 8 and 9 of the copy of Judgment claims to have mortgaged to secure the loan he had borrowed from CRDB Bank and not the house in Plot No. 848.

The respondent went further to argue that PW2 as the Valuer testified before the trial court to have carried valuation of the respondent's property situated at Plot No. 848, prepared a Valuation Report, produced it and thereafter delivered to CRDB Bank for more consideration. But the photograph of a mortgaged house which was taken by PW2 and which form part of the Valuation Report is that of the house on Plot No. 749 the house which the respondent in his defence claims to have mortgaged to secure a loan and not the house in Plot No. 848.

The respondent went to submit that, it is an established principle of law in our jurisdiction that in all criminal cases the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond any reasonable doubt. To buttress further his argument the respondent referred this Court to the provision of section 114 of the Evidence Act which read;

"Provided further that a person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilty of the accused person in respect of that offence"

The respondent in further reply to the appellant's submission contended that, the evidence produced by prosecution side (Appellant) creates a lot of reasonable doubts and that the defence given by the accused (Respondent) raises a lot of doubts as to the guilty of the appellant in respect of the offence he is charged with. In his opinion the trial magistrate properly evaluated the evidence by seriously analyzing the evidence presented before the trial court from both sides.

It was further argued by the respondent that he did not commit the offence charged but rather he was given loan by CRDB Bank after meeting all conditions including supplying the Letter of Offer of Right of Occupancy of his house situated at Plot No. 749 Block "A" after valuation was done by the Valuer and totally denied to have presented a Letter of Offer for Plot No. 848 and that the appellant totally failed to prove before the trial court that the respondent is the one who forged the Letter of Offer of a Right of Occupancy over Plot No. 848 as PW5 the Land Officer did not directly mention the respondent as the one who forged the document but rather he mentioned his fellow former Land Officer (Mr. Mkono) who was since terminated. The respondent finally argued that Mr. Mkono would have been apprehended and joined in the case as a co-accused so that he could admit or deny the charges.

In further response to the issue of a letter he submitted from CRDB Bank, the respondent forcefully argued that he produced and tendered before the trial court a letter from CRDB Bank to him dated 23rd September,

In so doing I will begin by scrutinizing records of the trial court which are conspicuously clear in that whereas the respondent was arraigned in court for three counts but the trial court addressed only two counts. Considering that the charge facing the respondent had three counts, it was imperative that each of the three counts was considered separately to determine if it has been successfully proved or not. Unfortunately, with due respect, the learned trial magistrate did not exercise care and close scrutiny to address the third count.

A careful scrutiny of the records of the trial court reveals that at page 12 of the typed proceedings the charge was substituted on the 17/01/2018 which contained three counts. Furthermore, at page 15 of the typed proceedings it is indicated that the three counts were read over to the respondent whereupon he pleaded not guilty. To appreciate what transpired at the trial court in respect of this matter, let the judgment of the trial court as it appears at page 10 and 11 paint the picture:

"Now since there was no evidence from documents examination expert and since PW5 and PW7 mention any other person to be responsible for the alleged forgery it follows therefore that, the accused person in court cannot be blamed for the alleged forgery as charged. Thus, he is not found liable of the 2nd count hence he is hereby acquitted"

Furthermore, at page 11 of the judgment, the trial magistrate stated that:-

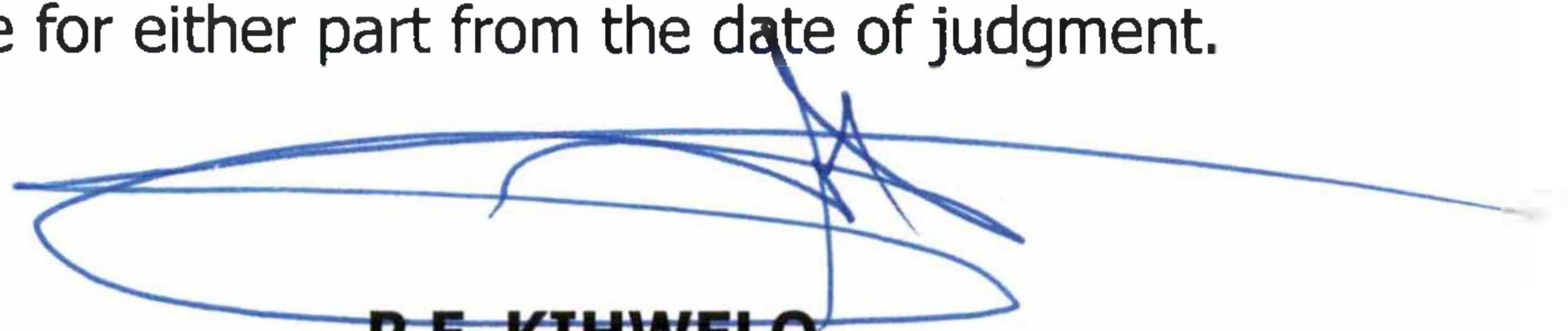
"That being the case I find the accused person not liable of the 1st count hence the case is hereby acquitted."

It is plain and clear from the above quoted paragraphs that although the respondent was found not guilty on the first and second counts the trial magistrate did not accord considerable weight on the third count during the evaluation of evidence and the findings thereto and that being the case I find considerable merit in the submission by the Senior State Attorney that the trial magistrate did not address the third count leaving the fate of the third count against the respondent undetermined. It is, indeed, obvious that this disquieting aspect of the proceedings was occasioned by the laxity of the trial magistrate.

I am fortified in this view by the cardinal principle of law that a decision of the court must contain the point or points for determination, the decision thereon and the reasons for such decision in line with section 312 (1) of Criminal Procedure Code. Cap 20 R.E 2002. Failure of that makes the purported judgment a nullity. Justice will not be done if it is not apparent to the parties why one has lost and the other has won. I have taken inspiration from the decision in the case of **Bassano v Battista** [2007] EWCA Civ 370 [28] in which the court stated that fairness requires that the parties, especially the losing party, should be left in no doubt why they have won or lost.

Having dispassionately considered the discrepancies as stated above, I wish to state that the trial court did not enter a proper judgment which can be cured under Section 388 (1) of the CPA and therefore the judgment is a nullity. Therefore, the file is remitted to the trial court with directions to compose a new proper judgment.

For purpose of clarity, it is without doubt that upon compliance of this order by the trial court, the right of appeal to the High Court will certainly be there for either part from the date of judgment.



P.F. KIHWELO

JUDGE

10/12/2020

Judgment to be delivered by the Deputy Registrar on a date to be fixed.



P. F. KIHWELO

JUDGE

10/12/2020



Date: 17/12/2020

Coram: Hon. B.R. Nyaki, Deputy Registrar

Appellant: Absent

Respondent: Absent

B/Clerk: Grace Mkemwa, RMA

Court:-

Judgement delivered this 17th day of December, 2020 in the absence of the parties.

Right of appeal available.



A handwritten signature in black ink, appearing to read "B.R. Nyaki", is written above the printed name.

B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020