IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CRIMINAL APPEAL NO. 40 OF 2021

(Originating from Criminal Case No. 377 of 2019, District Court of Moshi at Moshi)

WILLIAM JOHN OWENYA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

Before the District Court of Moshi at Moshi, the appellant was charged with seven counts, five counts i.e. 1st, 3rd, 4th, 5th, and 6th were of forgery contrary to **sections 333, 335 (d) and 337 of the Penal Code Cap 16 R.E 2002**, now R.E. 2019 (Penal Code). The other two i.e. 2nd and 7th were of Uttering False Documents contrary to **section 342 the Penal Code Cap 16 R.E. 2002 (R.E. 2019).**

At the trial court, the respondent alleged on diverse dates of 1st January, 1984, 30th April, and 16th September, 1985, the appellant forged a Will and a letter to Moshi Urban Primary Court showing Festo .J. Owenya, Dr. Fidelis .J. Owenya, Zakayo .J. Owenya, Wecenslaus .J. Owenya Elisante .J. Owenya, Douglas .J. Owenya and Ndeanasia Mashina had agreed for him to be the administrator of the estate of the late John Zakayo Owenya.

The appellant pleaded not guilty to the above allegations hence, a full trial involving seven witnesses and thirteen exhibits from the prosecution side and five defence witnesses and one exhibit from the defence side was conducted. In the end the appellant was not found guilty for the 1st and 4th counts but was found guilty and convicted of the 2nd, 3rd, 5th, 6th and 7th counts and accordingly sentenced one year and five months for the 2nd, 3rd and 5th counts and two years imprisonment for the 6th and 7th counts. The sentences were ordered to run concurrently. Aggrieved, he has filed this appeal raising a total of three grounds as hereunder: -

1. That, the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant on a defective

charge sheet.

2. That, the learned trial Magistrate erred in law and fact in failing to analyze the evidence which was tendered before the Court and eventually convicted the appellant.
3. That, the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant with the offence of Forgery and Uttering False Documents while the same was not proved beyond reasonable doubt.

During hearing of this appeal, the appellant was represented by Mr. Godfrey Saro, learned counsel whereas the respondent was represented by Mr. Innocent Njau, learned Senior State Attorney.

In support of the appeal, Mr. Saro on the 1st grounds submitted, the appellant was charged for the offence of forgery contrary to section 335(d) of the Penal Code which has subsections (i) to (iv) with distinctive actions of forgery. Failure of the respondent to state under which subsection the appellant was charged renders the charge sheet incurably defective. To cement on this argument the learned advocate cited the case of **Mussa Ramadhani Vs. Republic, Criminal Appeal No. 368 of 2013 (CAT-Mbeya unreported)**

where the Court of Appeal quoting the case of **Abdallah Ali Vs. Republic, Criminal Appeal No. 253 of 2012 (unreported)** observed, section 135 of **Criminal Procedure Act, Cap 20, R.E. 2019 (CPA)** directs how the charge sheet should be drafted. The same should contain facts of the offence(s) charged together with particulars. In this case the prosecution failed to state how the appellant participated in the said forgery, which answer could have been answered if the charge sheet was drafted properly by citing the specific section of the law. In view thereof it prejudiced him as he never understood his charges. The bottom line would be, he did not receive a fair trial. Much so the same cannot be cured by section 388 of the Criminal Procedure Act, Cap 20 R.E. 2019.

To this the appellant's counsel referred the court to the case of **Mussa Mwaikunda Vs. Republic, Criminal Appeal [2006] TLR 387 – 393**. The learned counsel further argued, even the evidence tendered did not support the charge. Giving an example the counsel referred to PW1's testimony who was the hand writing expert. This witness elaborated he did not examine the appellant's hand writing and neither did he comment on the participation of the appellant in making the forged document. A further example was PW2, (the

investigator), during cross-examination as reflected at page 37 of the trial court's typed proceedings, clearly stated he never took the appellant's signature samples to Arusha for examination on the reason it had not been mentioned anywhere that he signed the alleged documents. The learned counsel added, the rest of the five prosecution witnesses denied to have signed the documents and none of them demonstrated who signed or published the documents and under what part of section 335(d), (i) – (iv) of the Penal Code the said acts fell.

Still pressing on the defective charge, Mr. Saro argued, the appellant was also charged with uttering false document contrary to section 342 of the Penal Code. However, the charge sheet failed to indicate the sentencing provision thus prejudiced the appellant as he failed to understand the consequences of the offence charged. He cited the case of **Mussa Nuru @ Saguti Vs. Republic, Criminal Appeal No. 83/2017, CAT at Tanga)** to cement his argument.

On the 2nd and 3rd grounds, the learned counsel submitted on the same simultaneously that, the evidence was not properly analyzed and the offences not proved beyond

reasonable doubt. He prayed the Court be guided by the case of **James Bulolo and Another Vs. Republic, [1981] TLR 283** where the Court laid down a principle that: -

> *"The duty of the trial magistrate is to evaluate the whole evidence".*

In light of the authority cited above, Mr. Saro argued, the trial magistrate vacated from the legal duty of evaluating the evidence on record hence reached an erroneous decision. He argued, for the offence of forgery to stand, three elements must be established to wit; the accused uttered the document, the document is false and the accused person acted with intent to defraud. Short of this, the court will note that the prosecution has failed to prove their case. The same position was fortified in the case of **D.P.P Vs. Shida Manyama @ Selemani Mabuba, Criminal Appeal No. 285 of 2012, CAT at Mwanza**.

The learned counsel further argued that, it was not proven whether it was the appellant who authored Exhibit P2 (family meeting minutes) and Exhibit P13 (a Will). This was seen through PW1's testimony, (handwriting expert) who examined the handwriting samples of 5 different people

excluding the appellant and tendered Exhibit P1 (handwriting report). The same was the case for PW2, (Investigator), apart from testifying to have discovered that the 5 signatures were forged, he never took the appellant's signature sample for examination. It was his firm opinion since the two witnesses are experts in criminal justice whose evidence is persuasively binding on the court, they did not establish the appellant's involvement in making the said documents.

Mr. Saro further argued, PW3, PW4 and PW6 disassociated themselves and denied to have signed the family meeting minutes. In fact they revealed, there was no family meeting convened at all. The 3 witnesses did not bring evidence to show who might have signed Exhibit P2 leaving the court with doubts. As for Exhibit P13, these witnesses only testified, the Will was different from the one which was read before them, 3 days after the death of their father. The 3 witnesses did not describe the said original will. They also did not comment on the whereabout of the said original will and who might have authored Exhibit P13. These doubts were left unresolved by the trial court.

On the other hand, PW5 and PW7 stated, they allowed the appellant to put down their names on the minutes but was not to sign the same on their behalf. This goes to suggest there was an agreement in making of the said document. They also stated that Exhibit P13 was never forged hence their testimony contradicted that of PW3, PW4 and PW6. These unresolved doubts by the prosecution should go to the appellant's advantage the principle found in the case of **Joseph John Makame Vs. Republic, Criminal Appeal [1986] TLR 49.**

Still pressing on the issue of witnesses, the learned counsel argued, the respondent opted not to summon Elisante John Owenya whose signature was also said to have been forged under the 4th count of the charge sheet. Failure to call this witness left doubts and the trial court rightly dismissed the 4th count. In that regard, failure to summon a material witness one can draw an adverse inference to the party who fails to bring a material witness. The same was held in the case of **Hemed Said Mbiki Vs. Republic [1984] TLR 113**.

The learned counsel elaborated, the act of dismissing the 4th court, meant Exhibit P2 (family minutes) was partly faulty and

partly not faulty which does not tally with the evidence on record. To this the counsel expounded the appellant was not charged for making part of Exhibit P2 but forgery of the entire document. Be as it may, he explained although the trial magistrate at page 12 para 2 of the judgment made remarks that, the appellant did not dispute possession of the document and to have tendered it in the probate court, however, having possession of the document is not making the document. The position would have been different had the prosecution proved that, there was no meeting convened on that date at all but the appellant had proceeded to make the said document. In view thereof unfortunately, the appellant's conviction was not based on the strength of the prosecution evidence but on the weakness of his defence.

Mr. Saro contended while submitting on the second ingredient of the offence of Uttering False Document that, the said forged document should be false. The evidence tendered was contradicting as PW3, PW4 and PW6 faulted the appointment of the appellant as the administrator while PW5 and PW7 admitted the appellant was appointed the administrator of their late father's estate and that they

consented their names be put down on Exhibit "P2". Had the appellant intended to manipulate the appointment as the administrator, he would have done so without the presence of PW5 and PW7. For all purposes and intent all the other prosecution witnesses knew of the existence of Exhibit "P2" and its purpose hence the second ingredient was not met.

Regarding the last ingredient to wit; intended to benefit out of the said offence or intended to defraud, Mr. Saro submitted, by forging family meeting minutes and a Will, it can be speculated that he did so in order to benefit out of the deceased estate. However, in the trial court's record there is no evidence that the appellant deceived anyone. In actual fact PW3, PW4, PW5, PW6, and PW7 were the ones in the position to defraud or deceive as they had an interest in their father's estate.

The record also shows after their father's death, one Josephat Owenya read the deceased's will left at the bank. The trial magistrate believed P13 was forged without proof of the genuine Will or testimony from the one who read it to prove its authenticity. It can well be settled that there is a family feud on the distribution of the deceased estate which

ought to have been tried in a probate court. PW5 and PW7 confirmed, what was read 3 days after the deceased's death was actually what the appellant executed in the said probate cause. PW3, PW4 and PW6 apart from stating the Will was forged and did not participate in the meeting, did not mention how the appellant was benefiting out of the said acts ever since 1985.

Mr. Saro finally prayed the instant appeal be allowed, the entire proceedings be nullified and the appellant's conviction and sentence be set aside.

In reply, Mr. Njau supported the appeal on the grounds that; **first**, the charge sheet was premised on section 333, 335(d) and 337 but did not cite the sub-sections of section 335(d). Thus, the appellant was unfairly tried basing on a defective charge and such omission cannot be cured. **Second**, he submitted there was no evidence proving the offence of forgery against the appellant in respect of Exhibit P2 and P13. Worse enough, there was neither handwriting evidence nor general samples taken for phorensic examination to prove or disapprove the authenticity of the said documents.

Third, on the offence of Uttering False Documents contrary to section 342 of the Penal Code, there was no mention of the sentencing section. In that regard the appellant did not know the effect of the offences facing him. Mr. Njau finally submitted the defectiveness of the charge sheet and the fact that the prosecution had no sufficient evidence to prove the counts against the appellant, then the appeal is meritorious. There was no rejoinder thereafter.

After I have gone through the trial court's proceedings, judgment and parties' submissions, I as well support the appeal. Starting with the defective charge sheet, section 335 of the Penal Code which is among the offences the appellant was charged and convicted of provides that;

> "**335**. *Any person makes a false document who -*
>
> *(a)n/a;*
> *(b) n/a;*
> *(c)n/a;*
> *(d) signs a document-*
>
> *(i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing;*

(ii) in the name of any fictitious person alleged to exist whether the fictitious person is or is not alleged to be of the same name as the person signing;

(iii)in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person;

(iv)in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be."

Having carefully read the charge reproduced above and the cited section, I am of the settled view that the charge is incurably defective as the offence of forgery as per this section did not clearly stipulate which subsection did the appellant offend. For a charge of any kind to be proper, it must contain or indicate the actual offence and its particulars. This requirement is provided for under Section 132 of the Criminal Procedure Act Cap 20 R.E. 2019 so as to

enable the accused person to know the nature of the offence he is facing. The section provides:-

> *"132. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

In **Mussa Mwaikunda Vs. Republic [2006] TLR 387** the Court, observed, inter alia:-

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential element of an offence."*

I am further inspired by the case of **Isidori Patrice Vs. Republic Criminal Appeal No. 224 of 2007 (unreported)** as cited in the case of **Kashima Mnadi, Criminal Appeal No. 78 of 2011 CAT at Dodoma (unreported)** where the Court stated;

"It is a mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with which the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the ***actus reus*** *of the offence with the necessary* ***mens rea.*** *Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."*

In the appeal at hand, the charge does not disclose the exact offence under forgery and the same cannot be salvaged under Section 388 of the CPA. (See also

Mwaikunda case (supra) and Uganda Vs. Hadi Jamal [1964] EA 294). In that regard, as conceded by the respondent's Senior State Attorney, the appellant was prejudiced as he did not know the impact of the charges leveled against him.

As regards the applicability of section 342 of the Penal Code, the court is in all fours that the sentencing section was not mentioned or indicated hence the charge sheet was defective. This is because the charged offence is one of uttering a false document hence the charge ought to have shown the punishment attached to it by citing section 333 of the Penal Code. The court is settled as was held in the case of **Zarau Issa Vs. Republic, Criminal Appeal No. 189 of 2010 (unreported)** the same lays a foundation of the criminal proceedings, enables the accused to understand the nature of offence and its seriousness. In due thereof the court is of a settled mind by falling to cite the sentencing provision might have led the appellant not to appreciate the seriousness of the offence and more so to prepare his defence as held in the case of **Simba Nyangura Vs. Republic, Criminal Appeal No. 144 of 2008 (unreported)**. The end result is that he was prejudiced.

Be as it may, there is no clear evidence showing how the appellant forged the documents in question and since the prosecution witnesses contradicted themselves the court is settled the case against him was never proved beyond reasonable doubt. To be precise PW3, PW4 and PW6 testified the Will as well as the family minutes were forged while PW5 and PW7 alleged the said Will and even the minutes were genuine. These contradictions go to the root of the case hence tears apart the whole of the prosecution case.

In light of the above analysis, and as I stated earlier, I find this appeal meritorious and hence allows the same. The trial court's proceedings, conviction and judgment entered by the trial court are quashed and sentence set aside. The appellant is ordered to be released forthwith unless held in custody for other lawful reasons.

It is so ordered.

B. R. MUTUNGI
JUDGE
23/11/2021

Judgment read this day of 23/11/2021 in presence of the appellant, Mr. Oscar Malya holding Mr. Godfrey Saro's brief for the appellant and Mr. Innocent Njau (S.S.A) for the respondent.

B. R. MUTUNGI
JUDGE
23/11/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
23/11/2021