IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 222 OF 2017

(Appeal from the District Court of Ilemela dated 24th dated of February, 2017 in Cr. Case No. 7 of 2017)

JUMA S/O SAID.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

4th April & 21st June, 2022

DYANSOBERA, J.:

The appellant Juma s/o Said was arraigned in the District Court of Ilemela at Ilemela for the offence of forgery contrary to Sections 333,335 (a), (d) (iv) and 337 of the Penal Code [Cap. 16 R.E of then 2002]. The particulars of the offence alleged that the appellant, on 21st day of April, 2012 at Kigoto area within Ilemela District in the City and Region of Mwanza, forged minutes of clan meeting dated 2.3.2015 purporting to show that it appointed him to be administrator of the estate of the late Omary Hassan while knowing that all was not true.

After hearing six prosecution witnesses and five defence witnesses, the trial court convicted the appellant and sentenced him to five years term

of imprisonment. Dissatisfied, appellant appealed to this court against conviction and sentence.

The brief background of the case according to the record of the trial court is that Omary Hassan who was the father of Dotto Omary (PW 1) and grandfather of Mwanahawa Mlela (PW 2) was staying in his house at Kirumba with the appellant who is his nephew. In 1981 the said Omary Hassan went missing in unusual circumstances. PW 1 was taken to Dar es Salaam by his uncle to pursue his studies. In 2004 when PW 1 returned back to Mwanza, he found the appellant residing in that house. The appellant advised PW 1 to rent somewhere else to avert quarrels with his (appellants') wife and offered to pay rent for him. PW 1 obliged and rented a house at Ghana area.

In June, 2016, PW 1 got the wind that the appellant had instituted a Probate and Administration Cause No. 54 of 2016 petitioning to be appointed as administrator of the estate of Omary Hassan. On a follow up, PW 1 discovered that there were minutes of clan meeting showing that the appellant was nominated to petition for letters of administration by Kirumba Ward Committee members but none of the family members featured in the said minutes. Besides, in spite of the death certificate of Omary Hassan, no

evidence that the person had died. After gathering the said findings, PW 1 reported to the hounds of justice and PW 6 one F. 2414 Detective Corporal Maiga was assigned to conduct the investigation of the case. He interviewed some of the alleged members of the Ward Committee who denied to have nominated the appellant to petition for letters of administration. Before the trial court, the said minutes, the death certificate and Form No. II were admitted and marked collectively as exhibit P 1.

Upon arraignment in court, the appellant denied the charge. He recalled that he bought the said house on Plot No. 97 at Kirumba area jointly with Omary Hassan and he had paid him off before he left in 1982. Later, the appellant was informed that the Omary Hassan had died in the mining accident at Ulyankulu area. The appellant went to RITA and was issued with a death certificate. He appellant admitted to have submitted the said minutes to the probate court and to have not involved other family members arguing that all were also dead. He called four witnesses to buttress his defence.

In his judgment delivered on 24th day of February, 2017, the learned Resident Magistrate framed three issues. One, whether or not the document titled, *"muhtasari wa kikao cha ukoo wa mirathi ya Omary*

Hassan tarehe mbili mwezi wa tatu mwaka elfu mbili na kumi na tano "is a false document. Two, if the first issue is answered in the affirmative, whether or not it is the accused who made that false document. Three, if the 2nd issue is answered in the affirmative, whether or not the accused made a false document with intent to defraud or deceive.

It is on record that all the three issues were answered in the affirmative.

The appellant's initial appeal to this court in Criminal Appeal No. 222 of 2017 (Hon. Gwae, J.) was allowed whereby the conviction was quashed and sentence set aside after the trial was declared a nullity. A trial *de novo* was ordered and the appellant's bail was extended on his previous bail conditions. The appellant, however, thought that justice was not his triumph. He appealed to the Court of Appeal in Criminal Appeal No. 29 of 2018. Although the appellant, through Mr. Nasimire, learned Counsel, had preferred two grounds of complaint, only the first ground of appeal was argued while the second ground of appeal was abandoned.

On 1st day of December, 2021, the Court of Appeal nullified the proceedings, quashed the judgment of this court and set aside all orders emanating therefrom. It remitted the matter to this court for the appeal to be determined as a whole, and if necessary, along with the legal issue this

court had previously raised in the course of composing its judgment. It was ordered the appeal to be heard by another judge.

A further order was also made that the appellant be remitted into custody to continue serving his sentence pending determination of his appeal by this court.

This judgment is a result of the Court of Appeal's order of a re-trial.

According to the appellant's petition of appeal filed on 15th day of June, 2017, four grounds of appeal were raised as follows: -

1. That in the absence of proof that exh. P 1 was a forged document, and in the absence of any evidence that the appellant forged the said document, the learned trial Magistrate erred in convicting the appellant for the offence of forgery.
2. That the learned trial Magistrate erred in convicting the appellant on the basis of extraneous matters which were not part of the evidence produced at the trial.
3. That it was unsafe for the learned trial Magistrate to draw an adverse inference against the appellant simply because he did not cross examine PW 1 and PW 2.

4. That there was misdirection on the part of the learned trial Magistrate by shifting the burden of proof on the appellant and completely ignoring his defence.

Before me, Mr. Anthony Nasimire, learned Advocate, stood for the appellant whereas the respondent was represented by Ms. Margareth Mwaseba, learned Senior State Attorney.

In support of the appeal, Mr. Nasimire made the following submission. With respect to the 1st ground of appeal, he pointed out that according to the charge sheet brought in court on 3rd day of October, 2016, it is shown that the appellant forged the document known as '*Muhtasari wa Kikao cha Ukoo Mirathi ya Omary Hassan tarehe 2.3.2015*.' It was his argument that the evidence on record does not show that the document in question was offered, authored or signed by the appellant and that no witness professed to be acquainted with the appellant's handwriting as per requirement under Section 49 (2) of the Tanzania Evidence Act [Cap. 6 R.E.2019] and further that the trial court had powers under Section 75 (1) of the said Act to compare the appellant's handwriting with the disputed document but that obligation was not discharged.

Mr. Nasimire also faulted the trial court on the way it admitted in evidence exhibit P 1 which was admitted collectively with other documents. He argued that such practice is discouraged by courts and in support of this argument, he made reference to the case of **Anthony Masanga v. Penina (Mama Mgesi) and another**, Civil Appeal No. 118 of 2014 (unreported). On this anomaly, learned Counsel for the appellant urged this court to expunge the exhibit from the record.

He explained that once exhibit P 1 is expunged from the record, there will be no evidence to implicate the appellant. Continuing his submission, Mr. Nasimire informed the court that the document tendered and admitted was a photocopy and hence inadmissible.

On the proof that a person has forged a document, Counsel for the appellant referred this court to the case of **DPP v. Shida Manyama@ Selemani Mabuba**, Criminal Appeal No. 285 of 2012 (unreported).

Arguing on the 2nd ground of appeal, learned Counsel told this court that the appellant was convicted on extraneous matters outside the evidence to prove forgery. He explained that the documents, that is Form II and minutes which are alleged to be the documents the court used for the appointment as administrator, were irrelevant to the case as they were

not signed by the members of the clan. Reference was made to page 5 of the typed copy of the judgment as an illustration.

The 3rd and 4th grounds of appeal which are interrelated were argued together. They are on drawing adverse inference and shifting the burden of proof. Counsel for the appellant expostulated that it was wrong for the trial court to blame the appellant for his failure to cross-examine PW 1. He admitted that the appellant did not cross examine PW 2 but was quick to point out that PW 2's evidence did not touch on whether or not exhibit P 1 is a forgery. In his opinion, there was no basis on part of the trial court to draw the inference that the appellant knew that exhibit P 1 was a lie. He asserted that the appellant's failure to state where exhibit P 1 was obtained could not make him the author of exhibit P 1. He insisted that the prosecution bore the burden to prove the case. He cited the case of **Jonas Nkize v. R.** [1994] TLR 73 to buttress his argument.

In wounding up his submission, Counsel for the appellant argued that shifting the burden to the appellant amounted to failure to consider the defence and the effect is to vitiate the proceedings. Reliance was placed on the following case laws; **Elias Steven v. R** [1992] TLR 313, **Hussein**

Iddi and another v. R [1980] TLR 283 and **Lockhart Smith v. R** [1965] EA 211.

Resisting the appeal, learned Senior State Attorney supported both conviction and sentence. Responding to the 1st ground, she submitted that there are people mentioned in the minutes, were called in court and proved that the signatures were not theirs; for instance, DW 2 at p. 38 of the typed proceedings of the trial court admitted the names indicated to be his but denied to own the signature and to have signed in exhibit P 1. She argued that the appellant's act of forging the document was intended to defraud as explained under Section 336 (d) of the Penal Code. The learned State Attorney refuted any existence of discrepancy and explained that PW 1 said that in June, 2016 he discovered that the appellant had instituted Probate and Administration Cause at Ilemela.

On the 2nd ground, learned Senior State Attorney urged the court to find the said ground lacking any basis. He contended that there was sufficient evidence to prove that the appellant had forged the document with the intention to defraud. She clarified that the appellant not only forged the document but also went ahead and deceived the court that he had been appointed at the clan meeting to petition for letters of

administration. On the secondary evidence being admitted, she argued that the problem was discovered after the document had been received in court. She prayed the court to take judicial notice.

In reply to the 3rd ground, it was submitted on part of the respondent that the law is clear and cases abound that failure to cross examine means that one admits the correctness of the contents. The court was referred to the case of **Emmanuel Saguda Sulukuka v. R**, Criminal Appeal No. 422B of 2013 and an emphasis put on the fact that PW 2 was not cross examined on what he had stated at p. 13 of the trial court's proceedings. Ms Margareth was of the view that the appellant was rightly convicted and the adverse inference properly drawn against him and further that at p. 18 of the trial court's judgment, the appellant's defence was considered.

In a brief rejoinder, Mr. Nasimire pointed out that the crucial issue is whether the appellant was the author of exhibit P. 1. He sought this issue to be answered in the negative contending that no evidence was led to prove that the appellant was the author of and did sign exhibit P 1. He said that DW 5 gave hints on who exactly the author of the document was.

I have carefully perused the records of the trial court. I have also considered the grounds of appeal and the submissions of the learned

Advocate for the appellant and of the learned Senior State Attorney for the respondent.

In my analysis, the only issues calling for determination by this court as far as the first ground of appeal is concerned are two. One, whether the minutes of the clan meeting (exhibit P 1) was a forgery and two, whether it was forged by the appellant.

As far as the first issue is concerned, it was the case of the prosecution that the minutes of the clan meeting admitted as exhibit P 1 were not a genuine document. PW 1 told the trial court that the minutes showed that the clan meeting had recommended the appellant to be administrator of the estates of Omary Hassan but neither members of the family nor relatives of Omary Hassan including PW 2 featured in those minutes. Further, the members who alleged to have signed the said document who included PW 3 Ibrahim Hamis Magongo, PW 4 Sadiki Kaniba and Badul Abdallah (PW 5) denied having held that meeting and also denied having appointed the appellant to be administrator of the estate. This evidence was supported by F 2414 Detective Corporal Morega (PW 6) who investigated the case.

In his defence, the appellant at p. 34 of the trial court's typed proceedings is recorded to have given the following version:

> *'I do not know this document; it is the minutes of the meeting of the Probate case of the estate of Omary Hassan. This is the document I lodged at Ilemela Primary Court in which I was appointed as administrator of the estate of Omary Hassan. The copy of passport size photo appended in this document is mine.*
>
> *These people named in this document we are not related'.*

This evidence clearly shows that it is the appellant who presented it to court implying that through it, he was nominated by clan members as administrator of the estate of Omary Hassan. The author of exhibit P 1, though disputed, the evidence is abundant that it was a false document. Forgery as widely understood, is making a false document or modification of an existing genuine document or the unauthorized signing of a signature of another person with a deceptive or fraudulent intent.

With the foregoing evidence, I am satisfied and hereby find that the prosecution proved beyond any reasonable doubt that the said minutes contained in exhibit P 1 were a forgery and the accused did not raise any reasonable doubt in the prosecution case. The first issue is affirmatively answered.

The second issue is whether it is the appellant who forged it. According to the evidence and as rightly submitted by Mr. Nasimire, learned Counsel for the appellant, there was no evidence that the document in question was written or signed by the appellant. Further, there is no witness who professed to have seen the appellant writing or signing the said document. It is the law as succinctly elaborated by the Court of Appeal in the case of the **DPP v. Shida Manyama @ Selemani Mabuba** (supra) at pages 22 and 23 of the typed judgment that to prove the charge of forgery satisfactorily, the prosecution has the duty to prove that:

i. The disputed letter was authored by the accused
ii. The disputed letter was a false document
iii. The accused respondent had forged the disputed letter with intent to defraud or deceive.

As the law stands, proof of a handwriting or signature has to be either by direct evidence or by other additional types of evidence or modes of proof.

As far as direct evidence is concerned, the proof of handwriting or signature had to either come through admission by the accused as the writer or from the evidence of a witness in whose presence the document was written or signed.

Besides, the proof could be obtained in other three types of evidence or modes of proof. One, through opinions of a handwriting expert as provided for by Section 47 of the Evidence Act. Two, by the evidence of a person familiar with the writing of a person who is said to have written a particular writing as per Section 49 of the Evidence Act and three, through comparison by the court with a writing made in the presence of the court or proved to be the writing or signature of the person.

In the instant case, the appellant denied to have authored and signed the document. There was no witness who claimed to have seen the appellant authorizing or signing the exhibit P 1. Furthermore, there was no compliance with sections 47, 49 and 75 of the Evidence Act. In other words, although the exhibit P 1 was a false document and was intended to deceive or defraud, no evidence was led to prove beyond reasonable doubt that it is the appellant and none else who forged it.

I align myself with the appellant and his learned counsel that in the absence of any evidence that the appellant forged exhibit P 1, the learned Resident Magistrate erred in convicting the appellant for the offence of forgery.

Since this ground suffices to dispose of the appeal, I find it unnecessary discuss the rest three grounds of appeal as that would amount to a mere academic exercise and a waste of energy and precious time of the court.

The upshot of this is that I allow the appeal, quash the conviction and set aside the sentence. The appellant should be released from custody unless his liberty is otherwise being lawfully assailed.

W.P. Dyansobera

Judge

21.6.2022

This judgment is delivered under my hand and the seal of this Court this 21st day of June, 2022 in the presence of Ms. Leticia Sabas Lugakingira, learned Counsel holding brief for Advocate Nasimire for the appellant. The respondent is absent.

Rights of appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA
MWANZA

W.P. Dyansobera

Judge