

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIGOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 01 OF 2022

(Arising from Criminal Case No. 01/2021 the District Court of Kigoma before Hon. E.B. Mushi,
RM)

JUMANNE S/O RAMADHANI GANGE..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

27/6/2022 & 12/8/2022

L.M. Mlacha,J

At the Resident Magistrates Court of Kigoma in Criminal Case No. 01/2021, the appellant Jumanne Ramadhani Gange was charged of four counts of Personation contrary to section 369(1) and 35 of the Penal code, cap 16 R.E 2019 and one count of False Swearing contrary to section 107 of the Penal Code. On the first count, the court was informed that on unknown day in 1996 at Nsumba Secondary School Mwanza, with intent to defraud Joseph Simon Zakeo, the Second Master of the school, he falsely represented himself as a student known as George Lucas. In the second

count it was alleged that at unknown day in 2005, at Kigoma Ujiji Town Council Director's Office, with intent to defraud the Director, he falsely represented himself as George Lucas. In the third count it was stated that at unknown time in 2008 at Tabora with intent to defraud the Headmaster of Tabora Girls Secondary School, he falsely represented himself to be George Lucas, a form four candidate for the National Examination Council of Tanzania. And finally, in count four, the court was informed that on the 13th March 2000 at the District Court of Kigoma, he made a false affirmation before the district magistrate of Kigoma district regarding the names George Lucas. He was found guilty of all the counts, convicted and sentenced to a fine of Tshs 1,000,000/= on each count or two years in jail in default. Sentences were ordered to run concurrently. He paid the fines, total Tshs 4,000,000/= and proceeded to appeal to this court.

The grounds upon which the appeal is based read as under:

1. That the trial court erred in law and fact when it became functus officio after having admitted the Exhibit D1 with no objection from prosecutors but procedurally, with no jurisdiction and powers and without affording right to be heard on the intention of the court to

expunge the exhibit already admitted the trial court expunged the exhibit.

2. That, the trial Court erred in law and facts by not considering Exhibit D1 and the undisputed evidence on records from both sides that the appellant joined Nsumba Secondary School 1996 form one and completed form four in 1999.
3. That, the trial court erred in law and facts in holding that the appellant postponed one academic year while the evidence was strongly contested and there were no medical chits and the letter requesting for postponement of the studies was tendered as evidence.
4. That, the trial court erred in law and facts in holding that the appellant misled PW5 (Josephat Simon Zakeyo) while the witness testified that he was not the one who registered the appellant as he was away in Dar es salaam for studies and the teacher alleged to have admitted the appellant for undisclosed reasons was not called to testify.
5. That, the trial court erred in law and facts by shifting the burden of proof demanding the appellant to prove his innocence by calling

witnesses and tendering exhibits while the prosecution did not prove the case beyond reasonable doubt.

6. That, the trial court erred in law and facts by failing to scrutinize, evaluating and assessing weight of the evidence on records thereby erroneously held that the prosecution proved the case against the appellant beyond reasonable doubt.

The appellant had the services of Mr. Sadiki Alik. The respondent Republic was represented by Ms. Antia Julius state attorney. Hearing was done by oral submissions.

Before going to examine the grounds of appeal, this being a first appeal which amounts to a rehearing, I will now reproduce a summary of the evidence adduced at the lower court for easy of reference. PW1 George Lucas Kasase (41) a teacher by profession, told the court that he was born on 28/10/1979 at Kazilamihunda village, Kakonko village, Kakonko district. He received his primary school education at Kazilamihunda primary school between 1988 and 1994. He joined Kigoma secondary school in 1995 and finished form four in 1998. He moved to Uyui High School Tabora for his advanced level Secondary education. He thereafter moved for his diploma in education and became a teacher. He went on to say that he used the

name George Lucas throughout his secondary school education. He added the third name later when he applied for a birth certificate which has the names George Lucas Kasase. All these documents were tendered and received in evidence. He denied to know the appellant or have any relation with him. He denied to give him his certificate. His father appeared as PW3. He told the court that his name is Lucas Kasase Kachila (64). He is a pastor. He told the court that his son George Lucas (PW1) was born at Kazilamihunda village and did his secondary school at Kigoma secondary school as aforesaid. He denied to know the appellant, Jumanne Ramadhani George.

PW2 Charles Magembe (61) is a retired teacher. He was the head master of Kigoma secondary school from 2007 to 2020. He was there since 2002. He kept students records. He tendered the TSM9 form, student Assessment Documents (1995) and form 4 National Examination Results for Kigoma secondary 1998 for George Lucas. He told the court that George Lucas never shifted school. His secondary school certificate is No. 397/49. He denied to know the appellant. PW4 Balele George Lazima (34) is a teacher. He was in Tabora girls secondary School from 2015. He was assistant headteacher in 2017. He told the court that the school has school and

private candidates. He tendered the examination results for private candidates of Tabora Girls Secondary School for identification, Index No. Pozozo. This was for George Lucas.

PW5 Joseph Saimon Zakao (56) was a teacher of Nsumba Secondary between 1990 and 1993. He moved for studies and returned in 1997. He became Assistant head Teacher from 1998 to 2014. He kept the register of new students who joined the school. He dealt with admission, joining instructions, custodian of documents and transfers. He tendered the school register for 1996 – 1999 and results from CSEE 1999. He told the court that George Lucas is in admission No. S169 and was admitted in 1996 at form II having shifted from Kigoma secondary school. He graduated in 1999. He studied for 3 years as there was a year when he suspended school due to sickness. He said that the list of leaving certificates shows George Lucas in S. 01144/0047 who graduated in 1999. He went on to say that he remember George Lucas because he met him after graduation. He knew him as the man in court.

PW6. Benet Niralp (57) is the personnel officer of Kigoma Ujiji Municipal. He has been there from 2015. He told the court that Jumanne Ramadhani Gange was employed in 2005 as street Executive officer. He was supposed

to have a form IV certificate and above. He showed the letter of appointment of the appellant reference S/40/262/4 of 31/10/2005 and a confirmation letter reference No. S. 20/110/178 of 17/2/2007. They all refer to Jumanne Ramadhani Gange. PW6 proceeded to say that the appellant applied for the job in the name of Jumanne Ramadhani Gange. He changed the name to Jumanne R. Gange from George Lucas in 2000. He identified the appellant in court.

PW7 Martin Erasto Maonyesho (34) is an investigator from PCCB Mwanza. He was in Kigoma in 2017. He was assigned to investigate the accused who was using other people's names and certificates in his employment. He studied his personal file and found a letter of appointment and a letter of confirmation in the name of Jumanne Ramadhani Gange. He also had a result slip showing that he re-sat for form four exams at Tabora Girls Secondary school in 2008. He moved to Nsumba Secondary school to collect other exhibits. He received the admission register for 1996 – 1999. He moved to Kigoma secondary school where he picked the register for 1993 – 1996, form four results for 1998, TSM9 for George Lucas and continuous Assessments for standard one to four for George Lucas. The admission registerer was received as exhibit P7. He collected result slips

from the accused showing that he had a second sitting at Tabora Girls Secondary School using the name George Lucas. He also picked other documents from George Lucus (PW1) which included school certificates, result slip, teaching certificate and birth certificate. He tendered the seizure certificates (Hati za kuchukulia vielelezo) which were admitted marked exhibit P8 collectively. PW7 Proceeded to tell the court that he discovered that Jumanne Ramadhani Gange was employed by Kigoma Municipal on 31/10/2005. To meet the requirements for a form four certificate, he used the name George Lucas. To facilitate the need, he made an unlawful transfer from Kigoma Secondary School to Nsumba Secondary School Mwanza. He was admitted and went on with his studies. He also discovered that on 13/3/2020 Jumanne Ramadhani Gange went to the district court of Kigoma to change his name from George Lucas to Jumanne Ramadhani Gange while knowing that Gange Lucas is not his name. He re-sited the form four examination using the name George Lucas in Tabora in 2008. He discovered that Jumanne Ramadhani Gange never studied at Kigoma secondary school even though he prepared the transfer to show that he shifted to Nsumba Secondary School from Kigoma Secondary school because the admission registers of Kigoma secondary school had

one student only in the name of George Lucas with registration No. 2005 who started form one in 1995 and completed in 1998 and who did not shift the school. He met George Luca's parents – Lucas Kasesi Msongareli who said that his child studied at Kigoma secondary school. The accused used the name George Lucas who was transferred to Nsumba secondary school while the real George Lucas never shifted school. He went on to say that the transfer to Nsumba secondary school was unlawful because there was only one George Lucas at Kigoma Secondary School who never shifted school.

It was the defence of the appellant that he got the name George Lucas from his guardian in 1996 while studying. He started standard one at chakuru Uvinza district in 1989 and completed standard 7 in 1995. He told the court that he grew with his ant at the age of 3. Her husband was called Lucas George Nsongelezi. He got the name George Lucas before joining the school. He joined Nsumba secondary school in 1996 and finished form four in 1999. He tendered a leaving certificate, exhibit D1 in the name of George Lucas. He denied to join Nsumba secondary school from Kigoma secondary school. He said that he studied at Nsumba Secondary School from form one up to form four. He denied the evidence showing that he

made an unlawful transfer. He said that people may share names. Adding that, names may be similar. He decided to change his name from George Lucas to Jumanne Ramadhani George through an affidavit affirmed before Hon. Shayo in 2000. This is exhibit P6, he said. He could identify the exhibit. He went on to say that the reason behind the change of name was to get a name which could reflect his Islamic religion. The appellant proceeded to say that he was employed using the name Jumanne Ramadhani Gange in October 2005 using a leaving certificate of George Lucas and the affidavit. He said that all the names are his. He agreed that he re-sit form four examinations in Tabora in the name of George Lucas. He was advised to proceed to use the name.

DW2 Mbeko Mirami Shabani (42) is a teacher at Masanga Secondary School. He told the court that he met the accused at Nsumba Secondary School in 1996 as a student from Kigoma region. They studied together up to 1999. He knew him as George Lucas.

With that background, let us now examine counsel submissions. It was the submission of Mr. Sadiki Aliko in ground one that the trial magistrate erred to admit the leaving certificate, exhibit D1 and expunge it later in the judgment. He said that having admitted it, she had no power to expunge

it. She could only make an assessment of it for she was already functus officio. He referred the court to **R.V. Evangelina Jim Ager**, Criminal Appeal No. 84/2020 (H/C Mbeya) page 16-17. He said that the exhibit in this case was expunged suo mottu without giving the appellant the right to be heard but that found to be against the right to be heard provided under the constitution. He also referred the court to **Mbeya – Rukwa Auto Part and Transport Lts v. Jestina George Mwakyema** [2001] TLR 251 (CA) on the same reasoning. He argued the court to restore exhibit D1 on record and make a finding on it.

In ground two counsel submitted that, the failed to take into account the evidence contained in exhibit D1. That is, if it had taken into account the evidence contained in exhibit D1 and other pieces evidence, it could find that appellant was admitted at Nsumba Secondary School in 1996 and finished form four in 1999. He referred the court to the evidence of DW2 who said that he studied with the appellant and PW5 who said that he knew him as George Lucas.

In ground three counsel submitted that the court erred in concluding that the appellant postponed academic year without evidence. PW5 said that he postponed a year but failed to show any medical chits. He asked the court

to doubt the admission register. In ground four counsel submitted that, the trial magistrate erred to find that the appellant cheated PW5 because the evidence showed that PW5 was not in Nsumba Secondary in 1996. He was at the University of Dar es salaam. He is not the one who prepared exhibit P5. He argued that the charges that he cheated PW5 are not correct. The prosecution was supposed to call Mwalimu Manyanda and Christina Mrenda who prepared exhibit P5 to tell what they did. They were material witnesses to speak on exhibit P5 but were not called. While referring to **Hemed Saidi v. Mohamed Mbiru** [1984] TLR 113, he said failure to call a key witness give the court a chance to draw an adverse inference.

In ground five it was said that the trial court misdirected itself when it said that the appellant failed to prove at page 25 of the judgment for the burden of proof does not lie to the accused but the prosecution. He referred the court to **Nathanael Alphonse Mapunda and another V.R** [2006] TLR 395. He went on to say that the appellant said where he got the name George Lucas. He got it from his uncle. In ground six counsel submit that, the magistrate did not analysis the evidence properly. That, if he had done so, he could find the appellant not guilty. He asked the court to make that finding and set him free.

Ms. Antia Julius followed the trend of Mr. Sadiki Aliko in her submission. Submitting in ground one counsel took us to page 58 and said that the exhibit was not read in court. Failure to read the exhibit made it liable to be expunged as per **Lobison Mwanjisi v. R** [2003] TLR 218. She added that much as it may be said that the magistrate had no power to expunge the exhibit herself but the conviction of the appellant was not based on the exhibit alone. Submitting on ground two, counsel said that PW5 said that the appellant joined form II not form I. He tendered exhibit P5 which showed that he joined form II from Kigoma secondary school. She went on to submit on ground three and said that failure to get the exhibit does not mean that the prosecution have failed to prove the case because exhibit P5 is clear. He added that PW5 said that the appellant spent 4 years at Nsumba secondary School because he postponed school due to sickness.

In ground four counsel agreed that PW5 was not in school in 1996 when the appellant joined school but the error is curable under section 388 (1) of the CPA. His absence did not cause any injustice because the appellant agree that he joined the school. He also agreed that he used the name George Lucas which is not his proper name. In ground five counsel admitted that the burden of proof lies to the prosecution but hastened to

say that in law he who allege must prove. She said that the appellant alleged that George Lucas is his name but failed to prove that his name is George Lucas. Counsel submitted that if the appellant was picked by his ant at the age of 3, he must have had a name at that age. He was supposed to bring evidence to convince the court that his uncle changed the name. There was no birth certificate or evidence from his uncle on the change of name. The court did not shift the burden but failed to believe him, she submitted. She proceeded to submit in ground six and said that the magistrate analyzed the evidence properly and found that George Lucas is not his name. She argued the court to dismiss the appeal.

Mr. said Alik made a rejoinder submission and joined issues with Ms. Antia Julius.

I had time to read the evidence the substance of which have been given above. I have also considered the counsel submissions and cited cases. I have no problem with the cited cases all of which appear to be relevant. The appellant was charged of three counts of personation c/s 369 (1) and 35 of the penal code and one count of false swearing c/s 107 of the Penal code. In the first count he is alleged that with intent to defraud Joseph Simon Zakeo, the Second Master of Nsumba secondary school, he falsely

represented himself as a student known as George Lucas in 1996. In count two he is accused that with intent to defraud the Director of Kigoma Ujiji Town Council in 2005, he falsely represented himself to be George Lucas. In count three, it was alleged that with intent to defraud the Head Master of Tabora Girls secondary school in 2008, he falsely represented himself to be George Lucas a form four candidate for the National Examinations Council of Tanzania. And in count four it was alleged that he made a false affirmation before the district magistrate of Kigoma district regarding the names George Lucas on 13th March 2000. So, we have four key persons; the Second Master of Nsumba secondary school, the Director of Kigoma – Ujiji Town Council, the Head Master Tabora Girls Secondary School district and the district magistrate Kigoma district. We also have 4 key dates: 1996 when he joined Nsumba Secondary School Mwanza, 2005 when he was employed by Kigoma -Ujiji town Council, 2008 when he re-sited form four examination at Tabora Girls secondary school and 2000 when he swore a deed poll on change of name from George Lucas to Jumanne Ramadhani Gange the name he used while he was employed at Kigoma -Ujiji Town Council 2005. The district court received evidence from 7 prosecution witnesses and several documents as exhibits. It also received the evidence

of two defence witnesses and one exhibit. It in the end found that the prosecution have proved the case beyond doubts in all counts and convicted the appellant. He was sentenced as shown above. The central issue now is whether there was good evidence to prove the charges. The appellant is saying that there was no good evidence to convict him and have pointed out seven areas of weaknesses while the respondent Republic say that there was good evidence to convict.

I will now move to examine the ground of appeal and area of weakness pointed out by counsel for the appellant to see if he has managed to convince the court that the appellant was wrongly convicted on the charges facing him or any of them. In ground one the complaint that the magistrate having admitted a copy of the leaving certificate, exhibit D1, he had no mandate to expunge it in the judgment. I have considered this complaint and I agree that she had no mandate to expunge the exhibit because as correctly pointed out Mr. Alik, he was already functus office in the matter. What was done is usually done by an appellate court not the trial court. I however do not agree that the magistrate was supposed to proceed to evaluate the evidence contained in the exhibit. What he was supposed to do in my view was point out that he had received the

evidence wrongly and therefore not properly before the court. She could then leave it aside and proceed to deal with other issues. Counsel have invited the court to make an evaluation of the evidence contained in exhibit D1 at this stage and find for the appellant. With respect to Mr. Alik, the document being a photocopy which was admitted without laying a foundation for receiving secondary evidence remained useless and cannot be acted by this court. I can only say that exhibit D1 was wrongly expunged and therefore still part of the record of the lower but for it being a photocopy I cannot act on it to give justice to any. I will simply ignore it. That also dispose ground two for I cannot say if the district court had considered exhibit D1 it could find that the appellant finished form IV in 1999 at Nsumba secondary school while I have already found that it had no evidential value.

In ground three the complaint is that there was no good evidence to show that the appellant postponed a year for want of a letter from parents or medical chits. Neither could show the disease of the appellant. I have tried to reason out carefully. PW5 was looking at the records of 1996 to 1999. What he said was that the appellant postponed a year so instead of finishing in 1998 he finished in 1999. It is difficult to expect him to get all

the records due to the length of time. What he brought is exhibit P5, Regista ya Kuingia Shule 1996 – 1999 which showed that he had been there from 1996 up to 1999. He said that George Lucas had admission No. S. 169 and was admitted in 1996 as a form II student shifting from Kigoma. He left the school in 1999 with reference number S. 01144/0047. He said that he postponed studies due to sickness. He knew him by the name of George Lucas. He had earlier told the court that as Assistant Head Teacher he assisted the Head Teacher in administrative duties, he was the chairman of disciplinary committee and had a duty of registering new students. He was dealing with admission, joining instructions and custody of documents. I think he was in a position of knowing why the appellant postponed school. He said that the appellant postponed school on medical grounds tendering medical chits. He used the available records. The trial court believed him. I think this was the question of credibility of witnesses rather than demand for medical chits or other documents which may have been misplaced over the 20 years period. If the trial magistrate believed FW5 I have no reason to question that aspect for he was better placed than me on issues of credibility of the witness. See **Amani Justine @ Mpare v. The Republic, (CAT)**, Criminal Appeal No. 131 of 2018 and

Amani Justine @ Mpare v. The Republic, Criminal Appeal No. 131 Of 2018. I see no base for interfering with her findings. Ground three is thus baseless and dismissed.

In ground four the complaint is that there was no evidence to show that the appellant cheated PW5 because he was not in Nsumba Secondary school in 1999. He was at the University of DSM. He was also not the maker of exhibit P5 which was made by Mwalimu Manyanda and Christina Mrenda. I think this call for an examination of what is personation. Personation is contained under section 369 (1) of the Penal Code. It reads as follows:

"369 (1) Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of an offence".

Interpreting this section this court had this to say in **D.P.P v. Peter Saimon Mapunda**, (HC) Criminal Appeal No. 61 of 2020 (E.E. **Kakolaki, J.**) page 8 where it said:

"... the offence of personation is committed when one person who with intent to defraud another person goes further to

execute his intention by falsely representing himself to be another person while in fact he knows not to so be. So, the offence can be committed to any person whom the accused presents himself to be "another person" who is either living or dead."

See also **Edward Mbawala v. The Republic, (CAT)**, Criminal Appeal No. 150 of 2010.

The issue now is whether there was personation at Nsumba secondary school in 1996. I think there was none.

Reading through, I could find that this argument arose from the response of PW5 at page 32 of the proceedings when he replied saying:

"On 1993 I went in my studies and came back at Nsumba by 1997. I was at the university of Dar es salaam. While at Dar es salaam, I did not deal with Nsumba secondary school activities. I handled the office of others. The maker was the second master who handled the office to me, (1) Joyce Manyanda and Christina Mrema".

Going through the evidence of PW5 as recorded above, it is true as submitted by Mr. Aliko that he could not be cheated in 1996 at Nsumba secondary school because he was not there. He was at the University of Dae es Salaam from 1993 to 1997. So, if anything, he stayed with the

appellant from 1997 up to 1999. It follows that much as it is possible that the appellant cheated Mwalimu Manyanda and Christina Mrenga who were there in those days, he cannot be said to cheat PW5 in 1996 because he was not in school in the period. Ground four is answered in the affirmative.

In ground five, the complaint is that the court shifted the burden of proof to the appellant. With respect to counsel submission, reading through the judgment, I could not see any shifting of the burden of proof. It was rather, as correctly pointed out by the state attorney, an observation by the court that the appellant who had alleged that his name is George Lucas had a duty to prove that his name is George Lucas for in law he who allege must prove. See **Wambura Waryuba v. The Principal Secretary Ministry of Finance & Another.** (CAT), Civil Application No. 320/01 of 2020 and **Agatha Mshote v. Edson Emmanuel & 10 Others,** (CAT), Civil Appeal No. 121 of 2019. Ground five is thus baseless and dismissed.

Ground six goes to examine the case in totality. I have already said that there was no good evidence to prove ground one. I have substituted the finding of guilty with a finding of not guilty in that count. Count two take us to what was done at the council in 2005. The appellant presented himself as Jumanne Ramadhani Gange at Kigoma – Ujiji Town Council and was employed on 31/10/2005 as Mtaa Executive Officer III. He was confirmed

in his employment on 17/2/2007 vide a letter reference No. 20/110/178 in the name of Jumanne R. Gange. Attached to his letter of Appointment is a deed poll sworn on 13/3/2000. It reads in part as under: -

"BY THIS DEED POLE (sic) I JUMANNE R. GANGE do hereby wholly absolutely and utterly renounce, relinquish and abandon the use of my former name of GEORGE LUCAS and adopt as from the day of the date hereof the name of JUMANNE R. GANGE in lieu of and in substitution of my former name of GEORGE LUCAS....."

According to the letter of appointment, letter of confirmation and the evidence of PW6 Beneti Niralp, the appellant used the name of Jumanne R. Gange at the council as his official name. The change of name under a deed poll was done earlier in 2000. So it cannot be said that he falsely represented himself to the council as George Lucas in 2005 because he had renounced the name of George Lucas at an early stage. He applied for the job in the new name of Jumanne R. Gange and was employed and issued with both the appointment and confirmation letters in the name of Jumanne R. Gange. It follows that much as there is some truth in the matter but the charge is misconceived. He cannot be accused of presenting himself falsely as George Lucas in 2005 while he had no such name in

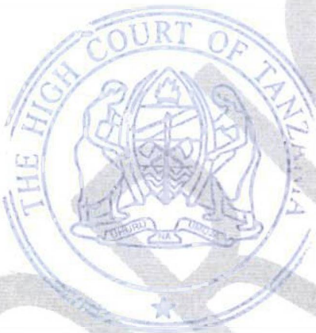
2005 having renounced it at an earlier stage as aforesaid. He was therefore not guilty of count two.

Count three talk of personation at Tabora Girls in 2008. This holds water. There was good evidence to show that he sat the examination in the name of Gange Lucas while he was not George Lucas. There was good evidence from PW1 (the real George Lucas), PW2 (the Headmaster of Kigoma secondary school), PW3 (the father of PW1), PW6 (the HR from Kigoma – ujiji town council) and PW7 (the PCCB Investigator) showing that the appellant is not George Lucas. He acted falsely to shift the name of the appellant from Kigoma secondary school to Nsumba secondary school and then to Tabora Girls secondary school where he made the re-sitting of examinations. I think that is the reason why he decided to abandon his former name and assumed his original name of Jumanne R. Gange. He was therefore properly found guilty of count three.

Equally there is good evidence of false swearing for while knowing that his name was Jumanne R. Gange he made a false swearing that his name was George Lucas which he was changing to Jumanne R. Gange under the deed poll. There was therefore good evidence to prove the offence.

So, the conviction on count one and two is set aside while the conviction on counts three and four is left intact. What about sentence? The appellant was a first offender who had no previous criminal record. He is also having a family of six (6) people to care. I do not see the sentence as being less or excessive. I will not make an intervention only that the fines which were paid in respect of counts one and two should now be refunded. I order the fines paid in respect of counts one and two, total Tshs. 2,000,000/= to be refunded to the appellant.

The appeal is partly allowed. It is ordered so.



L.M. Mlacha

Judge

12/8/2022

Court: Judgment delivered through the virtual court service. Right of Appeal Explained.



L.M. Mlacha

Judge

12/8/2022