

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 71 OF 2022

ROSE KHALID SALIM APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the District Court of Temeke at Temeke in
Criminal Case No. 358 of 2020)**

JUDGMENT

24th June & 12th July, 2022

KISANYA, J.:

Rose Khalid Salim, the appellant, was charged with offences of forgery contrary to section 333, 335(a) and 337 of the Penal Code [Cap. 16, R.E. 2019] (now R.E. 2022) and uttering false document contrary to section 342 of the Penal Code (supra).

It was the prosecution's case on the first count that on unknown date and place between 19th July, 2008 and 11th January, 2012, within Temeke District in Dar es Salaam Region, with intent to defraud, the appellant forged a certificate of marriage with Reg. No. 49139 dated 5th June, 1994 purporting to show that it was genuinely issued by the National Muslim Council of Tanzania (BAKWATA), the fact she knew to be untrue. The prosecution further alleged that the forged marriage

certificate purported to show that the accused was married to one Omary Mlachane Gamba.

It was further claimed that, on 29th March, 2017 at the District Land and Housing Tribunal for Temeke District, the appellant tendered the foresaid forged marriage certificate to the chairman of the District Land and Housing Tribunal (DLHT) for Temeke District one, Amon Richard Kirumbi, claiming that the house sale agreement between Amsons Industries (T) Ltd and Omary Mlachake Gamba was illegal for want of her consent.

As the investigation confirmed that the certificate was not issued by BAKWATA and that the appellant signed the same, she was arraigned before the trial court for the foresaid offence.

Apart from the evidence of Mohammed Mussa (PW1) of Camel Oil Company, Ramadhan Juma (PW2) and Mohamed Khamis Said (PW4), the prosecution called SP Maria Typhone (PW3) from the Forensic Bureau and F.5818 DCPL Samwel, a police officer who investigated the matter. Their testimonies were supported by six exhibits to wit, Certificate of Marriage (Exhibit P1), Sale Agreement (Exhibit P2), Residential License (Exhibit P3), the Forensic Bureau Report (Exhibit P4); Letter from BAKWATA (Exhibit P5).

In her defence, the appellant distanced herself from the offences laid against her. She contended that she was the wife of the said Omary Mlachake Gamba from

1994. She further testified that she signed the marriage certificate at the instance of her husband (Omary Mlachake Gamba) and PW2. The appellant's testimony that she was married to Omay Mlachake Gamba was corroborated by Salim Mwijuma Kitogo (DW2), Mayram Gamba (DW3) and Ashura Omary Gamba (DW4) who introduced themselves as the appellant's father, sister in law and mother, respectively.

After a full trial, the appellant was found guilty and convicted of the first count of forgery only. Consequently, she was sentenced to serve three years imprisonment for the offence of forgery and discharged for the offence of uttering false document.

The decision of the trial court displeased the appellant hence, the current appeal. The appellant through her counsel Olaf Kabogoye of KS Law Chambers lodged a petition of appeal that comprise the following grounds of grievance:

- 1. That the trial magistrate erred in law and fact by arriving to the decision basing on bias and not evaluating the evidence of the prosecution which was full of doubts as the appellant was not the maker of the alleged marriage certificate.*
- 2. The trial magistrate erred in law and fact by not proving that the alleged marriage certificate was forged.*
- 3. The trial magistrate erred in law and fact by acting as witness instead of being a neutral party and make a just decision.*

4. *The trial magistrate erred in law and fact by not putting into consideration the evidence of the appellant that she had never made the alleged marriage certificate and never uttered the same.*

At the hearing of this appeal, the appellant enlisted the services of Ms. Esther Mango and Messrs. Peter Shapa, Olaf Kabogoye and Robert Oteyo, all learned counsel. On the other hand, Ms. Nura Manja, learned State Attorney represented the respondent, Republic.

Mr. Shapa set the ball rolling. Submitting on the first ground, he argued that the trial court did not evaluate evidence adduced before it. He also faulted the trial court for failing to hold that the appellant was not the author of the alleged marriage certificate. It was Mr. Shapa's argument that the ingredients of the offence of forgery are making false document and intention to defraud. He bolstered his argument by citing the case of **John Rwemigira vs R**, Criminal Appeal No. 140 of 1994 (unreported). The learned counsel went on to submit that, none of the prosecution witnesses proved that the certificate of marriage was authored by the appellant and that the latter used the same to defraud. For that reason, the learned counsel argued that the prosecution case was not proved beyond all reasonable doubts.

On his part, Mr. Oteyo submitted that the prosecution case was not proved due to the following reasons. *One*, PW1 and PW5 contradicted themselves on the

utterance of the forged document. That, while PW1 adduced that the forged certificate was submitted to the District Land and Housing Tribunal, PW5 stated that it was before the Ward Tribunal. *Two*, PW2 was not a reliable witness due to the fact that at one time in point he testified that the certificate of marriage, the appellant and Omary Mlachake Gamba were known to him but later on changed the story by testifying that the appellant and Omary Mlachake Gamba were not known to her before the incident. *Three*, PW3 and PW5, Mr. Oteyo did not take the specimen of Sheikh Mohamed who was alleged to have officiated the marriage subject to the alleged certificate of marriage. *Four*, PW4 gave hearsay evidence.

Submitting in support of the second ground, Mr. Oteyo complained that the learned trial magistrate did consider that the appellant had not forged the certificate of marriage. He contended that it was not proved that the certificate of marriage was forged. Mr. Olaf added that the certificate of marriage in question was not tendered in evidence and that the evidence of PW3 was limited to the Forensic Bureau Report.

On the third ground, it was submitted that the learned trial magistrate acted as a witness. Referring the Court to page 9 of the typed judgment, the learned counsel submitted that the trial magistrate was not a neutral person.

With regard to the fourth ground, the learned counsel submitted that the appellant's evidence was not duly considered. However, the Court was not told

how the appellant's evidence was not considered. The learned counsel's submission in support of this ground was premised on the reason that PW3 and PW5 gave contradictory evidence and that Sheikh Mohamed who officiated the marriage in question was not called to testify.

In the light of the foregoing submission, this Court was called upon to quash the conviction and set aside the sentence.

On the part of the respondent Republic, the learned State Attorney commenced her submission by expressing her position of resisting the appeal. Starting with the first ground of appeal, Ms. Manja was in agreement with the appellant's counsel that, pursuant to section 333 of the Penal Code, the offence of forgery is proved by establishing that a forged document was made by the accused person and that the accused person intended to defraud. The learned State Attorney went on submitting that the alleged certificate of marriage was tendered by PW1 who stated on oath that it was tendered by the appellant in the DLHT claiming to be the wife of the late Omary Mlachake Gamba. When probed by the Court, Ms. Manja conceded that the evidence is silent on how the certificate of marriage in question was obtained from the case file of the DLHT.

The learned State Attorney further submitted that PW2 whose signature appears on the Certificate of Marriage (Exhibit P1) disputed to have signed the same and that he (PW2) testified that the appellant was not known to him.

Referring to the appellant's evidence that PW2 caused her to sign Exhibit P1, Ms Manja contended that such fact was an afterthought on the account that it was not put to the said PW2 during cross examination.

She further submitted that PW3 being an expert of handwriting gave evidence to the effect that her examination revealed that the appellant signed Exhibit P1 while PW2 did not sign the same. It was her further argument, that such evidence is admissible in evidence under section 49 of the Evidence Act and basing on the factors set out in the case of **DPP vs Shida Manyama @Seleman Mahaba**, Criminal Appeal No. 285 of 2012 (unreported). She contended that the appellant did prove that Exhibit P1 was not tendered before the DLHT for Temeke.

Ms. Manja went on to submit that PW4 proved that Exhibit P4 was not issued by BAKWATA as per Exhibit P5 while PW5 testified how the case was investigated.

That said, the learned State Attorney was of the view that the prosecution proved that the marriage certificate was forged by the appellant and that he tendered the same in the DLHT in order to show that she is the beneficiary of the house sold to Camel Company. She submitted that the alleged contradiction between PW1 and PW5 does not go to the root of the case.

On the second ground of appeal, Ms. Manja submitted that Sheikh Mohamed could not be called as witness because Exhibit P1 does not bear his signature. When probed by the Court, she admitted that the specimen or sample of the

signature of the late husband of the deceased was not taken and compared with the signature appearing on Exhibit P1. She went on submitting that PW4 did not adduced hearsay evidence.

With regard to the third ground, the learned State Attorney argued that the appellant's counsel had not pointed out how the learned trial magistrate assumed the role of a witness.

On the fourth ground, Ms. Manja conceded that the trial magistrate did not analyze the evidence adduced by the appellant. Citing the case of **Mzee Ali Mwinyimkuu @ Babu Seya vs R**, Criminal Appeal No. 499 of 2017 (unreported), she urged this Court to step into the shoes of the trial court and consider the defence case. However, she was of the firm view that the defence did not raise doubt on the prosecution. Therefore, the learned counsel prayed that the appeal be dismissed for want of merit.

In his rejoinder, Mr. Olaf contended that the respondent had conceded that evidence as to how Exhibit P1 was obtained from the DLHT is wanting. He also urged this Court to disregard, Exhibit P1 on the ground that it was not indorsed by the trial court.

On his part, Mr. Shapa reiterated the submission in chief that the prosecution did not prove its case beyond all reasonable doubt, while Mr. Robert

maintained that PW1 and PW5 gave contradictory evidence on how Exhibit P1 was obtained.

From the foregoing submissions, the main issue for determination by this Court is whether the appellant's appeal has merit.

I prefer to start with the third ground in which the learned trial magistrate is faulted for acting as a witness and failing to be a neutral person. This ground goes to the root of the case. It suggests that the appellant was not accorded a fair hearing enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. As rightly observed by Ms. Manja, the appellant's counsel did not point out to the Court on how the learned trial magistrate acted impartial let alone playing the role of a witness. I have gone through page 9 of the typed judgment referred to by the learned counsel for the appellant. Nothing suggests that the trial magistrate was impartial. Reading from page 9 of the typed judgment, I have noticed that the learned trial magistrate made reference to evidence adduced by PW1, PW2, PW4 and the appellant (DW1) when addressing the issue whether the certificate of marriage was made with intent to defraud. Given that the learned trial magistrate considered the evidence before, this Court finds no reason to hold that she was not impartial. Thus, I find no merit in the third ground of appeal.

Next for consideration is the fourth ground of appeal in which the learned counsel for the parties were in cohort that the defence case was not considered. While the appellant's counsel was of the view that the omission is fatal, the learned State Attorney invited this Court to step into the shoes of the trial court and consider the evidence adduced by the appellant.

My starting point on this ground is the settled law that failure to consider the defence case is a serious misdirection. It is the duty of the trial judge to deal with the prosecution evidence and consider the defence evidence before making his or her decision. See the case of **Hussein Idd and Another vs R Republic** [1986] TLR 166 in which the Court of Appeal held that: -

"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."

In the instant appeal, having briefly summarized the prosecution evidence and the appellant's account in defence, the learned trial magistrate considered the issue whether the offences of forgery and uttering false documents were proved beyond reasonable doubt. Starting with the offence of forgery, the learned trial magistrate referred to the provisions which create the offence of forgery and drew the conclusion that the certificate of marriage was forged. She also held that the appellant was found in possession in possession of the said certificate of marriage.

The learned trial magistrate arrived at the foresaid conclusion basing on the following analysis:

*"PW1 explained that the accused person came with a lawsuit after the seller had passed away with the aim of defrauding that she was the wife of the seller and the land was sold without her consent. **The accused person explained that her husband died in 2015 but failed to provide a death certificate thereto. DW1 explained that her late husband and PW2 came with certificate and she signed it without questioning its authenticity.** PW2 also denied contracting the marriage of the accused. No records of the said certificate were found at the headquarters as per the research done by PW4. The expert opinion indicates that the sample of PW2's handwriting does not match the signature in the certificate but the accused handwriting matches. All these proves that the document is forged and it was in possession of the accused."* (Emphasize supplied).

In the light of the above, I respectfully disagree with the learned counsel for both parties that the defence case was not considered. It is my considered opinion that bolded excerpts suggest the appellant's evidence was considered by the trial magistrate. The fact that the learned trial magistrate was not convinced with the defence case does not necessarily mean that she did not consider the same. I, therefore, dismiss the fourth ground for want of merit.

Reverting to the first and second grounds of appeal, I am of the view that both grounds raise the issue whether the offence of forgery was proved beyond all reasonable doubt.

I have indicated earlier on that, the offence of forgery laid against the appellant was preferred under sections 333, 335 (a) and 337 of the Penal Code. Now, while section 333 of the Penal Code defines forgery as "the making of a false document with intent to defraud or to deceive", section 337 of the Penal Code provides for general penalty of the offence of forgery. As regards section 335(a) of the Penal Code, it specifies that a person is held to make a false document when he or she makes a document which is false or which he or she has reason to believe is untrue [See also the case of **Joseph Mapema vs. R** [1986] TLR 148].

That being the position of law, the issue whether the offence of forgery was proved can be considered by addressing three questions namely; one, whether the alleged certificate of marriage was false; two, whether the marriage certificate was made or signed by the appellant; and three, whether the marriage certificate was made with intent to defraud or deceive.

Before addressing the above questions, I find it apposite to comment on the certificate of marriage. The first issue stems from the appellant's counsel complaint that the said certificate was not tendered in evidence. Having examined the record, I agree with Ms. Manja, the certificate subject to this case was tendered by PW1

and admitted in evidence as Exhibit P1. The record reveals further that the contents of Exhibit P1 were read out after being admitted in evidence. It follows that the alleged complaints have no legs to stand on. Another issue is the trial court's omission to endorse Exhibit P1 after being admitted in evidence. This issue was raised by the court in the course of hearing the parties. Unlike the Civil Procedure Code [Cap. 33, R.E. 2019], the Criminal Procedure Act [Cap. 20, R.E. 2022] does not have provision on the requirement to endorse exhibits admitted in evidence. However, it is important that the exhibit be endorsed. Otherwise, failure to endorse the exhibit may lead to confusion and doubt whether the exhibit in the case filed was indeed tendered in evidence.

Reverting to the question whether the certificate of marriage (Exhibit P1) is false Ms. Manja submitted that Exhibit P1 was false is based on evidence adduced by the prosecution. Upon evaluating the evidence on record, I agree with her. As stated earlier, Exhibit P1 is a certificate of marriage with reg. 49139. It was alleged to have been issued by BAKWATA. Among others, Exhibit P1 names and bears the signature of Ramadhan Juma (PW2) as the person who officiated the marriage the marriage between the appellant and Omary Gamba Mlachane.

However, PW4 and the BAKWATA's letters dated 18th February, 2019 (Exhibit P5) confirm that the alleged certificate of marriage was not issued by BAKWATA. As that was not enough, PW2 testified to have not officiated the

marriage between the appellant and Omary Gamba Mlachane. He also disputed to know the appellant and signature appearing on Exhibit P1. The fact that PW2 did not sign Exhibit P1 was confirmed by the handwriting expert (PW3) who tendered a report (Exhibit P4) which revealed that PW2's signature on Exhibit P2 was not his. Thus, in view of evidence of PW2, PW5 and Exhibits P4 and P5, it is the findings of this Court that Exhibit P1 was false.

The second question is whether the marriage certificate was made or signed by the appellant. The appellant's counsel held the view that the prosecution did not prove that Exhibit P1 was authored by the appellant. I have shown earlier, that in terms of section 335(a) of the Penal Code cited in the charge sheet, a person is deemed to have made a false document when he or she makes a document which is false or which he or she has reason to believe is untrue.

In the present case, the appellant's name and signature appear on Exhibit P1. The prosecution called PW3 who testified that her examination as the handwriting expert revealed that the signature appearing on Exhibit P1 belongs to the appellant. Her testimony was supplemented by the Forensic Bureau Report (Exhibit P5). In her defence, the appellant stated that she was married to Omary Gamba Mlachake at Ponge Village- Tanga on 5/06/1994. It was also her evidence that upon moving to Dar es Salaam, her late husband met PW2 who assisted him to get a certificate of marriage. She went on to admit to have signed the certificate

of marriage after being asked by her husband. Considering further that her marriage was officiated in Tanga and not Dar es Salaam, I am of the considered view that the appellant had reason to believe the said certificate was untrue. That said, the second question is answered in affirmative.

The crucial question is whether the marriage certificate was made with intent to defraud or deceive. In the case of **Jones Ndunguru vs R** [1984] 20, this Court cited with approval the case of **Re London and Globe Finance Corporation**, [1903] 1 Ch. 728 in which Buckley, J defined the term defraud as follows:-

"To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

In our case, in the charge sheet that the alleged certificate of marriage was made on unknown date between 19th July, 2008 and 11th January, 2012. However, no evidence was produced to prove that the certificate was made between 19th July, 2008 and 11th January, 2012. However, PW1 testified that upon demise of Omary Gamba Mlachake in 2012, the appellant emerged to challenge the house sale agreement dated 19th July, 2008 between Omary Gamba and Amsons

Industries Ltd (Exhibit P2) on the account that she did not consent to the transfer or disposition of the house in question. According, to PW1 and PW5, the certificate of marriage (Exhibit P1) was tendered by the appellant at the land Tribunal in order to prove her claim.

It is however, on record that, neither PW1 nor PW2 stated the land case in which the marriage certificate was tendered in evidence. Further to this, the prosecution did not produce any evidence to support that the certificate of marriage was tendered in the DLHT as stated by PW1 or the Ward Tribunal named by PW5. Since the certificate of marriage was tendered in the land case, the prosecution was expected to produce evidence such as case number, exhibit number, proceedings or judgment and how the said certificate of marriage was retrieved or obtained from the land case. Since that evidence is missing, it raises doubt as to whether the appellant made the document for purposes of claiming the house alleged to have been sold to PW1's company. This is also when it is considered that the appellant was discharged on the second count of uttering false document.

I have considered further that, the appellant defence that she married Omary Gamba Mlachake on 5th June 1994 before moving Dar es Salaam on the second day. Further to this, the appellant recalled to have signed the certificate of

marriage when it was brought to her by her husband (Omary Gamba Mlachake)

and PW2. Her evidence went as follows: -

"...on the second day we travelled to Dar es Salaam and he rented for me a room at Temeke-Miteja Street- Omary Gamba went to Tungi Mosque and met Sheikh Ramadhan Juma who assisted him in getting a marriage certificate and they came home with two certificate and I was ordered to sign them by Ramadhan Juma and I was given a copy thereto."

Since the prosecution did not produce direct evidence as to the circumstances under which the certificate of marriage was made, I am of the considered view that the above evidence suggest that the appellant had no intent to deceit. It is her husband who brought the certificates and caused her to sign the same. Also, it was not proved that Omary Gamba Mlachake did not sign the certificate of marriage. For instance, it was not stated whether or not the signature of Omary Gamba appearing on the sale agreement (Exhibit P2) tendered by PW1 is similar to his signature on the marriage certificate (Exhibit P1). If Omary Gamba Mlachane signed Exhibit P1, the appellant's defence that she was forced to sign the same cannot be ignored. This raises doubt on whether the appellant intended to deceit or defraud due. In terms of the settled law, any doubt on the prosecution case must end in favour of the accused person. That being the position, I hold the view the offence of forgery was not proved beyond all reasonable doubts. Thus, the first and second grounds are partly allowed to extent shown afore.

To this end, I am satisfied that this appeal is meritorious. The conviction and sentence meted on the appellant are, respectively, quashed and set aside with an order that the appellant be released from prison forthwith unless she is detained for other lawful cause.

It is so ordered.

DATED at DAR ES SALAAM this 12th day of July, 2022.



S.E. Kisanya
JUDGE
12/07/2022