IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

CRIMINAL APPEAL NO. 52 OF 2021

(Originating from Criminal Case No. 168 of 2014 District Court of Moshi at Moshi)

HAMZA MOHAMED NGOTI..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

27th July & 7th September, 2022

JUDGEMENT

MWENEMPAZI, J.

Before the District Court of Moshi at Moshi (the trial court), the appellant herein was charged with and convicted of two offences; first, forgery contrary to section 333, 335 (a) and 339 of the **Penal Code**, Cap 16 R.E. 2002 (now R.E. 2019) and the second offence was uttering false document contrary to section 342 of the same law.

During trial the prosecution managed to summon three witnesses, who proved that, the appellant with intent to defraud made a false copy of death certificate with Entry No. 3940/2010 purporting to show that one Manka Machuwa Kisenga is dead. Further that, he used the same document at Mabogini Primary Court and successfully petitioned to be appointed as administrator of estate of the said Manka Machuwa Kisenga while knowing the same was a false certificate. That, after his appointment, PW1 Said Selemani Mfinanga owner of the plot which the appellant listed as one of the deceased estate, objected to

the said appointment in vain. The latter claimed he knew the deceased by another name Fatuma Selemani. It is through such suspicions that he went to inquire from the Registrar of Titles and confirmed that Manka Machuwa Kisenga's death certificate was forged. The case was filed against the appellant and after the full trial which consisted of two witnesses and two exhibits the trial court was satisfied that the case against the appellant was proved to the required standard. He was found guilty of all two counts, convicted and sentenced to serve one year imprisonment for each count, the sentences were to run concurrently. Aggrieved he filed this appeal advancing five grounds as follows;

1. That, the trial court erred in law and fact in convicting and sentencing the appellant basing on flimsy evidence.
2. That, the trial court erred in law and fact in convicting the Appellant based on a defective charge.
3. That, the trial court erred in law and fact in convicting the Appellant based on a defective charge while the prosecution side failed to prove the case beyond reasonable doubt.
4. That, the trial court erred in law and fact in convicting the Appellant without considering the defence evidence.
5. That, the trial court erred in law and fact in convicting the Appellant based on proceedings and judgment which are not corresponding to each other.

During hearing of this appeal, the appellant was represented by Mr. Lekton Ngeseiyani, learned Advocate whereas Mr. Innocent Njau learned State Attorney represented the respondent, Republic.

Supporting the 1st and 3rd grounds of appeal the appeal Mr. Ngeseyan, submitted that, the trial court convicted the appellant basing on weak evidence as the offence was not proved to the required standard. He argued that, the appellant was charged with the offence of forging a death certificate of one Manka Machuwa Kisenga and also for uttering false document contrary to section 342 of Penal Code. However, none of the prosecution witness tendered evidence that the person who forged the document is the appellant. Also, the said forged document was not taken to the hand-writing expert to prove the same. He further argued that, to be found with the document does not necessarily render the person found with it to be the one who forged the same. That, prosecution evidence is based on mere allegations which does not suffice to prove the offence against the appellant. He cited the cases of **DPP Vs. Shida Manyama @ Seleman Mabuba**, Criminal Appeal No. 285 of 2012, CAT at Mwanza and **Bakari Mwahimu Jumbe Vs. The Republic**, Criminal Appeal No. 278 of 2017, CAT at Tanga (all unreported) to cement his argument that, knowledge that the document has been forged is material proof to the offence facing the appellant.

Mr. Ngeseiyani further argued that, prosecution ought to have brought a key witness to prove the fact that the said Manka Machuwa Kisanga is alive. PW1 testified that, the said Manka is alive but no proof was brought to prove that fact. Thus, it was wrong in law not to call important witnesses without reasons as observed in the cases of **Hemed Said Vs. Mohamed Mbilu** [1984] TLR 113 and the case of **Aziz Abdallah Vs. Republic** [1991] TLR 71. Apart from that, the said alleged forged death certificate was a photocopy and was tendered against to section 64 of the **Law of Evidence Act**, Cap. 6 R.E. 2019,

as it was not stated where the original copy was. The prosecution ought to have issued a notice to produce according to Section 68 of Law of Evidence Act. In the circumstances, he argued, convicting the appellant using the document which was received illegally render the proof illegal as it did not meet the required standard. Another argument by the learned counsel was the fact that the person who tendered the said forged document was not a competent person.

On 2nd ground of appeal, learned counsel argued that, the charge was defective as it is against one person while at page 10 of the proceedings, it shows the charge was read over and explained to two accused persons. As to the 4th ground of the appeal, learned advocate asserted that defence evidence was not considered as the appellant tendered the original copy of the death certificate of Manka Machuwa Kisenga. More so, he was appointed to be administrator of the estate of the late Manka Machuwa Kisanga on 7/3/2011 through minutes of the family meeting. However, the court continued with conviction without considering his defence. Appellant also tendered another certificate which shows the Death Certificate of his daughter Marium having the same signature as the one in Manka Machuwa's but that also was not considered. He referred the court to the case of **Hussein Idd and another Vs Republic** [1986] TLR 166 and **James Bulolo and another Vs. Republic** [1981] TLR 283 where the court held that failure to consider defence evidence was fatal. The defence has to be weighed as against prosecution evidence to see if the same introduces any reasonable doubt.

On the 5th ground of appeal Mr. Ngeseiyani averred that the proceedings and judgment do not corresponding to each other as the first paragraph of page

10 of the judgment implies that the appellant was the one who made follow up of the death certificate. But this fact was nowhere in the proceedings. He prayed that appeal be allowed, judgment should be quashed and sentence set aside.

In reply Mr. Njau supported the appeal for the reasons raised and added that according to pages 37-38 of the trial court's typed proceedings the case was shifted from Hon. S.S. Massati, RM to Hon. J.C. Tiganga, PRM who continued to hear the defence and delivered a judgment on 02/12/2015. However, no reasons were advanced for such re-assignment contrary to the requirement provided under Section 214 (1) of Criminal Procedure Act, Cap 20 R.E. 2019. There ought to have reasons given and parties were to be informed of such change failure of which vitiated the proceedings from 19/10/2015 to the day the judgment was delivered on 02/12/2015.

Also, all exhibits tendered were admitted without following procedure as per the case of **Robson Mwanjisi & 3 Others Vs. Republic** [2003] TLR 218, as they were not read loud in court. It was therefore wrong for the court to rely on them during composition of the judgment. Once these exhibits are expunged, the remaining evidence is mere allegations that the appellant forged the death certificate and falsely uttered the document without proof. In the circumstances, as submitted by the counsel for the appellant, it is obvious there is no evidence that the appellant forged the death certificate or had knowledge that the said death certificate was forged. Therefore, the appellant was wrongly convicted and the defaults observed above cannot be cured by retrial since by doing so prosecution will go back and fill the gaps of their flawed evidence. He prayed that the court allow the appeal and set the appellant free.

After I have gone through the parties' submissions and trial court's proceeding and judgment, I as well support the appeal. According to section 333 of the Penal Code, the offence of forgery has three elements to wit; existence of false document, intention to commit forgery and that, it is the accused who made such documents. in **D.P.P Vs. Shida Manyama Seleman Mabuba** (supra), Court of Appeal at Mwanza held that;

> *"To prove the offence forgery satisfactorily the prosecution had the duty to prove that;*
>
> *(i) The disputed letter was authored by the respondent*
>
> *(ii) The disputed letter was a false document*
>
> *(iii) The respondent has forged the disputed letter with the intent to defraud or deceive.*

Likewise, in proving the offence of uttering false document the prosecution must prove that, *one*, the document was false in the sense that it was forged, *two*, the accused knows that it was forged and *three*, the uttered document intended to defraud. All of the above requirements were not proved during appeal. There was no proof that it was the appellant who authored the death certificate with intent to defraud. As rightly argued by the appellant's advocate, no expert witness was summoned to prove that the signature from the said document was indeed forged. Most important, the prosecution tried to establish that the said Manka Machuwa was alive, however none of the witnesses proved that fact. Since there were family minutes appointing the appellant to administer deceased estate, such defence evidence was strong enough to raise doubt which would have favoured the appellant. It was therefore wrong to convict and sentence the appellant on the offences.

The records also show that all the exhibit tendered were not read out aloud after their admission. Reading out the contents of any document to be admitted into evidence is vital as it allows other party to know what the contents are and prepare defence. Failure to do so could easily lead to injustice and that is why the Court of Appeal in its many decisions has stressed trial courts to strictly observe that. Court of Appeal in the case of **Robinson Mwanjisi and Three Others Vs. R. [2003] T.L.R. 218,** underscored three stages of clearing, admitting and reading out which details contained in documents, before their exhibition as evidence. It held that;

> *"...Whenever it is intended to introduce any document in evidence, **it should first be cleared for admission** and **be actually admitted** before it can **be read out**....' [Emphasis added]."*

As the above stages were not adhered the cautioned statement are hereby expunged from the record and as a result, the whole prosecution case crumbles

Apart from that, as hinted by the learned state attorney, it was improper to change a magistrate in the course of proceeding without assigning reasons thereof. The rationale behind assigning reasons is to assess the credibility of witnesses thoroughly, promote transparency and integrity and minimize chaos in the administration of justice. In the case **Hatwibu Salim Vs. R,** Criminal Appeal No. 372 of 2016, CAT at Bukoba (unreported) Court of Appeal held *inter alia*;

> *"The requirement to state the reasons of change of magistrates from one magistrate to another is a very important issue to consider. This is for the reason of controlling and avoiding the danger of some mischievous persons who might be able to*

access the file and do issues not in accordance with the procedure or requirement of the law."

In light of the above, the trial courts' change of magistrate without assigning reasons was fatal and vitiates the proceedings from the day such change was made. Retrial could have been a proper order after this default however in the case of **Fatehali Manji Vs. R [1966] EALR 343.** The Court observed the following in regard to retrial:

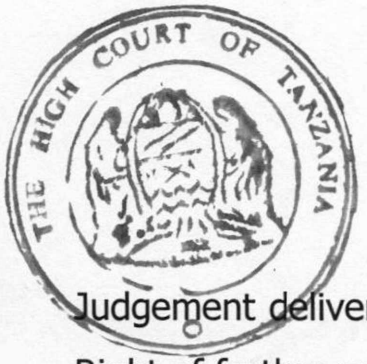
> *"In general a retrial will be ordered only when the original trial was illegal or defective,* ***it will not be ordered when conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial****, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and* ***an order for retrial should only be made where interest of justice require it"*** [Emphasis mine]

In the present appeal, the evidence was insufficient to prove forgery and uttering false documents, hence, ordering retrial will by any standard be allowing the prosecution to fill the gaps. And I do not consider that interest of justice requires it.

Under the circumstances, I am of firm opinion that the case has many unresolved questions which were not considered during trial. I therefore allow the appeal, quash the judgement of the trial court and set aside the sentence. The appellant should be set free unless he is being held for another lawfully cause.

It is ordered accordingly.

Dated and signed at Moshi this 7th day of September, 2022



T.M. MWENEMPAZI

JUDGE

Judgement delivered in typed copy in court in the presence of the appellant. Right of further appeal explained.

E.PHILL

AG. DEPUTY REGISTRAR

07/09/2022