

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC. CRIMINAL APPEAL NO. 62 OF 2021

(Originating from the District Court of Dodoma at Dodoma
in Criminal Case No. 9 of 2018)

1. JOSEPHINE ALEX KAMUNYA.....1ST APPELLANT

2. JANE SIXTUS.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

28/4/2022 & 01/6/2022

KAGOMBA, J.

JOSEPHINE ALEX KAMUNYA (1st appellant) and JANE SIXTUS (2nd appellant) (henceforth referred to as "appellants") were jointly and together charged, in the District Court of Dodoma (the trial Court) for conspiracy to commit an offence under section 384 of the Penal Code [Cap. 16 R.E 2002] (henceforth "Penal Code") in the 1st count; forgery under section 333, 335(a) and 338 of the Penal Code, in the 2nd count; forgery again in both the 3rd and 4th counts. The 1st appellant had one additional count of personation under section 369 and 371 of the Penal Code, preferred as the 5th count. After trial the duo were found guilty in the 1st, 2nd, 3rd and 4th counts only and were convicted by the trial Court accordingly. The trial Court proceeded to sentence both appellants to serve a two-year jail term for the first count; and four years jail terms for each of the 2nd, 3rd and 4th count.

Having been aggrieved by the trial Court decision, the appellants have come to this Court to challenge the said decision based on the following grounds of appeal:-

1. That, the learned District Court Magistrate erred in law and fact for failure to consider that since the appellants were charged with four counts, each count ought to have been argued separately for prosecution to prove their case beyond reasonable doubt in respect of each count.
2. That, the Trial court erred in law and fact for convicting the appellant basing on procedural irregularities.
3. That, the appellants were wrongly convicted and sentenced as the trial Court violated the requirement of section 312(2) of the Criminal Procedure Act, [Cap.20 R.E 2019] which mandatorily require the trial Magistrate to comply with it but on page 20 of the copy of judgment he said "I find 1st and 2nd accused person guilty in 1st, 2nd,3rd and 4th counts only. This Court convict them forth with", a statement which is inconsistent with the law.
4. That, the trial Court erred in law and fact in convicting the appellants and sentencing them to four years jail without considering the appellants' defence.

On the date set for hearing of the appeal, the appellants fended for themselves as they appeared under custody without legal representation. The respondent was represented by Ms. Bernadetha Thomas, learned State Attorney.

Being lay persons, the appellant prayed the Court to consider their filed petition of appeal as their submission in Court. They had nothing to add.

Ms. Bernadetha Thomas vehemently opposed the appeal. She supported both the conviction and sentence pronounced by the trial Court against the appellants. The learned State Attorney justified her submission in respect of each ground of appeal as follows;

In the first ground of appeal where the appellants want each count to be proved separately, the learned State Attorney submitted that the fifth count was not proved and the Court didn't convict the 1st appellant on that Court. She submitted that the rest of the counts were duly proved by the testimony of PW1, Amos Kutoka who testified on how he met with the appellants, and how they pretended to be the owners of plot No. 43 Block 'M', Mwangaza, the price of Tshs. 3.3 million which they agreed for the plot; the venue where they met in the office of an advocate who also testified as PW6 and the forged documents to show that the appellants were owners of the said land which were admitted in evidence as Exhibit P1 and P2 which were not objected by the appellants when tendered in Court.

Mr. Thomas further submitted that PW1 was able to identify the appellants in Court through dock identification. She also submitted that when the police came to arrest the appellant they were in possession of the documents. That, the said documents were properly seized vide a certificate of seizure (Exh.P8). That, the documents were also tendered and admitted as Exh. P9.

Ms. Thomas also told the Court on how the testimony of arresting officer PW4 was corroborated with the evidence of PW5 to show that there was forgery of the Voter Registration Card of Ms. Sarah Mwanga, the real owner of the plot who also testified as PW3. That, Sarah Mwanga produced her real NIDA card and Voter Registration card (Exh. P4 and P5) and who also testified that she had never sold that land to any person. She wound up with the testimony of PW7 who testified to the effect that the appellants sought from him a photo of Sarah Mwanga and he gave them not knowing what they were going to do with it.

Having labored so much to show how the evidence was tightly adduced, the learned State attorney submitted that the prosecution case was proved beyond reasonable doubt, and she prayed first ground of appeal to be dismissed as each count was specifically proved.

On the second ground of appeal, where the appellants allege that there are procedural irregularities, Ms. Thomas submitted that, after her perusal of the proceedings of the trial Court, she found no any irregularities. She submitted that a total of eleven (11) exhibits were tendered properly. Each exhibit was tendered by the right witness duly allowed to tender evidence in Court; for each exhibit tendered the appellants did not object its admission, the appellants did not cross-examine PW1 and each exhibit was duly read in Court as required by the law. She submitted that since the appellants have not mentioned the irregularities they complain about, there is in fact none that was found by her.

On the third ground of appeal that section 312 (2) of CPA was not observed, by the trial Magistrate who did not specify the offence, the law and punishment to which the appellants were convicted, the learned State Attorney submitted that even if the trial Magistrate did not fully comply with the cited section of the law, that omission has not prejudiced the appellants anyhow, because the offences and the law specified in the charge read to the appellant.

On the 4th ground of appeal, which alleges that the defence case was not considered, Ms. Thomas submitted that according to the record, the defence was duly considered. She cited page 87 to 91 of the proceedings as well as page 11,12,13, 18 and 19 of the trial Court judgment where the Magistrate summarized the defence evidence and concluded that the same has not created any doubt on prosecution case.

Having so submitted, Ms. Thomas prayed for the appeal to be dismissed and the conviction and sentence passed by the trial court to be upheld.

The above submission by the learned State Attorney raised the appetite of the appellants to rejoin, each separately. In her rejoinder, the 1st appellant submitted that they did not object to exhibits when they were tendered in Court for lack of knowledge on procedures. She also submitted that PW7 did not mention them but mentioned the other accused person one Lusajo Jamson Mwasambungu, who was not found guilty.

The 1st appellant rejoined further that they went to PW6 to buy land and not to sell land.

In her rejoinder, the 2nd appellant jointed hand to submit that PW7 identified Lusajo Jonson Mwasambungu. She also faulted the testimony of PW1 who told the Court that they were arrested in Advocate Mavunde's office while they were arrested in Advocate Ayub's office. She also rejoined that PW4 Mwajuma did not search her but just took her parse.

The above represent the submission of both parties in full from which this Court has to frame issues and proceed to determine the same accordingly. Having read the grounds of appeal, proceedings of the trial Court and judgment based thereon, I think there are two issues to be determined in this appeal;

1. Whether the case against the appellants was proved beyond reasonable doubt by the prosecution sides.
2. Whether the decision of their trial Court is engulfed by procedural irregularities.

On the first issue above, I should start by stating the obvious. That, it was the duty of prosecution to prove the case against the appellants beyond reasonable doubts. As stated in the background information of this case the appellants were facing charge of conspiracy to commit an offence termed as forgery c/s 384 of the Penal Code in the first count and forgery in other 2nd, 3rd, 4th counts.

With regard to the first count, the charge section provides;

*"S. 384. Any person **who conspires with another to commit any offence**, punishable with imprisonment for a term of three years or more, or to do any act in any part of the world which if done in Tanzania would be an offence so punishable, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of an offence, and is liable if no other punishment is provided, to imprisonment for seven years or, if the greatest punishment to which a person convicted of offence in question is liable is less than imprisonment for seven years, then to such lesser punishment".*

Under the cited section of the law, the prosecution had a duty to prove conspiracy.

On page 14 the trial Magistrate framed the issues for his determination which included whether the appellants did conspire to commit an offence contrary to section 384 of the Penal Code. He correctly analyzed, with the help of the decision of this Court in **The Republic Vs. Shosho Yohana**, Criminal Appeal No. 28 of 2020, High Court, DSM (unreported), the essential elements of the offence of conspiracy. There must be two or more people, as they were in this case. Those people should share common intention to do unlawful act or to commit an offence. Again, he applied the guidance in the case of **Wanjiro Waimath V. R** [1955] EACA 116 where proof of conspiracy can be inferred from in the course of the act of the offenders. To determine conspiracy the trial Court relied on the testimony of PW4,

Mwajuma who on 15/1/2018 arrested the appellants at airport area in the office of PW6 advocate Ayoub Sunday.

However, the trial court on page 16 of its typed judgment, in justifying existence of conspiracy stated:

"But the evidence on records shows that the first and 2nd accused person where (sic) present when the 2nd accused person personated to the PW1, and PW6. It means they all have a common intention in that regards the first issue answered affirmatively for the first and 2nd accused persons".

I think the learned Magistrate was right to justify existence of common intention on the fact that the appellants were together when the 2nd appellant was personating Sarah Mwanga. What I can add on this finding is that not only that PW4, WP7147 D/C Mwajuma arrested both appellants in the office of the advocate, but upon searching them she found from Jane Sixtus, the 2nd appellant items including a Voters Registration Card with the name of Sarah D. Mwanga in the assortment of other items such as ATM Card bearing the 2nd appellant's name. The arrested items were duly recorded in the certificate of seizure, Exhibit P8. The Voter Registration Card had the photo of the 2nd appellant.

It is the testimony of PW4 on page 63 of proceedings that 1st appellant Josephine mentioned Lusajo Jamson Mwasambungu as a person who faltered them in the illegal deals. Apparently, Common intention was proved.

On the issue as to whether there was forgery, the trial Magistrate properly guided itself by invoking the principles laid down in **DPP V. Shida Manyama @ Seleman Mabuba**, Criminal Appeal No. 285 of 2012, CAT, where the Court of Appeal guided that to satisfactorily prove forgery the prosecution had to show that the disputed document was authorized by the respondent, it was falsely uttered and the respondent had forged it with intent to defraud or deceive.

The evidence on record, which the trial Court rightly applied, show that PW5 A/Insp. Habibu testified that inside the office of the advocate they met with a lawyer and the two ladies. He wrote a letter to National Election Commission (NEC) and tendered their reply letter as Exhibit P10 showing that the ballot card that was found with the appellants with No. T1003-0527-826-3 was not in NEC Database. This implies simply that the same was forged document.

It was PW5's further testimony that the document sent to Mawazo passed the phone of the 1st Appellant and for that reason 1st appellant did facilitate her fellows to communicate with Mawazo.

PW5 further testified that the 2nd appellant had long started negotiated with PW1. The first agreement was to be signed before Mavunde advocate but failed because 2nd appellant failed to produce ID. Hence, she went to another advocate after serving the forged Voter Registration Card.

Having analyzed the testimonies of PW1, who was the potential buyer, PW2, Rutachungura who proved forgery of Land Ownership

document for the said plot, PW3 Sara Daimon Mwanga the true owner of the plot, who tendered the genuine voter registration card and her National ID Card and PW4 WP7147 D/C Mwajuma who arrested, searched and seized the documents items the appellants were found with.

Also, after considering the testimony of PW5- A/Insp Habibu and PW6, Advocate Ayub Suday who both corroborated the story of the business that was intended to be done by the 2nd appellant in collaboration with the 1st appellant, and considering the defence evidence who purported to be buyers rather than sellers of land, I am of settled mind that the prosecution was able to discharge its duty of proving the case beyond reasonable doubt before the trial Court.

The defence evidence was duly considered by the trial Court and there were no irregularities cited which could help the appellant to disprove prosecution evidence or vitiate the proceedings anyhow.

I accordingly find no merit in the appeal and dismiss it. Both conviction and sentences pronounced by the trial Court are upheld accordingly.

Dated at **Dodoma** this **01st** day of **June, 2022**




ABDI S. KAGOMBA
JUDGE