

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 229 OF 2021

(Originating from Criminal Case No. 285 of 2017)

PATRICK ANTHONY KINGALU @DICKSON A. KAYOMBO..... APPELLANT

VERSUS

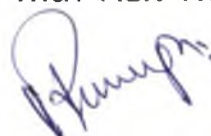
THE REPUBLIC RESPONDENT

J U D G E M E N T

29th September & 5th October, 2022

MWANGA, J.

The appellant, **Patrick Anthony Kingalu @ Dickson A. Kayombo** was charged of several counts of forgery contrary to Sections 333, 335 and S. 337(a) of the Penal Code, Cap. 16 R.E 2002, now [R.E 2019]. The 1st count relates to forgery of staff identity card by the name of Dr. D. A. Kayombo with Serial No. 24, purporting to show that it was genuinely issued by the Open university of Tanzania, the fact he knew to be false. The second count related to forgery of an introduction letter with Ref. No. OUT/PF 248 dated 30th September, 2014, purporting to show that it was issued by the Open University of Tanzania, the fact he knows to be false. In the third count of forgery related to a loan application letter with Ref. No. OUT/PF dated



30th September, 2015, purporting to show that it was issued by Open University of Tanzania, the fact he knows to be false. In the fourth count, he was charged of uttering false document contrary to Section 342 of the Penal Code, Cap 16. R.E 2002 now R.E 2019. That on 1st October, 2014 at National Microfinance Bank (NMB) Maktaba Squire Branch, Posta Mpya area within Ilala District, Dar es Salaam region knowingly and frequently the appellant uttered documents; Identify Card, Introduction letter, and loan application letter to the National Microfinance Bank officers. In the fifth count, the appellant was charged with offence of personating a police officer Contrary to Section 100(b) read together with Section 35 of the Penal Code. The appellant is alleged to have presented himself as an employee of the Open University of Tanzania to the National Microfinance Bank officers.

At the trial court, the appellant was convicted and sentenced to seven years imprisonment in respect of the 1st, 2nd, and 3rd counts. In the 4th and 5th counts the appellant was convicted and sentenced to 2 years imprisonment on each count. Both sentences were ordered to run concurrently. Being dissatisfied with the trial court decision, he appealed to this court on seven (7) grounds.



1. That, the trial court erred in law and fact by failing to indicate whether the appellant would defend on OATH or not as required by S. 231 (1) (a) and (b) of the CPA.
2. The trial court erred in law and fact by recording that the defense case marked closed just after the appellant testimony before the appellant stated that he would call witnesses.
3. That, the trial court erred in law and fact to convict the appellant by relying on incredible and unreliable prosecution evidence.
4. That, the trial court admitted all documentary exhibits without considering the procedures on its admission.
5. That, the trial court convicted the appellant based on objected cautioned statement that was illegally admitted in evidence as the inquiry was not conducted to determine its voluntariness.
6. That, the trial court misdirected itself by convicting the appellant based on unreliable laboratory scientific report.
7. That, trial Court erred in law and fact by holding that the prosecution had proved its case beyond reasonable doubt.

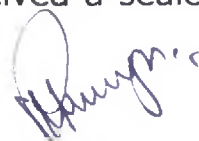
Brief facts leading to this appeal were that, the appellant went to open an account at NMB Bank in order to apply for a loan and represented himself



as Dr. Dickson Adrian Kayombo, an employee (lecturer) of the of the Open University of Tanzania. Upon inquiry, the University informed the bank that it does not have such an employee in the name of Dr. Dickson Kayombo.

On 21st October, 2014 when the appellant went to collect his ATM Card at NMB, Mlimani City, he was interrogated by the bank fraud officers after having realized suspicious move by the appellant. It was discovered that the appellant was not a good champ, hence one Hamza Likulu a bank officer called D/Sgt Arbogast Kashaia, informing him that they have arrested a person in the name of Dr. Dickson Adrian Kayombo who opened an account at their bank and pretending to be an employee of to Open University of Tanzania, the fact which was not true.

Consequently, the appellant was arrested and he was searched and seized with the following; Identification Card No. 248 of the Open University of Tanzania bearing the name Dickson Adrian Kayombo, ATM Card bearing the name Dickson Adrian Kayombo, Health Insurance Card bearing the name Patrick Anthony Kingalu and a bank deposit form showing that the appellant had deposited Tshs. 25,000/= to his account. The appellant was therefore taken to the Zonal Crimes Office for further interrogation. On 7/01/2016 SP Christians Kitandala (PW1) while in office received a sealed envelope from



one D/Sgt Arbogast. The envelope had several documents, to wit National Microfinance Bank Individual Account opening form, four letters with a head paper of the Open University of Tanzania, paying slips of Open University of Tanzania and Identity Card of the University of Tanzania.

Then aforesaid documents and handwritings, signature and rubber stamp were disputed by the appellant but the findings after examinations indicated that the disputed handwritings, signature and rubber stamp were similar/marked with the specimen handwritings, signature and rubber stamp signs of the appellant. Finally, The Documents Examination Report was prepared on 28/10/2016 to that effect and it revealed that the disputed handwritings of the purported documents belonged to the appellant one Patrick Kingala @ Dickson Kayombo.

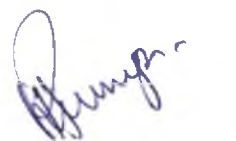
When the matter was called on for hearing, parties preferred to argue this appeal by way of written submission. Both parties filed their submissions and I have greatly considered them to be helpful to the court in determination this appeal.

With reference to the first ground of appeal on failure by the trial magistrate to comply with Section 231 (1) (a) & (b) of the Criminal Procedure Act, Cap. 20 R.E 2019, the learned State Attorney submitted that Section



231 (1) (a) & (b) was complied with as shown at page 57 of the typed proceedings. As rightly stated by the learned State Attorney, the court at page 57 noted stated 'the accused is hereby addressed in terms of S. 231 of the CPA'. He was also given right to make his defense and call witnesses. On the other hand, the case of **Emmanuel Richard @ Humbe V. Republic**, Criminal Appeal No. 369 of 2018 as cited by the appellant in support of his submission is irrelevant in the circumstances of the case at hand. This is because, in the cited case, the court did not indicate that it complied with S. 231 (1) (a) & (b) of the Criminal Procedure Act, hence distinguishable. I therefore hold that; this ground of appeal has no merit.

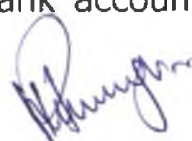
In the second ground of appeal, the appellant submitted that conviction of the appellant was based on unreliable and incredible evidence of the prosecution witnesses. The appellant was trying to show that failure to match the bank account numbers by PW3 and PW5 during the hearing was fatal, hence making the evidence of the prosecution unbelievable and untrustworthy. Admittedly, the learned State Attorney submitted that it is true there are such contradictions but, such contradiction is minor and could not affect the prosecution case. The evidence on records (PW3) shows that, the appellant was given ATM Card with Bank Account No. 22 31 00 95 07 (ten



digits) while PW5 stated that the appellant was given ATM Card with Bank Account No. 22 31 00 09 50 7 (eleven digits). I am inclined to state that, the discrepancy on the prosecution witnesses on a single digit in such long numbers or digits is a minor contradiction and cannot be taken to have discredited evidence of the prosecution and such mistakes could even occur during the recording of evidence by the trial court. Again, I consider that as a normal and minor errors which can happen to any human being whose memory comes and disappears due to passage of time.

The learned State Attorney submitted that such contradictions do not go to the roots of the matter and as long as it was the same account bearing the name of the appellant, it is enough to comprehend that the account number belonged to the appellant. In support of this ground of appeal he cited the case of **Issa Hassan Uki V. The Republic**, Criminal Appeal No. 129 of 2017, where it was held that failure to mention exact number in a trial do not go to the roots of the matter.

In the third ground of appeal, that the prosecution witnesses failed to mention the bank branch where the appellant opened the bank account. The same was clearly answered that PW3 (page 26), PW5(page 31) PW7(page 38), PW8 (page 55), the appellant opened bank account at NMB House



Branch. It is shown in the record that, all these witnesses referred to one branch, that is, NMB house Branch. I also hold this ground of appeal not meritorious.

In relation to the fourth ground of appeal, which concerned on unprocedural admission of prosecution exhibits, the learned State Attorney submitted that all procedural legal requirements in relation to admissibility of the exhibits were complied with. He referred this court at page 32 of the typed proceedings where PW5 tendered ATM Card and PIN number and page 39 when PW7 tendered seizure note. The record showed that; procedures were complied with because the prosecution witness prayed to tender exhibit, and where the appellant objected, the court proceeded to issue an order in respect of that exhibits, and ultimately the exhibits were either admitted or rejected. It should be noted that procedures for admitting some exhibits like caution statement of the accused differs substantially with the procedures of admitting other exhibits, so the two should not be confused.

The learned State Attorney when submitting on this point stated that even if the admissibility of the exhibits were unprocedural at the lower court, the same does not have effect as long as the oral evidence of a witness who described the contents of the said document is not affected. He cited the

case of **Zhen Zhi Chao V. The DPP**, Criminal Appeal No. 506 of 2019, where the court expunged the documentary evidence and stated that in all cases after expunging the certificate of seizure and trophy valuation certificate which were not read out, the court relied on the oral evidence of those prosecution witnesses who proved contents of both expunged exhibits. Undoubtedly, I have found out that procedures relating to admissibility of exhibits were followed. I wish to state further that, If the appellant was not satisfied with contents of the exhibit after having been admitted, he ought to have discredited the same during cross examination or during his defense case.

In the fourth ground of appeal relating to admissibility of cautioned statement without conducting inquiry, I need not to dwell much in this because the cautioned statement of the appellant was admitted without objection. The learned State Attorney was right in his submission that inquiry as to the admissibility of the cautioned statement is only conducted when the same is objected. The record available shows at page 45 of the proceedings that exhibit P10, which was the appellant cautioned statement was not objected when it was being tendered by PW7. In support of his submission the learned State Attorney cited the case of **Juma Kaulule V.**

Republic, Criminal Appeal No. 281 of 2006 CAT, where it was held that when the exhibit is not objected during admission stage, there is no need for conducting inquiry that the same was involuntary obtained.

The learned state Attorney referred at page 45 of the typed proceedings that the appellant was given opportunity to comment on the exhibit and replied that he had no objection, hence there was no need to conduct an inquiry in a cautioned statement of the appellant. He added that, even if the cautioned statement of the appellant is not found palatable in this case, oral evidence of PW7 who recorded the same is of importance because the confession need not to be oral. He cited the case of **Saganda Saganda Kasuzu V Republic**, Criminal Appeal No.53 of 2019 when the court referring to section 3 of the Evidence Act, stated that;

'The above quoted provision of the law is very clear that confession may be oral, written, or by conduct.'

With reference to the above decision, I do not agree with this ground of appeal. The only means for the appellant to discredit the evidence of the prosecution after admissibility of the exhibits was through cross examination or during defense case.

For the sixth ground of appeal, the appellant posed challenge on the Document Examination Report that, it did not consider the chain of custody.

The learned State Attorney rightly submitted that, the law is very clear that chain of custody need not to be recorded on a paper trail. He added that, it was sufficient for the witness to state orally as to who handed him the said specimen. He cited the case of **Abas Konde Gede V. Republic**, Criminal Appeal No.472 of 2017, CA where it was held that;

'From the foregoing deliberation concerning the chain of custody, we have no hesitation to state that even in the absence of paper trail documentation of how the pellets were seized, handled, controlled. Stored and transferred from one person to another, the oral evidence sufficiently established that the chain of custody was not broken'.

Considering the decision above, the record speaks loudly that PW1, PW4 and PW7 handled the evidence so chronologically in such a way that there was no break of chain of custody. This is a case where no node occurred in between, i.e from the appellant, bank, Open University of Tanzania, Police and the handwriting expert. The leaned State Attorney reiterated further that even the issue of specimen the appellant cannot dispute the same because the application form in dispute was processed by the appellant, thus it was sufficient to take sample specimen of the appellant in order to compare with the one in dispute.



As summarized in the facts of this case, the evidence on the record shows that the appellant present himself to the NMB bank, he also submitted form on application to open an account, and the process went further to the stage of collecting the ATM Card. This being the facts, the appellant had engaged himself to a lot of transaction that involved writings and signing into various documentation, hence he cannot be heard to say that there was any doubt with respect to specimen signatures or handwriting. I also find the issue of rubber stamp of the bank not being tendered in court and the statement of the bank in respect of the account opened by the appellant as irrelevant and of no substance, hence this ground of appeal also has not substance.

In the seventh ground of appeal, the learned State Attorney submitted that the prosecution had proved its case beyond reasonable doubt. As cited in the case of **Magendo Paul and Another V Republic, [1993] TLR 220** where the court of Appeal quoted with approval in the decision of Lord Denning in the case of **Miller V Minister of Pensions (1947)2 ALL ER 372** where it was stated that,

'... the law would fail to protect the community if it admitted fanciful possibilities to defeat justice...'



In view of the above decision, the learned counsel submitted that, if the evidence is so strong against a man but it only a remote possibility, then the case is proved beyond reasonable doubt. He summarized and narrated that, all documents which were found with the appellant and their contents, the manner on how he presented himself to the bank, considering also the findings of the Document Examination Report are pointing towards the role of the appellant in the commission of several counts of forgery.

According to the prosecution, the forged documents were in the possession of the appellant, the document examination report pointed out that the handwritings and signatures were similar to the document found in possession by the appellant. It also the evidence of the prosecution that the same forged documents were uttered by the appellant to the NMB bank and the were processed to the stage of money being deposited to the bank account of the appellant. This clearly substantiate submission by the learned State Attorney that offences of forgery and uttering false document were proved against the appellant.

Having said that, this appeal deserves to be dismissed. Therefore, the Appeal is dismissed.



It is so ordered



A handwritten signature in blue ink, appearing to read "H. R. Mwanga", is written over the printed name.

H. R. MWANGA

JUDGE

05/10/2022

ORDER:

Judgement delivered in Chambers this 5th day of October, 2022 in the presence of the appellant and the learned State Attorney for the Respondent.



A handwritten signature in blue ink, appearing to read "H. R. Mwanga", is written over the printed name.

H.R. MWANGA

JUDGE

05/10/2022