IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO 28 OF 2022

(Originating from the District Court of Tunduru in Criminal Case No. 37 of 2016)

NEHEMIA TOGOLANI KIONDO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

13.10.2022 & 28.10.2022

U.E Madeha, J.

The Appellant that is none other than, Nehemia Togolani@ Kiondo was arraigned before the District Court of Tunduru for the six (6) counts of forgery contrary to sections 333, 335(a) and 337 of the Penal Code (Cap 16, R.E. 2002), uttering false document contrary to sections 342 and 337 of the Penal Code (Cap 16 R.E. 2002) and unlawful possession of forest produce contrary to section 88 of the Forests Act No. 14 of 2002 read together with Regulation 10 and 57 of the Forest Regulations GN No. 153 of 2004 and Regulation 2 of the Forest (Importation of Forest Produce) Regulations GN No. 181 of 2007.

As a matter of fact, it was alleged that on diverse dates between 15th September, 2012 and 1st November, 2012 at an unknown place within Tunduru District in Ruvuma Region with intent to defraud or deceive, made a false document namely Invoice No. 0004952. Additionally, in the second (2nd) count the Appellant made a false document namely: The transit guide of forest product No. 3408760. In the third (3rd) count the Appellant made a false document namely, Custom Receipt with no reference Number. In the fourth (4th) count the Appellant made a false document namely Licence No. 59/2012. In the fifth (5th) count the Appellant made a false document namely Phytosanitary Certificate No. 200/RSV/2012. In the sixth (6th) count the Appellant made a false document namely: Certificate of Origin No. 18613/CD/2012: Purporting to show that the same is a permission document for the importation of four hundred and sixteen (416) pieces of Timber from Mozambique into the united Republic of Tanzania issued by the relevant authority from Mozambique a fact which he knew to the best of his knowledge that it was false or which he had reasons to believe it untrue,

Moreover, the appellant was charged with another count of uttering false document contrary to sections 342 and 337 of the Penal code (Cap. 16 R.E. 2002) as amended for the following counts as elaborated hereunder: It

is also alleged that Nehemia Togolani Kiondo on 1st November 2012 within Tunduru District in Ruvuma Region, knowingly and fraudulently uttered a false document namely: the seventh (7th) count Invoice No. 004952. The eighth (8th) count false document namely; Transit Guide of Forest Products No. 3408760. The ninth (9th) count is a false document named custom receipt. Furthermore, the tenth (10th) count is a false document named License No. 59/2012. Additionally, the eleventh (11th) count uttering a false document named phytosanitary certificate No. 200/RSV/2012. To add to it, the Twelve (12th) count was uttering false document named Certificate of Origin No. 18613/CD/2012 purporting to show that the same is a permission document for the importation of four hundred and sixteen (416) pieces of timber from Mozambique into the United Republic of Tanzania issued by the relevant authority from Mozambique a fact which he knew that it was false or which he had reasons to believe to be untrue. For the Thirteenth (13th) count the Appellant was charged with the offence of unlawful possession of forest produce contrary to section 88 of the Forest Act No. 14 of 2002 read together with Regulations 10 and 57 of the forest Regulations G.N No. 153 of 2004 and Regulation 2 of the forest (Importation of Forest produce) Regulations G.N No. 181 of 2007.

It was also alleged that Nehemia Togolani Kiondo, on 27th October, 2012 at Ruanda Mchangani village within Tunduru District in Ruvuma Region he was found in possession of four hundred and Sixteen (416) pieces of timber with the value of Tanzanian shillings sixteen million and two hundred only (16,200,000) without a license issued by the director of the forest.

To crown it all, the Appellant was convicted and sentenced to serve two (02) years imprisonment and the sentence was to run concurrently. On the same note, he was sentenced to serve for the first (1st), second (2nd), fourth (4th), seventh (7th), and eight (8th) and tenth (10th) counts for two (02) years imprisonment concurrently whereby for the thirteenth (13th) count either pay a fine of five hundred (500,000) Tanzanian shillings or to serve a sentence of two (02) years imprisonment. The sentence and conviction did not amuse him. Therefore, he lodged this appeal on two (02) grounds of complaint which are none other than: -

1. *That, the Honourable Trial Magistrate erred both in law and fact in convicting the appellant by relying on exhibits P1, P2, P3, P4, P5, P6, P7, P8, P9, and P10. Which were tendered by the Prosecutor (state's attorney) contrary to the rules of evidence in criminal procedure.*

2. *That, the Honourable Trial Magistrate grossly misdirect himself in law. In fact, upon exhibits P1, P2, P3, P4, P5, P6, P16, and P20 being tendered and admitted into evidence, the contents of the said documentary exhibits were not read in court whereby this act was prejudicial to the appellant.*
3. *That, the Honourable Trial Magistrate grossly misdirect himself in law and in fact by dealing with the prosecution's evidence on its own as a result the appellant was found guilty, therefore, charged and convicted him without considering the defence evidence.*
4. *That, having found that there was no remittance of the records in Criminal Case No. 166 of 2012 from the High Court of Tanzania at Songea which finding is extrinsic and not borne out in the record, the Honourable Trial Magistrate grossly misdirected himself by his failure to hold that the prosecution's act of filing a new case that is, Criminal Case No. 16 of 2016 and later on Criminal case No. 42 of 2015 which ordered a retrial of Criminal Case NO. 37 of 2016 were unmaintainable and were liable to be dismissed.*
5. *That, having found that Criminal Case Number 10 of 2016 was dismissed for want of prosecution and that the Appellant was*

discharged, the Honourable Trial Magistrate grossly misdirect himself in law and in fact by his failure to follow the binding authority of the Court of Appeal of Tanzania. Reference is made to the case of Twaha Hussein Versus Republic (Criminal Appeal No. 415 of 2017) which the authority has not been departed from and held that the court had jurisdiction while he had no such jurisdiction.

6. *That, the Honourable Trial Magistrate grossly misdirect himself in law and in fact by holding that when PW2 testified that the appellant presented to him exhibit P2 he was never cross-examined on that piece of evidence whereas a specific accused person handed over to him exhibit P2 and PW2 responded clearly that the recorded the statement of the accused person, as a result, the said statement is in the police file.*
7. *That, the Honourable Trial Magistrate grossly erred in law and in fact by holding that the Appellant handed over to PW2 exhibit P2 as proof for importation of four hundred and sixteen (416) timbers from Mozambique without evidence on the record.*

8. *That, the Honourable Trial Magistrate erred both in law and fact by holding that the accused person forged invoice No. 004952, transit guide of forest products No. 3408760, and Licence No. 59/2012.*
9. *That, the Honourable Trial Magistrate erred in law and fact by holding that the appellant did not meet the requisite conditions before importing forest produce into the country and that was in unlawful possession of the four hundred and sixteen (416) pieces of timber.*
10. *That, the Honourable Trial Magistrate erred in law and fact by holding that exhibits P5, P6, P7 and P8 prove during a retrial real or physical evidence that does not exist anymore can be replaced by oral and documentary evidence while there is sufficient evidence that the purported use of timber/wood came post-High court's order of retrial and there is variance between the charge and evidence.*
11. *That, the Honourable Trial Magistrate grossly misdirect himself in law and in fact by not taking into account mitigating factors presented by the Appellant at the time of passing sentence.*

It is worth considering that, having gone through the petition of appeal, which encompasses eleven (11) grounds, I find that they boil down to five (05) issues, namely: - **Firstly**, whether the procedure of tendering

exhibits was followed by the trial court. **Secondly**, whether they had been able to prove the appellant's elements of forgery and uttering a forged document. **Thirdly**, whether the trial court failed to consider the defence case. **Fourthly,** whether the issue of withdrawing the case under section 225(5) of the CPA (supra). **Lastly**, whether the prosecution proved its case beyond reasonable doubt.

As a matter of fact, the prosecution's evidence was to the effect that the Appellant was found in possession of four hundred and sixteen (416) pieces of timber with the value of sixteen million and two hundred (16,200,000) Tanzanian shillings without having a permit from the respective authority that is, (the Director of Forest).

Also, the prosecution's side gave evidence to the effect that the Appellant, when asked, he tendered the forged documents, which he alleged that they were obtained from the respective authorities in the nearby country (Mozambique). To add to it, the prosecution witness stated that the timbers were the Appellant's property. After hearing the prosecution's case and cross-checking with the respective Mozambique authorities, it was determined that the documents were forged by the Appellant. On the same note, the timber was imported from Mozambique without a permit from the

respective authority (Director of Forest). Notably, the prosecution also tendered documents that the Appellant gave to the police officer, alleging to have obtained them from the respective authorities in Mozambique.

Moreover, the defence evidence was to the effect that the timber was exported to Mozambique by another person who is a timber business dealer that is none other than, Hussein Issa Mfinanga, who has a license to deal with timber business between the two (02) countries that is, Tanzania and Mozambique. Furthermore, he stated that he deals with the timber business in Tanzania and he was working in the same office with Hussein Issa Mfinanga. Also, he stated that he had no license for either importing or exporting timber. In fact, on that day of the incident four hundred and sixteen (416) pieces of timber were caught by the police officers and they were from Mozambique. They were imported by Hussein Issa Mfinanga and not him. To crown it all, he was caught with those timbers however they were not his property but the property of Hussein Issa Mfinanga. Basically, he was just assisting Hussein Issa Mfinanga since they used to work together and they were in the same office. On the same note, the Appellant (accused) also stated that the timbers were lawfully exported from Mozambique.

Therefore, the documents tendered by the prosecution's side were correct and lawfully obtained, not forged.

With the leave of this Court, this appeal was heard by way of written submissions. In fact, the Appellant was represented by none other than the learned advocate, Mr. Wilson Edward Ogunde. On the contrary, the Respondent enjoyed the services of none other than the learned advocate, Mr. Tulibake Juntwa Senior State's Attorney.

To start with, whether the procedure of tendering exhibits was followed by the trial Court; submitting on that ground of appeal Mr. Wilson Edward Ogunde started submitting by consolidating the first (1st) and second (2nd) grounds of appeal and arguing them conjointly. On the same note, he invited the Court to consider exhibits P2, P3, P4, P5, P6, P7, P9, and P10. Basically, he contended that it was the State's Attorney who requested and tendered evidence of the said exhibit. In that regard, the said State's Attorney was not a witness. In fact, he could not be subjected to cross-examination with regard to the documents he tendered in evidence. Therefore, the Court wrongly received those exhibits in evidence and acted upon the same to convict the Appellant. Moreover, he contended that the consequence when a document is wrongly admitted is to expunge the exhibit

in the Court records. Moreover, he invited the court to expunge and disregard exhibits P1, P2, P3, P4, P5, P6, P7, P8, and P10. For more emphasis he cited with approval the case of **Thomas Ernest Msungu @ Nyoka Mkenya v. Republic,** Criminal Appeal No. 78 of 2012 (unreported) had to make the following pertinent observation:

> *"A prosecutor cannot assume the role of a prosecutor and witness at the same time. With respect that was wrong because in the process the prosecutor was not the sort of a witness who could be capable of examination upon oath or affirmation in terms of Section 198 (1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness, he could not be examined or cross-examined."*

As much as the second (2nd) second ground of appeal is concerned, the failure to read the content of the exhibit in Court and he prayed the Court to proceed with expunging the said exhibits which were not read in Court upon being admitted. To add to it, he mentioned with approval the case of **Kaenge Christopher v. Republic,** Criminal Appeal No. 187 of 2016 (unreported) which put more emphasize on the hereabove position.

On the contrary, Ms. Tulibake Juntwa the Senior State's Attorney for the Republic submitted that in tracking the two (02) grounds although the above grounds bare the truth there is still validity of their content which was explained by the prosecution's witnesses who tendered them.

Ms Tulibake Juntwa Senior State Attorney the Appellant's complaints regarding ground number 1 and 2 of appeal are merited. She averred that the Respondent's views are that even if the said exhibits are to be expunged from the records, their content as explained by the prosecution's witnesses is enough to sustain the Appellant's conviction. On a serious note, she further submitted that the six (06) count of forgery which the Appellant faced before the trial Court was on each document allegedly to have been forged to wit, Invoice No. 004852, Transit Guide of Forest Product No. 004852, Transit Guide of Forest Product No. 3408760, the Custom Receipt with no reference number, License No. 59/2012, Phytosanitary Certificate No. 200/RVS/2012 and the Certificate of Origin No. 18613/CD/2012.

To crown it all, she stated that these documents form the basis of six (06) counts of forgery tendered by the State's Attorney and were not read after admission as exhibits P2 collectively.

She averred that these documents as they are the roots of the offence of forgery and uttering false documents. Likewise, if exhibit P2 collectively is expunged from the records as well as agreed, oral accounts of witnesses will support nothing and therefore cannot sustain the conviction.

On the same note, Mr. Ogunde the Appellant's learned counsel submitted that in rejoinder submission the Respondent has conceded that exhibits P1, P2, P3, P4, P5, P6, P7, P8, P9, P10, P11, P16 and P20 were tendered and acted upon contrary to the law and should be expunged. On the one hand, he further submitted that they reiterate their submission in chief in support of the first (1st) and the second (2nd) ground of appeal. With the view of the first (1st) and the second (2nd) grounds of appeal, the issue here is whether the procedure of tendering exhibits was followed by the trial Court. In that regard, the Appellant's learned advocate submitted that the prosecution exhibits have to be expunged from the Court's records.

He stated that the State's Attorney tendered the exhibits in Court instead of the witness. Secondly, the exhibit was not read in Court in order to give the Appellant a chance to cross-examine the witnesses.

To start with the issue of whether the procedure of tendering exhibits was followed by the prosecution side. In building this argument, let's have a look at the decisions that have been addressed on the issue of receiving the exhibits. It is worth considering that, according to part 11 of the Evidence Act (Cap. 6, R.E. 2019) read together with chapter three, paragraph 3.2 of the Exhibits Management Guidelines of 2020, the general principles for admitting or rejecting exhibits in both civil and criminal cases include relevance, originality, and authenticity.

> *"The general principles governing admission of exhibits in both civil and criminal proceedings underscore factors include the following:(a) Relevance: the exhibit is relevant if tends to make the fact that it is offered to prove or disprove either more or less probable, For the document to be admitted it must be both authentic when it is written by its supposed author and is genuinely and what it purports or is asserted to be. (b) Originality: The document is receivable in evidence when it's original (Primary evidence). 19 (c) Authenticity: Reliability may be established by first explaining the foundation of the exhibit. So, when the*

exhibit is objected for want of foundation it means its competency is called upon into question."

On the same note, as it can be vividly seen from the records of the District Court, prosecution exhibits were not read over after admission as evidence. Moreover, the content of the exhibits was not communicated, in order for each party to grasp the full evidence so as to counter and go through cross-examination. Basically, this renders the exhibits lacking in evidential value. To crown it all, this statement was stated in the case of **Samweli Kambanga v. UFK,** North West Land Appeal No. 21 of 2019, High Court of Tanzania at Kigoma, whereby it was stated that: -

"On my part, I should at the outset state that if has been clearly settled that whenever a documentary exhibit is tendered in evidence, the same must be read loud in the presence of parties to accord them an opportunity to hear its contents for their guard in defense against the document. This is both in Civil and Criminal trials."

To add to it, reference is made to the case of **Jumanne Mondolo v. Republic,** Criminal Appeal No. 10 of 2018 (unreported) where the Court

emphasized the importance of reading a documentary exhibit after its admission. Furthermore, at this juncture, I am inclined to state that, as rightly pointed out by the Appellant's counsel, I strongly agree with the first (1st), second (2nd) and tenth (10th) grounds of appeal. The District Court erred in law by admitting the prosecution's exhibits because they were admitted and tendered unprocedural, which as a result made erroneously. As much as the prosecution's evidence is concerned, the appellant accounted for the possession of the property.

In fact, some exhibits were found in the Appellant's hands because the Appellant admitted that he possessed four hundred and sixteen (416) pieces of timber from Mozambique. Moreover, he proved that he transported timber products from Mozambique to Tanzania. It is conclusively obvious that the timber products belonged to the Appellant. The fact is, along with the exhibit tendered in Court it was enough to say that he failed to ask the important questions related to these exhibits when his case was heard at the trial Court.

Find that the failure to cross-examine a witness as a matter of principle as the Appellant was served with the witness' statement and documentary exhibits that have been mentioned above before the trial started. Some of the important exhibits were found in the hands of the Appellant because he

admitted that he owned or possessed 416 pieces of timber. To crown it all, he has knowledge of those exhibits and it is not enough to say that he failed to ask important questions related to those exhibits when his case was being heard in the trial court. Principally, it seems to be true that the same issue had been raised in the case of **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 (Arusha May 2012), **Cyprian Athanas Kibogoya v. Republic,** Criminal Appeal No. 88 of 1992, **Paulo Yusuph Nchia v. National Executive Secretary, CCM and Another,** Civil Appeal No. 85 of 2005 (both unreported). Notably, the Appellant's learned advocate stated that the Appellant accounted for the possession of the property in his defence case. Basically, he transported timber products from Mozambique to Tanzania. On the same note, I observed that if the Appellant proved the possession of the exhibits and timber 416 pieces of products.

Additionally, he was actually the one who used to transport the same to Tanzania. In that case, I find that there are no sufficient reasons discussed by the appellant's learned advocate which led this Court to expunge the prosecution exhibits in the case records. Furthermore, the timber products belonged to the appellant at the same time the exhibits belonged to the appellants too. In that regard, the appellant does not deny the statement

that the burden of proving is on the Appellant. Therefore, they should not be expunged from the court records because it does not prejudice the appellant. As far as this court can see, the first (1st), second (2nd), and tenth (10th) grounds of appeal failed.

Consequently, considering the issue of whether the trial Court failed to consider the defence evidence. Mr. Ogunde the appellant's learned advocate submitted that the appellant is faulting the trial magistrate by only dealing with the prosecution's evidence and convicting the Appellant without considering the defence's evidence. In addition, he further submitted that in the testimony of DWI & DW2 in its findings, the Trial Magistrate relied on the prosecution witnesses alone. He neither considered defence evidence before concluding that the prosecution's evidence proved contents of forgery, uttering false documents, and unlawful possession of forest produce. More emphasis he cited with approval the case of **Moses Mayanja @ Msoke v. Republic,** Criminal Appeal No. 56 of 2009 (unreported) this Court made the following observation:

> *"... it is now trite law that failure to consider the defense case is vital and usually vitiates the conviction." Likewise,*

he contended that the Trial Magistrate to consider the defence's evidence has initiated the conviction."

Again, in view of the above submission, he invited the Court to uphold the third (3rd) grounds of appeal.

On the contrary Ms. Tulibake Juntwa the State's Attorney for the Republic submitted that, with regard to the issue of whether the defence case was considered and reached in the rightful decision of convicting the appellant.

Besides, rejoinder submission by Mr. Ogunde the Appellant's learned advocate with regard to the failure to consider and take into account the defence's evidence. On the contrary, the respondent has submitted that the appellant's defence was considered in detail. That the Respondent's submission forced them to revisit the trial Court's judgment to ascertain if the appellant's evidence was considered. He emphasized that considering its findings the Trial Court did not take into account the appellant's defence. He, therefore, reiterates submission in chief with regard to the third (3rd) grounds of appeal that fails to take into consideration defence's evidence is vital and vitiates conviction.

In the same way, referring to the issue of whether the trial Court failed to consider the defence case, the Appellant's learned advocate has submitted that the Court failed to look at the defence's evidence when giving his decisions. Similarly, I have realized that because this is the first (1st) appeal, I will therefore evaluate the defence evidence as follows; the Appellant in his defence evidence said that he accounted for the possession of the timber product as follows:, DW1 is said to be a timber dealer. He actually used to import timber from Mozambique from the year 2010. That she obtained a business licence, and a certificate of registration from the Forest and Bee Department, Ministry of Natural Resources and Tourism. Generally, in his defence evidence, the Appellant did not deny the exhibit tendered and he eventually accounted for the possession of the arrested timber products. In other words, he is the owner of the timber product by providing the defence's exhibits corroborated the prosecution case. I hereby mark that the defence case was considered in respect of the thirteen (13th) count because the Appellant does not deny the ownership of timber produce.

With regard to the fourth (4th) ground of appeal, Mr. Wilson Edward Ogunde, the Appellant's learned advocate submitted that the Appellant was arraigned in Criminal Case No. 166 of 2012 before the District Court of

Tunduru facing three (03) offences to wit, forgery contrary to section 333, 335 (a) and 337 of the Penal Code (Cap 16 R.E. 2002) and unlawful possession of the forest produce contrary to section 88 of the Forest Act 2022. At the same time, he further submitted that Criminal Case No 10 of 2016 was before the trial court. Moreover, it is the Appellant's submission that the High Court in (DC) Criminal Appeal No. 42 of 2015 ordered Criminal Case No. 116 of 2012 to be retried however a new case was filed that was contrary to the order of the High Court. Similar to that, he invited the Court to allow the fourth (4^{th}) grounds of appeal.

On the contrary, Ms. Tulibake Juntwa submitted that even if the retrial order of Criminal Case No. 166 of 2012 was not complied with the same didn't led to any miscarriage of justice against the Appellant. She further averred that, that omission was on the part of the Court itself and not the prosecution. Basically, the Court's findings on that matter were correct and thus it had full jurisdiction to try the same.

Moreover, rejoinder submission by Mr. Wilson Edward Ogunde learned advocate submitted that the Appellant has submitted noncompliance with the High Court Orders of the retrial of Criminal Case No. 166 of 2012 did occasion injustice against the Appellant. Furthermore, the omission was not

caused by the Court but the Republic or the Respondent was the one who prepared a charge sheet which was registered as Criminal Case No. 10 of 2016. Besides, he submitted that without presenting a new charge sheet in terms of section 132 of the CPA, the Court would not have filed and registered Criminal Case No. 10 of 2016. Additionally, he further averred that noncompliance with the order of retrial of criminal case No. 166 of 2012 has occasioned injustice to the Appellant. In fact, the said Criminal Case No. 166 of 2012 is still pending. Unfortunately, the District Court of Tunduru has disobeyed the High court's order. Moreover, he further contended that the subordinate Court must respect and follow the directives of the Superior Court. Therefore, failure of it, it will end up in justice mockery. In that regard, the District Court has no right to act without receiving the records from the High Court which ordered a retrial.

As a matter of fact, the issue to be asked here is whether there was a retrial order from the High Court, as it was contended by the learned counsels for both parties. To crown it all, having perused the records I did not find the order of the High Court that ordered the retrial of the case. Therefore, up to now, I have found that there is no proof that there was a retrial order. However, the Appellant's counsel did not show that the retrial

order was ordered from which stage of the case. Notably, I am of the view that this ground of appeal is meaningless in the absence of proof of the records which ordered a retrial and it is dismissed.

With regard to the fifth (5th) grounds of appeal, Mr. Ogunde the Appellant's learned advocate submitted that the fifth (5th) ground of appeal touches the trial Court's jurisdiction to try criminal case No. 37 of 2016 after the dismissal of Criminal Case No. 10 of 2016 in view of the decision of the Court of Appeal of Tanzania in **Twaha Hussein v. Republic**, Criminal Appeal No. 415 of 2017. He further contended that the said case was dismissed for want of prosecution under section 225(5) of the Criminal Procedure Act and the Appellant was discharged. He emphasized by making reference to the case of **Twaha** (supra) where the Court of Appeal faced a similar situation whereby the first criminal charge was dismissed under section 225(5) of the Criminal Procedure Act (supra) while being guided by the provisions of section 137 of the Criminal Procedure Act and section 225(5) of the criminal procedure Act (supra). The case was dismissed for want of prosecution under section 225(5) of the Criminal Procedure Act (Cap. 20 R.E 2002) the Court of Appeal has this to say;

"Following the dismissal, ten days later, the prosecution lodged fresh charge against the Appellant vide Criminal Case No. 125 of 2015 which is subject to present appeal ... the dismissal order has not been revised or set aside by any competent Court."

In that regard, the learned counsel further contended that the trial Court was bound to follow the binding authority in the case of **Twaha** (supra) and rule that it has no jurisdiction to try the Criminal Case No. 37 of 2016 while the dismissal order in Criminal Appeal No 10 of 2016 was intact. On the same note, he invited this Court to allow the fifth (5th) ground of appeal with regard to the issues concerning the dismissal of the case for want of prosecution under section 225(5) of the Criminal Procedure Act.

Having perceived the submission of both parties. I hereby quote section 225(5) of The Criminal Procedure Act Cap 20 R.E. 2019.

"225(5) Where no certificate is filed under the provisions of subsection (4), the court shall proceed to hear the case or, where the prosecution is unable to proceed with the hearing discharge the accused in the court save that any discharge

under this section shall not operate as a bar to a subsequent charge being brought against the accused for the same offence."

Consequently, this Court reckon with the Appellant's learned advocate's argument that if the case has been dismissed for want of prosecution. In that regard, what should be done is to set aside the dismissal order. Notably, based on the explanation of the Appellant's counsel, there was no setting aside of the dismissal order. To put in a nutshell, I agree with the submission of the Appellant's advocate that there should have been an order to set aside the dismissal order and then proceed to file another case.

However, section 225(5) of the CPA (supra) allows returning the same case with the same subject matter and parties to the Court. In respect to this appeal at hand, there is no evidence brought by the Appellant's learned advocate to show that there is a case that was dismissed for want of prosecution under section 225 (5) of the Criminal Procedure Act. Additionally, in the absence of a supporting Court order which dismissed the case for want of the prosecution I, therefore, find that this ground of the appeal is unfounded since there is no order which dismissed the case for want of prosecution.

In addition, Mr. Ogunde the learned counsel submitted that ground number eight (8) is concerning with the Appellant's forged Invoice No. 004952, Transit Guide of Forest Product No. 3408760, and Licence No. 59 of 2012. Besides, he succumbed to prove that exhibits P2 are forged documents. He averred that, the prosecution relied on the evidence of PW2, PW8 and PW12. Moreover, they went to the place called Musimbwa and showed copies of exhibits P2. In that regard, the government official told him that exhibit P2 was a forged document. In fact, the evidence cannot be acted upon by the Court. He further contended further that the evidence of PW2 and PW8 did not prove that exhibits P2 are forged documents.

On the contrary, Ms. Tulibake Juntwa the learned state attorney for the Republic submitted that the trial court was correct in holding that exhibit P2 was forged documents because of the witnesses that testified on it. PW2, PW8, PW11, and PW12 were trustworthy witnesses. Thus, the Appellant himself forged documents. From the above submission, she prayed that the Appellant's conviction and sentence be sustained.

Moreover, the submissions of the learned State's Attorney for the Republic, did not talk much about the issue of forgery and uttering forged documents to justify that the prosecution proved the case to the required

standards. As a result, the Appellant has been convicted under the count of forgery. It is worth considering that, this Court enquires the question of whether the prosecution has been able to prove the Appellant's elements of forging and uttering the forged documents.

Considering the issue of whether the prosecution proved its case beyond a reasonable doubt, if you carefully look at this case and the evidence presented in the District Court, the Appellant was accused of forgery and uttering false documents contrary to sections 342 and 337 of the Penal Code (supra).

It is worth considering that, whether the Appellant forged the prosecution exhibits. In fact, in the instant case, the offence of forgery was not proved by the prosecution. In that regard, this means that there is no combination of events which shows that the documents that transported a load of timber products from Mozambique were forged. The prosecution failed to prove the following **first;** that the appellant did make the false document. **Second;** with intent to defraud or deceive. **Third**; the document was made by the accused. To crown it all, it is obvious that the prosecution failed to prove that the appellant forged the documents.

With regard to whether the appellant uttered forged documents, the offence of uttering forged documents includes three (03) elements passing or making use. Additionally, intent to defraud the knowledge of forgery, passing, and making use is constituted by putting into circulation a written document that involves forgery. The second (2nd) element is the same intent to defraud under forgery knowledge. In fact, the issue of forgery is held to exist when the person uses a forged document with the knowledge that it is forged. This stance was stated in the case of **Uganda v. Okiroe James,** Criminal Appeal No.39 of 2008 [2009] UGHC (11 November 2009). Eventually, from the information provided above it seems that the prosecution has failed to prove the counts for forgery against the Appellant. Since the counts of forgery were not proved, also, the counts for the offence of uttering forged documents has failed to be proven.

As a matter of fact, the prosecution must establish a prima facie case. This is important because if no prima facie case is established, the Court could always give an accused person the benefit of the doubt and acquit him. Reference is made to the case of **The Director of Public Prosecutions v. Morgan Maliki and Nyasa Makorii,** Criminal Appeal No 133 of 2013 (unreported), the Court stated that: -

"A prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence which he is charged or kindred cognate minor offence... the prosecution is expected to have proved all the ingredients of the offence or minor cognate are thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defense so as to fill it in, as this would amount to shifting the burden of proof".

Basically, in all fairness under the prevailing circumstances of this case, concerning the count of forgery and uttering forged documents, this Court holds that the guilt of the Appellant was not proved beyond reasonable doubt. It is as conceded by the Appellant's learned advocate concerning the offence of forgery and uttering forged documents. In addition, the prosecution's evidence was scant to convict the appellant of forgery and uttering forged documents that were tendered as exhibits in court.

On the contrary, Mr. Ogunde the learned advocate with regard to the thirteenth (13th) count submitted that the Appellant accounted for the possession of four hundred and sixteen (416) pieces of timber through the evidence of DW2 and exhibit D1. Moreover, he further submitted that the

Trial Magistrate would have considered the evidence of DW2 as he would not fail to conclude that the Appellant has obtained the locality-issued permit and was in the process of obtaining an imports certificate as it was the practice however the prosecution intercepted while the process was going on.

On the same note, the issue of whether the Appellant was found with the forest products. The Appellant was charged with unlawful possession of forest produce contrary to Section 88 of the Forest Act No. 14 of 2002, as well as Regulations GN. No. 153 of 2004 and Regulation 2 of the Forest (Importation of Forest Produce) Regulation G.N No. 181 of 2007. Eventually. In a nutshell, I am of the view and strongly agree with the State's Attorney submissions whereby I find that this ground has no merit since the Appellant, does not deny the ownership of the pieces of timber and was not prejudiced. Consequently, the nine (9) grounds of appeal are unfounded and is hereby dismissed.

Therefore, the trial Court was right to find that the Appellant was guilty and convicted of the offence of unlawful possession of forest products contrary to section 88 of the Forest Act No. 14 of 2002 read together with Regulations 10 and 57 of the Forest Regulations G.N. No. 153 of 2004 and

Regulation 2 of the Forest (Importation of Forest Produce) Regulations G.N. No. 181 of 2007.

Consequently, I have weighed the prosecution evidence alongside with the defence evidence which proved that the Appellant was arrested with the possession of 416 pieces of timber produce. Moreover, though, the prosecution's side proved the case beyond a reasonable doubt in respect of the thirteenth (13th) count. I hereby uphold the decision of Tunduru District Court that convicted the Appellant for the thirteenth (13th) count.

In the event and for the reasons stated above, the conviction and sentence imposed on the Appellant by the District Court in respect of the first, second, fourth, seventh, eighth, and tenth counts are hereby quashed and set aside. I hold that the learned trial Magistrate imposed the appropriate sentence in respect of the thirteenth count; in the circumstance of this case, I find no reasons to interfere with it. I uphold the sentence of Tshs 500,000/= or to serve two years imprisonment. Hence, for the reasons stated above, the appeal is hereby partly dismissed. Order accordingly.

DATED at **DELIVERED** at SONGEA this 28th day of October, 2022.

U. E. MADEHA

JUDGE

28/10/2022