IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO. 63 OF 2021

(Appeal from the Criminal Case No. 212 Of 2019 in the District Court of Nyamagana by Hon. Sumaye, SRM dated 14th of January, 2021)

THE REPUBLIC.....APPELLANT

VERSUS

EDSON EDWARD IGAKAMBA..... 1st RESPONDENT

SARAH RICHARD HAMZA..... 2nd RESPONDENT

GADIEL SAWE PHILEMON..... 3rd RESPONDENT

JUDGMENT

15th February & 4th March, 2022

ITEMBA, J.

This appeal arises from the decision of the District Court of Nyamagana, in respect of Criminal Case No. 212 of 2019. The charge sheet had three main counts as follows; **1st count of Conspiracy** contrary to section 384, **2nd count of Stealing** contrary to sections 258(1) and 265, against to all respondents, **3rd & 4th counts of Forgery** contrary to section 333, 335(a) and 337 against the 1st respondent and **5th count of Forgery** contrary to section 333, 335(a) and 337, against the 3rd respondent, all counts stipulated under the Penal Code, Cap. 16 R.E. 2019.

To start with I think it is important to narrate, albeit briefly, the facts which led the prosecution to charge the respondents. Pius Machunda (PW1) was a Primary school teacher and he was about to retire. Sometimes in 2015 PW1 borrowed money from the 1st respondent amounting to Tshs 6,500,000/= at the interest rate of 100% so PW1 was supposed to pay the 1st respondent Tshs 13,000,000/=. PW1 surrendered his ATM card and the password to 1st respondent so that he can withdraw Tshs 100,000/= each month. It is not established how much money the 1st respondent managed to withdraw using the ATM card. Later on, the 1st respondent introduced PW1 to the 2nd respondent who was a NMB employee whereby she also issued PW1 a loan of Tshs 5,000,000/= at the same interest rate of 100%. PW1 was to pay the 2nd respondent Tshs 10,000,000/=. On the incidence day PW1 received a call from Sengerema District treasurer informing him that they should meet near a post office in Mwanza so that the treasurer could handle PW1 his retirement benefit cheque. Upon meeting the treasurer, PW1 realised that the said treasurer was together with the 1st and the 2nd respondents. PW1 was handled his check amounting to Tshs 54,271,619.27 and the 1st and 2nd respondents convinced PW1 to deposit the cheque at NMB Buzuruga branch because

the 2nd respondent knows the manager, hence, they will avoid the queue. PW1 agreed as he also intended to pay back the 1st and 2nd respondents. At the bank 1st and 2nd respondents introduced PW1 to the 3rd respondent who was a branch manager. The 2nd respondent handled the withdrawal and deposit slips to PW1 and asked him just to sign them without adding any other particulars. Thereafter, PW1 was advised by the 2nd respondent that he will be able to collect his money after seven days. After the lapse of seven days, PW1 did not find any money deposited in his bank account. PW1 contacted the 2nd respondent who told him that because he owed money to the 1st and 2nd respondent, they used the money to pay themselves. In 2019, PW1 decided to report the matter to the Police who arrested the respondents and they were charged as mentioned hereinabove.

At the end of full trial, all the respondents were acquitted. The DPP was not amused by the trial court's decision thus, he preferred this appeal.

He has two grievances against the trial court's decision and these are:

1. ***That the trial magistrate erred both in iaw and fact to acquit the respondents by holding that the prosecution case was not proved beyond reasonable doubts.***

2. ***That the trial magistrate erred both in law and fact by delivering judgment without analysing reasons for the decision.***

When the appeal was called on for hearing, the DPP was represented by Ms. Gisela Alex, the 1st and 3rd respondents had the services of Messrs Sijaona Revocatus and Dr. George Mwaisondola respectively while the 2nd respondent fended for herself.

It was Ms. Alex who rolled the ball. She referred the court to the prosecution evidence and stated that the chain of transactions and the acts of the three respondents show that they all conspired to steal, that is to take more money from PW1 which was higher than the loan amount. She argued that the trial court was not justified not to see the conspiracy. In respect of the count of stealing, the learned state attorney explained that based on section 258(1) of the Penal Code, the elements of theft were proved because money was withdrawn from PW1 to the account of 1st respondent. She referred the court to the case of **Mshewa Daudi Vs Republic Criminal Appeal No. 50/2018** which stated that in proving the offence of stealing, prosecution must prove that an item is stolen from

general owner to the accused and that an *actus rea* is stealing and *mens rea* is an intention to deprive the money.

Ms. Alex stated further that the respondents were supposed to transfer only the amount which PW1 owed them and that respondent's evil intention is proved by 1st and 2nd respondents convincing PW1 to go to NMB Buzuruga Branch and 3rd respondent to approve money based on deposit slip which were filled not in the presence of PW1. She argued that the 3rd respondent was supposed to witness PW1 filing the forms.

Ms. Alex also referred the court to the expert witness, PW2 who examined the handwriting of all 3 respondents and that according to PW2, the details in the deposit and withdrawal slips belong to 1st respondent and the handwriting in the fund transfer request belongs to the 3rd respondent and 3rd respondent did not cross examine PW1 on that therefore he was involved in the process of the said money. The 1st and 2nd respondent went to the bank and the process was done at the bank therefore the offences of forgery, stealing and conspiracy was proved.

Ms Alex stated further that as the three respondents filled the disputed documents thus, they committed forged and the 3rd respondent

facilitated stealing by approving the transaction. She added that the court was to believe PW1 because he was a credible witness. She referred the court to section 127 of the Evidence Act stating that PW1's evidence was reliable and it was corroborated by expert opinion of PW2 and his report which was admitted as exhibit P3. She added that the court misled itself by finding that the prosecution did not prove its case beyond reasonable doubts.

In respect of the 2nd ground the learned state attorney argued that the trial magistrate did not properly evaluate the evidence as required by section 312 of the CPA. She explained that the court was expected to appreciate the fact that PW1 added his signature against empty forms but it did not do that and it did not state why it did not believe PW1.

Ms Alex argued that this being an appellate court it has power to rehear the case and in that, she referred the court to page 6 of Court of Appeal decision of **Siza Patrice Vs Republic** Criminal Appeal No. 19/2010. The learned state attorney prayed for the court to set aside the decision of Nyamagana District Court and allow the appeal.

In reply, Mr Sijaona argued that the prosecution did not prove its case beyond reasonable doubt as required by law. He stated that the chargesheet has 5 counts the 1st count being that of conspiracy but there is nowhere in the proceedings showing that the respondents have conspired. He added that the evidence should show intention of respondents apart from just the respondents being together with the victim, failure to that benefit should be given to the respondent.

Referring to the 2nd count the learned counsel stated that there is no evidence of theft because in order to prove theft there must be an item to be taken without consent. That the victim went to the bank and signed all deposit and withdrawal forms and that the bank does not issue or accept money without satisfying itself on the validity of signature of either the depositor or withdrawer. He stated that PW1 does not deny anywhere that the signature was not his. Thus, PW1 was not induced, he consented to issue money which was owed to the 1st and 2nd respondents.

In respect of the last ground, he argued that the offence of forgery was not proved beyond reasonable doubts because the documents before the bank were genuine and there were no other documents apart from

those which the victim signed, which were brought before the court. That the victim knew bank processes thus when he signed the withdrawal and deposit forms, he was approving the transaction and what is said by forensic expert could not prove charges against the 1st respondent as the handwriting indeed belonged to the 1st respondent but he wrote after PW1 consented. He added that an accused person should not be convicted a weakness of defence but on the strength of prosecution case and relied on **Christina Kale and another Vs Republic** [1992] TLR 302 and **Joseph John Makwe Vs Republic** [1980] TLR 44.

Referring to the 2nd ground he stated that although the trial magistrate was in writing in short at page 4 of the judgment, the trial magistrate mentioned all exhibits and analysed them and decide that there was no evidence of forgery and at page 3 of judgement the trial magistrate analysed the elements of stealing and even the fact that PW1 put a signature on an empty form were mentioned by the trial court.

The 2nd respondent Ms Sarah R. Hamza started by refering at page 52 of proceedings regarding conspiracy arguing that in her defence she explained that she was working at the Bank as loan officer for government

employees and private sector. She added that PW1 owed her Tshs 5,000,000/= not as a private loan and that at page 52 of proceedings she stated that it was an official loan which PW1 had to pay back. She stated that she knew the 1st and 3rd respondent but knowing each other does not mean they conspired. Ms Hamza also questioned as to why PW1 delayed to report the complaint from 2015 when the alleged theft occurred to 2019. She denied to have introduced herself as PW1's daughter and that it was PW2 who signed all the bank documents and not her thus, there is no evidence that she conspired with anyone.

The 2nd respondent strongly argued that the defence summoned a witness from bank who testified to the effect that banks usually examine the signature when processing transactions, all the disputed slips were genuine and there was no theft because PW1 as a client went to the bank and signed the documents.

Responding for the 3rd respondent Dr. Mwaisondole stated that PW1 did not mention that 3rd respondent was present when he was handled a cheque and that PW1 went at NMB Buzuruga branch to avoid standing in the queue and not otherwise. He added that PW1 stated he is the one who

told 3rd respondent that 2nd respondent is his daughter which means there was no conspiracy between 1st and 2nd and 3rd respondent. Regarding the offence of stealing, he argued that there is nowhere PW1 implicating 3rd respondent benefiting. He referred the court to page 22 of typed proceedings where during cross examination PW1 stated "I entered my signature to transfer money" and that PW1 evidence at page 19 stated that he signed all the forms including exhibit P3C". He also stated that the 3rd respondent had to authorize at the end. The 3rd respondent was supposed to sign as a manager

As regards the offence of forgery, he argued that there is no dispute that money was transferred from PSPF to PW1 account by 3rd respondent and that was not forgery. That as per exhibit P3i the deposit and withdrawal are done before the teller. The 3rd respondent as a manager had to authorize the transactions.

In rejoinder, Ms Alex insisted that the offense against respondent were proved. She argued that there is nowhere in the proceedings where PW1 agreed to have gone before the teller to do any transaction. PW1 was attended by 3rd respondent and not a teller. That, PW1 did not go to

the bank alone, he went together with 1st and 2nd respondent using the 2nd respondent's car.

She asserted that the statement that PW1 asked 1st respondent to fill deposit slip this is an afterthought and there was no cross examination of PW1 on that. On the issue of loan agreement between PW1 and 1st respondent, valued at Tsh 34,000,000/= Ms Alex stated that there is no such evidence before the court. Regarding the magistrate analysis in the judgment, she stated that, there is no reasoning even when the magistrate mentions the exhibits, he did not explain the content of those exhibits.

She countered the explanation that the loan of Tshs 5,000,000/= issued to PW1 by the 2nd respondent was an official loan because the 2nd respondent did not issue any document to prove that.

She insisted that ttransactions of withdraw and deposit were done by manager and not PW1 and that on the deposit slip there is a phone number of PW1 thus the 3rd respondent would have at least called PW1 to check whether he authorized the same. The fact that PW1 was issued benefits in 2015 and he reported on 2019, Ms Alex stated that page 20 of proceedings shows that PW1 made efforts of reporting the matter to the

District Commissioner Sengerema, that is why PW1 took too long to report anyhow she argued that there is no time limitation in reporting a crime. She reiterated her prayer that the trial court decision should be set aside.

I have gone through the court's record and the rivalry submissions by both parties, the issue is whether this appeal is meritorious.

I find it prudent to start with the 3rd ,4th and 5th counts which refers to the offence of forgery. The offence of forgery is defined under section 333 and 335(a) of the Penal Code as follows: -

> *333. Forgery is the making of a false document with intent to defraud or to deceive.*
>
> *335 (a) Any person makes a false document who - (a) makes a document which is false or which he has reason to believe is untrue,*

The three documents which are alleged to have been forged in the 3rd, 4th, and 5th count respectively are as follows: **Cash withdrawal slip** amounting to Tshs 54,000,000, **Cash deposit slip** amounting to Tshs 30,000,000 both being labeled **Exhibit P3I** and **Fund transfer request exhibit P3C**.

Before I delve into the details of the said forgery, as the principle of ***abundans cautela non nocet*** entails that abundant caution does no harm, I needed to satisfy myself on how the said exhibits found its way before the court. The law governing admissibility of exhibits before the court is clear that the person who intends to tender an exhibit should be competent. That means he should be either the author, custodian, possessor, owner, addressee or arresting officer. See the case **of DPP v Christina Biskasevskaja** Criminal Appeal No. 76 of 2016. It is also a principle of law that once a (documentary) exhibit has been cleared out for admission, and admitted in evidence, it must be read out in court. See also the cases of **Issa Hassan Uki v Republic** Criminal Appeal no. 129 of 2017, **Thomas Pius v Republic** Criminal Appeal no. 245 of 2012 and **Jumanne Mohamed and 2 others v Republic** Criminal Appeal no. 534 of 2015. The Court enlightened further that omission to read the documents is a fatal irregularity as it deprives the party to hear what they were all about and to enable the accused to understand the nature and substance of the facts contained therein. The effect is for the said exhibit to be expunged from records. Based on the type proceedings, it is noted that all the relevant documents were tendered by handwriting expert who

testified as PW2. The trial court had issued a ruling and the relevant documents were admitted as exhibit P3A, P3B, P3C, P3D, P3E, P3F, P3G, P3H and P3I as follows:

1. *The forensic bureau reports and its attachments Exhibit P3A.*
2. *NMB cheques of Pius Machunda Exhibit P3B.*
3. *Transfer Request Exhibit P3C.*
4. *Handwriting samples of collected since exhibit P3D.*
5. *Handwriting as samples of Edson Igakamba Exhibit P3E.*
6. *Handwriting samples of Pius Bungenza Machimba Exhibit P3F.*
7. *Note book Exhibit P3G.*
8. *Handwriting samples of NMB bank Slip, Sarah Richard Exhibit P3H.*
9. *The disputed NMB Bank slip, Exhibit P3I Pius Machunda and Edson Igakamba.*

As to what transpired after admission of the said exhibits, let the typed proceedings at page 29 and 30 speak for themselves:

> ***"SSA**: the witness who tender the exhibit is present and ready to proceed with hearing.*
>
> .....
>
> .....
>
> ***XXD by SSA proceed***

The report I prepared of Exhibit P3I I received documents on 10/1/2019 from E9235 D/Ssgt Godlove and requested to conduct examination of handwriting."

Therefore, based on these proceedings PW2 did not read the documents after they have been admitted . As mentioned above admission of the documents before the court was unprocedural as none of the nine documents were read before the court. This omission is a fatal irregularity and as a result I expunge all the exhibits P3A, P3B, P3C, P3D, P3E, P3F, P3G, P3H from the record. According to **Issa Hassan Uki** *"even without the exhibits, the testimonies of the witness tendering the said exhibit or other witnesses will be quite sufficient to cover the content of the exhibit"*. The question is, were the testimonies of PW2 or other prosecution witnesses sufficient to cover the contents of the deposit slip, withdrawal slip and transfer request? The answer is no, because in his testimony, PW2 went straight ahead to explain about how he examined the documents and compared the handwriting in the said exhibits as opposed to the contents of the exhibits and its relation to the case and there was no other prosecution witness who testified in respect of those exhibits.

I think the most appropriate witness to explain the said exhibits would have been a person from the bank which issued, stamped, and authorized the said withdrawal the slip deposit slip and transfer request. This witness would be in position to first establish the procedure of withdrawing money and relate the same with the content of the exhibits before the court.

I say this because in defending themselves the respondents paraded **DW4** who introduced himself as a branch manager NMB Pamba Road and among others, he explained the procedure for processing a cheque, he identified the disputed documents and stated that they were properly processed and for clarity, at page 60 of typed proceedings he stated as follows:

> *"Exhibit P3C identified by the witnesses, he clarified as he explained exhibit does not have a problem. It may be brought by another person, by duly instructed person signature assented"*

What I can gather in this statement is that DW4 stated that any other person can bring the documents before the bank so long as they have a signature and that all the documents were genuine and there is no

fraudulent transaction therein. This evidence raises a reasonable doubt which leaves the prosecution's evidence in relation to forgery shaky and unreliable.

That being said, in the absence of the exhibits and in the absence of the oral testimony to explain the contents and effect of the said exhibits, there is no evidence left to establish the offences of forgery against the 1st, 2nd and 3rd respondents beyond reasonable doubts.

The second count refers to the offence of stealing which is against the three respondents.

In this case, the property which is claimed to be stolen is money amounting to Tshs. 54,000,000/= from NMB Bank account belonging to PW1.

The evidence which was presented before the court in respect of stealing was that **one;** the 1st respondent owed money to PW1 amounting to Tshs. 12 million. **Two**; the 2nd respondent asked PW1 to sign the blank bank forms and the 1st respondent added the figures therein. **Three**; an amount of Tsh. 30,000,000 was deposited into 1st respondent bank account by PW1 and the 1st respondent does not dispute receiving the said money,

he only claims that PW1 was paying him back his money. **Four**, PW1 states that he did not authorize the 1st respondent to withdraw money from his account and at the same time, the 1st respondent claims authorization by PW1 and states further that PW1 signed the documents to allow the disputed transaction.

Section 258(1) of the Penal Code establishes the offence of stealing and states as follows: - *A person who* ***fraudulently and without claim of right takes anything capable of being stolen,*** *or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing. (emphasis supplied).*

I have considered the arguments by the learned state attorney. Based on prosecution evidence, the alleged stealing was done through forgery, having failed to prove forgery the remaining evidence is still wanting to prove the offence of stealing.

It is my opinion that so long as the 1st respondent refers to PW1 as the one who adduced his signature in all the disputed bank documents and PW1 agrees to that; and referring to the evidence by DW4 relating to bank

procedures as explained above, these facts translate that PW1 either withdrew the disputed money by himself or approved another person to proceed with said transactions. It means therefore, in these disputed transactions, there was no 'fraudulent taking' which is an element of stealing as per section 258(1) of the Penal Code.

It is the principle of law that the burden of proof in criminal cases **rests squarely on the shoulders of the prosecution side unless the law otherwise directs**, and that the accused has no duty of proving his innocence. For the reasons stated hereinabove, given the lack of sufficient evidence, the offence of stealing was not proved against the 1st, 2nd and 3rd respondent.

Under the circumstances of this case where the main offences of stealing and forgery could not be proved against all the respondents, the offence of conspiracy to steal it left with no legs to stand.

I should add that the prosecution evidence was considered by the trial court as it is, and it was found to be weak and therefore unreliable. The second ground of appeal is accordingly, without merit.

Based on the above, the appeal has no merit and it is hereby dismissed.

DATED at MWANZA this 4th day of March, 2022

L. J ITEMBA
JUDGE
4/3/2022

Judgment delivered under my hand and seal of the court in chambers in the presence of Ms. Maryasinta Lazaro, learned State Attorney for the appellant, the first, second and third respondent and Dr. George Mwaisondola for the 3rd respondent.

L. J ITEMBA
JUDGE
4/3/2022