IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 24 OF 2022

(Originating from Criminal Case No 174 of 2020 of the Resident Magistrate Court of Dar es Salaam at Kisutu before Hon. Luambano- RM)

THE DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT

VERSUS

BILLIONEIR JOHN MKEU.....RESPONDENT

JUDGMENT

Date of last Order: 12th December, 2022

Date of Judgment: 17th February, 2023

E.E. KAKOLAKI, J.

The appellant herein was indicted before the Resident Magistrate Court of Dar es Salaam at Kisutu in Criminal Case No. 174 of 2020, facing one count of Giving False Information to a Person Employed in the Public services, contrary to section 122 (b) of the Penal Code [Cap 16 R.E 2019, [now R.E 2022]. It was the prosecution case that, on unknown dates in February, 2016 at Temeke Municipal council area within Temeke District in the city and Region of Dar es Salaam, the accused person knowingly gave false information to a land officer one Nyendo Hamisi Kaombwe, pretending to be

the lawful owner of the plot No. 3391, Block A, Mbutu Kigamboni, intending to use the lawful power of the said land officer to injure the lawful owner of the said plot, the fact he knew to be false. The prosecution relied on the letter (exh. P3) alleged written by the respondent and presented to the said Nyendo Hamisi Kaombwe (PW2).

Appellant flatly denied to have committed the offences and in disproving prosecution's accusation he relied on the letter (exh. D1) to the District Executive Director for Temeke Municipality requesting for the permit as administrator of estate to be allowed to survey the plot/land owned under customary ownership. After full trial the court was convinced that, the prosecution failed prove its case beyond reasonable doubt, thus acquitted the appellant. Displeased, the DPP has preferred the present appeal raising three (3) grievances going thus:

(1) That, the trial Magistrate erred in law and fact by holding that an expert was essential in proving this case.

(2) That the magistrate erred in law and in fact for deciding this case without considering the evidence of PW2 who was credible.

(3) That the trial magistrate erred in law and in fact by holding that prosecution side failed to prove their case beyond reasonable doubt.

Hearing of the appeal was done viva voce as all parties were represented. Appellant/DPP appeared represented by Mr. Hezron Mwasimba, learned Senior State Attorney, while respondent enjoyed the legal services of Mr. Nehemia Nkoko, learned advocate. During hearing Mr. Mwasimba informed the court that, he was abandoning the first ground of appeal and set to argue the rests of the grounds in seriatim. In determining this appeal, I will join both grounds as they are interrelated.

In support of second ground of appeal which is faulting the trial magistrate for not considering the evidence of PW2, it was Mr. Mwasimba's submission that, the evidence of PW2, Nyendo Hamisi Kaibwe found at page 29 of the typed proceeding was not considered by the trial magistrate when analyzing the evidence as seen at page 12-13 of the typed judgment. According to him, this credible witness proved the offence of giving false information to a person employed in the public services c/s 122 (b) of the Penal Code, for being a person whom the respondent presented himself to as owner of the estate of the late Ester John Mkeu who died on 30/08/2013 at Dar es Salaam. Mr. Mwasimba while referring the court to the case of **Goodluck Kyando Vs. R** [2006] TLR 363, stressed that, every witness is entitled to credence, hence taking the view that, had the trial magistrate accorded weight PW2's

evidence, he would have found that the prosecution case was proved to the hilt.

Concerning the third ground of appeal, it was Mr. Mwasimba's submission that, since PW2's evidence proved the case beyond reasonable doubt, it was wrong for the trial court to arrive at the conclusion of acquitting the respondent. He contended that under section 143 of the Evidence Act, a number of witnesses is immaterial in proving a certain fact, thus PW2's evidence if taken into consideration as a whole would have be sufficient to lead the trial Court find the prosecution case was proved beyond reasonable doubt. He implored the court to allow the appeal, convict and sentence the respondent here in in accordance with the law.

In response, it was Mr. Nkoko's submission that, the trial magistrate was justified to reach the conclusion arrived at, as looking at page 9,10,11,12 and 13 of the typed judgment the trial court evaluated and analyzed prosecution's evidence before reaching into conclusion. He referred the Court to page 32 of the typed proceedings when PW2 was cross examined and replied that, it is one Moza who had complained in this case and not PW2, thus to him PW2 not being the complainant the offence was not proved beyond reasonable doubt. He further referred the Court to pages 12 and 13

of the judgment in which the trial magistrate was satisfied that, the case before it concerned ownership of the disputed land hence a finding that, it is either a probate or land court which is vested with jurisdiction to entertain it, in terms of section 4 (3) of the criminal Procedure Act [Cap 20 R.E 2019] providing that, all civil claims shall be exhausted first before resorting to criminal complaints. To buttress his point, the learned counsel cited the case of **Mtwa Michael Katusa Vs. R**, Criminal Appeal No. 577 of 2015 (CAT) at page 10-11. Basing on the above submission he was of the view that the trial magistrate was justified to arrive at the decision made.

Mr. Nkoko submitted further that, the evidence of PW2 was at variance with the charge sheet, as can be evidenced at page 31 of the proceedings where PW2 said there were more than one plots in which the respondent worked on, that there were 17 of them including plot No.3391. In his view, there is no possibility that only one plot had problems in which the respondent allegedly misrepresented himself before PW2.

It was his further submission that, the prosecution's complaint was to the effect that, the respondent represented himself as the owner and not the administrator of the estate but the trial court after reminding itself of the provisions of section 67 of the Land Registration Act, that the administrator

of the estate shall be registered as the owner of the land in replace of the deceased, the court at page 10 of the judgment agreed with the respondent through exhibit D1 when presented the letter as administrator of the estate requesting for survey of the plot.

In further view of Mr. Nkoko, since exhibit D1 was not objected by the appellant when tendered in court as indicated at page 58 of the proceedings, then that is a proof that, the respondent did not present himself to PW2 as the owner but administrator of the estate. It was his submission that, since PW2 never complained anywhere as stated at page 34 of the proceedings at line 6-10, that the respondent represented himself as owner, he submitted there was misconception of the duties of the respondent as administrator of the estate as he could not have presented himself as the owner of the plot rather the administrator of estate.

He referred the court to page 36 of the proceedings in lines 10th -13th where PW2 was wondering as to why only one plot was subject of the complaint out of 17 plots. It was his submission that, respondent never represented himself as the owner of the land in dispute. In winding up he submitted that, the case was not proved beyond reasonable doubt, and pressed for the dismissal of the appeal.

In rejoinder, Mr. Mwasimba maintained that PW2 was a credible witness and that, his evidence should be accorded weight in proving the charge. Concerning the submission that the request of surveying the plot was made in respect of 17 plots, he submitted that, the plot under question in which the respondent allegedly used to misrepresent himself before Pw2 is plot number 3391 and not others, hence prosecution evidence was not at variance with the charge and for that matter there was no need for amendment of the charge sheet. In his view, variance if any, by mentioning more than one plot is curable under section 388 of the CPA as it did not occasion any injustice to the respondent's side.

Regarding the submission that the matter was of civil nature, he contended that, the same is misplaced as it is evident in the charge sheet that, the accusation against the respondent was on misrepresentation before the public officer, thus the issue cannot be resolved under section 4 (3) of the CPA.

Concerning the application of section 67 of the Land Registration Act, it was his submission that, he does not dispute its applicability but the issue of ownership is not the subject of this appeal rather the issue is of his misrepresentation before PW2 as owner of the plot and not administrator.

To support his contention he referred the court to page 34 of the typed proceedings and concluded that, had the court directed its mind on the fact that, the respondent had provided false information it would not have arrived at such decision. He then reiterated his prayer as prayed in submission in chief.

I have dispassionately considered the rival submissions by the parties regarding both grounds of appeal, and revisited the lower court records in order to find whether the appellant's complaints are reflected there in. The main contentions being that the evidence of Pw2 was not considered, and that the case was proved to the hilt.

It is a trite law that, this court being the first appellate court is seized with jurisdiction to review trial court's evidence and come up with its own findings. See the cases of **Peters Vs. Sunday Post Ltd.** (1958) E.A. 424 and **Demaay Daat Vs. R**, Criminal Appeal No. 80 of 1994 (CAT-unreported). In **Demaay Daat** (supra) the Court of Appeal had this to say:

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact*."

Basing on the above principle, I find it imperative to review the complained of trial court's evidence relied on by both parties, to establish whether the prosecution's case was proved to the hilt against the respondent on the charge of giving false information to the person employed in the public contrary to section 122 and whether the evidence of PW2 was disregarded as submitted by Mr. Mwasimba.

In this case it is uncontroverted fact that, the appellant was charged of the offence of Giving False Information to a Person Employed in the Public Service, contrary to section 122(b) of the Penal Code [Cap 16 R.E 2019.] The said section provides that:

> ***122.*** *Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause that person;*
> *(a) NA*
> ***(b)*** *to use the lawful power of that person to the injury or annoyance of any person, shall be guilty of an offence and shall be liable to imprisonment for six months or to a fine of one hundred thousand shillings or to both.*

From the above exposition of the law, it behoved the prosecution to prove the following ingredients, **one**, false information was actually given to the

person employed in public service (PW2), **second**, it is the respondent who gave that information knowing or believing the same to be false and **third**, that false information intended to use power of such person employed in the public service to cause injury or annoyance to another person. Though not part of the ingredient of the offence the prosecution is also duty bound to prove the time and place in which the alleged offence was committed as stated in the charge sheet.

Now coming to the evidence on record especially evidence of PW2, (the land officer and prosecution star witness) allegedly given the said false information, it is Mr. Mwasimba's contention that her evidence was not considered and properly analysed by the Court, while Mr. Nkoko is of the contrary view it was considered and the trial court satisfied prosecution case was not proved beyond reasonable doubt. It is true as gathered from PW2's evidence at pages 29 up to 36 that, she came to know the respondent while making follow-ups in obtaining the right of occupancy of 17 plots and that, he introduced to her as the owner of the plot in dispute plot No. 3391 and not administrator as claimed by him (respondent), before he presented a letter which was tendered in court as exhibit P3, hence a proof of the first and second ingredient of the offence. It is also in evidence of both PW1 and

PW2 that, since there was a dispute over the said plot his giving false information to PW2 aimed as injuring PW1 by disowning her the right to inherit her mother's estate. The tendering of exhibit D1 by the respondent is disproving the accusation that he tendered exhibit P3 to PW2 and presented himself as owner of plot No. 3391, in my considered opinion would not have dented prosecution case as the said letter is dated 20/11/2014 and not 2016 in which he is alleged to have presented it to PW2. Further to that there is no evidence by the respondent as to when he presented it leave alone the claim that it was presented to the Ministry of Land instead of before the Land officer Temeke Municipality.

Despite of proving all those three ingredients of the offence, I find one important element in the charge sheet missing as the time in which the alleged offence was committed was not proved to the required standard. It is the law that, in any criminal charge the prosecution is duty bound to lead evidence disclosing that the offence was committed in the date alleged in the charge sheet, failure of which is to render the preferred charge fatally incurable for being unproved. Unless the charge is amended under section 234(1) of the CPA, the accused shall be entitled acquittal. This position of the law was observed by the Court of Appeal in the case of **Abel Masikiti**

Vs. R, Criminal Appeal No. 24 of 2015 (CAT-unreported) where the Court held that:

> *"In a number of cases in the past, this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed in the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance and uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur."*

Similar stance was taken by the Court of Appeal in the case of **Justine Mtelule Vs. R,** Criminal Appeal No. 482 of 2016 (CAT-unreported), when the Court found the date in the charge sheet in which the appellant's accusations based was at variance with the evidence adduced against him something which was not observed by the High Court while exercising its appellate jurisdiction, the Court had the following observations at page 16 of the judgment:

> *"…as also found by the first appellate judgment, the variance is in the dates of the incidence of commission of an offence between what is in the charge sheet and the evidence on*

record by witnesses and not the time when the offence was committed. Thus if the ***High Court judge would have critically considered this in light of the existing decisions of this Court on the issue, she would not have reached the conclusion she did but found that, the variance in the dates of the incidence between the charge sheet and the evidence on record, makes the anomaly fatal and not curable****." (Emphasis added)*

Form the above legal stance is evident to me that, when the date in which the offence is alleged to have been committed is disclosed in the charge sheet, it is incumbent for the Republic to prove the same, the essence being to prove the charge to the court's satisfaction and beyond reasonable doubt that, the offence was actually committed on the alleged date as well availing the accused with full knowledge of his accusation and an opportunity to prepare and martial his/her defence properly on the said accusations.

In this matter, the charge sheet disclosed that, the offence was committed on unknown date in February, 2016 at Temeke District in the city and region of Dar es salaam. However, when testifying in Court PW2 apart from stating that, in 2016 she was working with Temeke Municipal counsel as assistant land officer grade II, though the dates not known to her, never disclosed to the trial Court even the month and year in which allegedly the respondent

gave false information to her that, he was the owner of the alleged plot of land, hence variance of evidence on the date in which the offence was committed. Since there is variance between the charge and evidence, and guided with the position of the law in **Abel Masikiti** (supra) and **Justine Mtelule** (supra), though with different reasons, I am of the finding that, the trial court was justified to acquit the respondent as there was no cogent evidence to prove the charge facing him beyond reasonable doubt.

Consequently, this appeal is dismissed in its entirety.

It is so ordered.

Dated at Dar es Salaam this 17th February, 2023.

E. E. KAKOLAKI

JUDGE

17/02/2023.

The Judgment has been delivered at Dar es Salaam today 17th day of February, 2023 in the presence of the appellant in person, Mr. Paul Kimweri, Senior State Attorney for the Respondent and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
17/02/2023.