

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 38 OF 2022**

(Appeal from the decision of the District Court of Simanjiro at Orkesument, Criminal  
Case No. 91 of 2019)

**EZEKIEL FABIAN MAYUMBA .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

14/12/2022 & 06/02/2023

**MWASEBA, J.**

In the District Court of Simanjiro at Orkesument the appellant was charged and convicted of three counts of forgery contrary to **Section 333,335 and 337 of the Penal Code** [CAP 16 R.E 2022], Embezzlement and misappropriate contrary to **section 28(1) of the Prevention and Combating of Corruption Act**, [Cap 329 R.E 2019] and use of documents intended to mislead the principal contrary to **Section 22 of Prevention and combating of Corruption Act**, [Cap 329 R.E 2019]. He was sentenced to serve two years imprisonment for the first count, three

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years to the second count and two years to the third count. Sentences were to run concurrently.

Aggrieved by the decision of the trial court, the appellant had preferred this appeal raising six grounds as follows:

- 1. That, the Trial Court erred in law and fact for convicting the Appellant in the first count, while the charge sheet in respect of the first count is defective for failure to point out specifically to whom the fraud was intended to.*
- 2. That, the Trial Court erred in law and fact for deciding in favour of the respondent by convicting the appellant in the first Count based on the handwriting specimens Report which was made contrary to the law.*
- 3. That, the Trial Court erred in law and fact for deciding in favour of the Respondent while the exhibits tendered by the Respondent in Court were not made clear, hence read over not to the court, the act which made exhibit illegally received.*
- 4. That, the Trial Court erred in Law and fact for failure to evaluate properly evidence before it.*



*5. That, the Trial Court erred in Law for failure to observe the Law in determining the case against appellant before it.*

*6. That, the Trial Court erred in law and fact for delivering judgment in favour of the respondent while the prosecution failed to prove the case beyond Reasonable Doubt.*

At the hearing of the appeal the appellant was represented by Mr Tadey Lister, learned Advocate whilst the respondent had the services of Ms Eunice Makala, learned State attorney. The appeal was disposed of by way of written submission.

Submitting on the first ground of appeal, Mr Lister complained that the problem appeared in the particulars of the first count as it did not specify who the appellant intended to deceive or defraud. His argument was supported with the case of **David S/O Richard Kiputa vs Republic, Criminal Appeal No. 388 of 2016 (HC-Unreported)** which held that failure in particulars of the offence to specify who the Appellant intended to deceive or defraud, renders the charge sheet defective and deserve it to be dismissed.

*Harela*

In arguing the appeal, the learned State Attorney, supported the conviction and sentence meted by the trial court. She submitted further that the particulars of the first count have no problem as alleged by the appellant since it meets all the legal requirements as stipulated under **Section 132 of Criminal Procedure Act**, Cap 20 R.E 2022. However, any problems regarding the particulars of the offence as alleged by the Appellant if it really exists, it is not fatal and it is curable under **Section 388 of the Criminal Procedure Act**, Cap 20 R.E 2022, and it did not occasion any miscarriage of justice to the Appellant because he understood the offence he was facing.

submitting on the second ground, Mr Lister stated that a forensic Bureau Examination Report was made contrary to **Section 205 (1) of the Criminal Procedure Act**, Cap 20 R.E 2019 and PW7 who tendered Exhibit P13 admitted this fact as quantified at page 57 of the typed proceedings. Looking at the judgment of the court, the evidence of PW7 which based on Exhibit P13 was considered as a major factor for conviction of the Appellant in the 1<sup>st</sup> count.

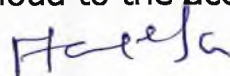
This allegation was strongly objected by the learned state attorney who submitted that the Trial Magistrate convicted the Appellant based on the

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strong testimonies of PW5, PW6, PW7 and PW8 and to support her argument she referred this court to page 5 of the typed judgment. She further clarified that during trial, exhibit P13 was not objected by the appellant and was rightly made. She said that the cited case of **Fauster Charles Kambanga & 3 others vs Republic**, HC Criminal Appeal No. 269 of 2017 at page 7, 2<sup>nd</sup> paragraph has been overtaken by emergence of Section 205(1) of Criminal Procedure Act Cap. 20 R.E 2022 which cured the mischief in the same way as PW7 did while preparing exhibit P13. On that basis he prayed that the second ground be dismissed.

Regarding the third ground of appeal, Mr Lister submitted that the exhibits tendered by the respondent did not follow proper procedure because the trial court did not complete the third requirement of reading the exhibits P1, P2, P3, P5, P6, P11, P13 and P14 after being admitted. He cemented his argument with the case of **Robinson Mwanjisi and Others vs Republic**, [2003] TLR 218, and **Steven Salvatory vs Republic**, Criminal Appeal no 275 of 1028, CAT at Mtwara (Unreported).

He further clarified that as a matter of procedure as per the decision of CAT in **Robinson Mwanjisi and 3 Others vs Republic**(supra), any document admitted in evidence, must be read aloud to the accused person.



Non compliance to that procedure those exhibits must be expunged from the record.

Replying to this ground Ms Makala disputed the contention that failure to comply with the said procedure causes the said exhibits to be expunged from the record. She supported her position with the case of **Stanley Murithi Mwaura vs Republic**, Criminal Appeal No. 144 of 2019, CAT at Dar es salaam (Unreported) and **Ernest Jackson Mwandikaupesi and Another vs Republic**, Criminal Appeal No. 408 of 2019 (Unreported).

The counsel for the appellant submitted on the fourth, fifth, and sixth grounds of appeal jointly that the trial court failed to evaluate the evidence on record and the prosecution failed to prove its case due to the following reasons. **Firstly**, the receipt book was under their custody, how did the appellant manage to have them and forge as alleged by the prosecution. **Second**, the guiltiness of the accused person in respect of the 1<sup>st</sup> count was based on the evidence which was illegally obtained since the charge was defective and there was noncompliance with the law by PW7 when preparing Exhibit P13. **Third**, is failure to read over the exhibits to the appellant in court which goes to the root of the case and this irregularity

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cannot be cured rather than expunge the said exhibits. They pray before this honorable court to allow this appeal and order accordingly.

Responding to these grounds, Ms Makala learned State Attorney argued that the trial Magistrate rightly evaluated the evidence on the record and was rightly guided by the same thus the conclusion reached by the trial magistrate was supported by the strong evidence adduced at the trial court. She cemented her argument with the case of **Pronches Christian Kavishe vs Republic**, Criminal Appeal No. 145 of 2020, (HC-Unreported). She concluded by urging this honorable court to dismiss the appeal and increase the sentence to the maximum possible in accordance with the provision of **Section 337 of the Penal Code**.

Having carefully considered the grounds of appeal, the submissions of both parties and the records before this court, the issue for determination is whether the appeal has merit.

In respect of the first ground, the appellant complained that the charge sheet on the 1<sup>st</sup> count did not disclose to whom the fraud was intended to. For easy of reference, I wish to quote the particulars of the said charge as follows: -





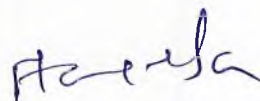
1<sup>st</sup> COUNT

*Forgery; Contrary to Section 333,335 (a) and 337 of the Penal Code (Cap 16 R.E 2002)*

PARTICULARS OF THE OFFENCE

*EZEKIEL FABIAN MAYUMBA, on 17<sup>th</sup> day of October, 2014 at Orkesumet Township within Simanjiro District in Manyara Region, with intent to defraud, forged a receipt No. 0893 of Kanisa la Kiinjili la Kilutheri Tanzania Dayosisi Mkoani Arusha purporting to show that a total sum of Tanzania Shillings Six Million and One Sixty Six Thousand (Tshs. 6,166,000/=) only, was received by Kanisa la Kiinjili la Kilutheri Tanzania Dayosisi Mkoani Arusha as payment of Refreshment for 411 participants who participated Measles Rubella (Mr) Training the fact he knew to be false.*

Having gone through the content of the charge sheet this court is of the view that the particulars were enough to understand to whom the fraud was intended to as it was Kanisa la Kiinjili la Kilutheri Dayosisi Mkoani Arusha. It could have been better if the appellant had explained more what he meant regarding the particulars of the charge sheet. Therefore, this court do concur with the learned State Attorney for the respondent that the particulars of the 1<sup>st</sup> count met the requirement stipulated under **Section 132 of the Criminal Procedure Act**, Cap 20 R.E 2022. Therefore, the first ground of appeal has no merit.






Coming to the 2<sup>nd</sup> ground of appeal, Mr Tadey complained that exhibit P13 which was the basis for conviction was made contrary to **Section 205 (1) of the Criminal procedure Act**. On her side, Ms Makala was of the view that the conviction of the appellant was not based solely on the testimony of PW7 and exhibit P13, but rather, the trial Magistrate took into considering the strong testimonies of PW5, PW6, PW7 and PW8 as per page 5 of the typed judgment. As for the issue of procedure of preparation of forensic bureau report, it is a procedural one and has been overtaken by the emergence of **Section 205 (1) of the CPA**, Cap 20 R.E 2022 which requires an expert in hand writing to prepare his report in accordance with a form set out in the fourth schedule.

Having gone through the proceedings of the trial Court at page 57, PW7 (Inspector Adam Ntamuti (Handwrite Expert)) did admit that his report complied with the 4<sup>th</sup> schedule instead of 3<sup>rd</sup> schedule as per the **Criminal Procedure Act**, Cap 20, R.E 2002. Section 205 of the revised edition 2002 requires the handwriting expert when preparing a report to fill the form in the third schedule of the Act which is titled as hereunder:

*"Certificate Regarding Photographic Prints  
The Criminal Procedure Act  
(Section 202)"*

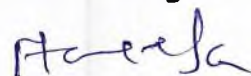


Looking at this title it goes without saying that it does not relate with handwriting expert but photographic prints. More to that, it is made under Section 202 which does not relate to handwriting expert too. In this case PW7 wrote his report by filling form in the fourth schedule which is titled as follows:

"Report of Handwriting Expert  
The Criminal Procedure Act  
(Section 205)"

Indeed, this was a proper form to write handwriting report as it was done by PW7. The confusion of the specific provision and the related form was merely a drafting error which does not guarantee PW7 to fill those forms blindly. The said error has already been rectified and currently Cap 20 R.E 2022 directs that the handwriting expert has to prepare his report by filling the form in the fourth schedule of the Criminal Procedure Act. Therefore, the PW7 prepared the Exhibit P13 properly and this has not prejudiced in any how the appellant. Having said so, this ground lacks merit too.

As for the 3<sup>rd</sup> ground of appeal, the appellant submitted that exhibit P1, P2, P3, P5, P6, P11, P12, P13 and P14 were not read aloud after its admission and prayed for them to be expunged from the records. On the other hand, the learned State Attorney argued that even though some of the

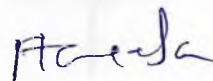


documents were not read aloud the person who tendered them already explain its content.

Having gone through the records of the trial court I concur with the counsel for the appellant that the mentioned exhibits were not read aloud before the court after its admission. However, witnesses who tendered the same did explain its content for the accused to understand its content. As it was held in the case of **Ernest Jackson @ Mwandikaupesi and Another vs Republic**, Criminal Appeal No. 408 of 2019 (reported at tanzlii) that:

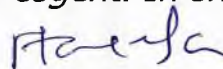
*"Although the record does not expressly indicate that the said documents were methodically read out as directed. It is noteworthy that in the rest of their respective evidence in chief the witnesses canvassed the contents of the documents and thereafter they were cross examined so substantially on the documents by the defence counsel to leave no doubt that the appellants and their counsel were fully abreast of the contents of the two documents."*

That being the legal position, I find no plausible reasons to expunge the mentioned exhibits as they were fully explained by the person who tendered the same before the court. And the adverse party had a chance to cross examine witnesses regarding those exhibits. Thus, this ground lacks merit.



Coming to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> ground of appeal, the learned counsel for the appellant argued that a charge was not proved beyond reasonable doubt since the evidence was not properly evaluated by the trial court. He argued that the person who was the custodian of the receipt book would be the one who stole the money and shifted the blame to the appellant. On his side, the respondent's counsel submitted that the evidence was properly evaluated and the appellant forged receipt No. 0893 (exhibit P4) to receive Tshs. 6, 166,000/=. From these grounds of appeal, I have revisited the records of the trial court, and noted that the evidence was properly evaluated and the entire evidence was well considered in determining the matter. As it was decided in the case of **Mkulima Mbagala vs Republic**, Criminal Appeal No. 267 of 2006 (Unreported) cited in the case of **Emmanuel Aloyce Daffa vs The Republic**, Criminal Appeal No. 131 of 2021 (CAT- reported at Tanzlii) that:

*"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case .... is more cogent. In short, such*



*an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at."*

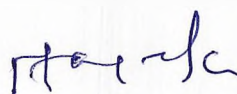
Being guided accordingly by the cited authority and the records of the appeal, this court is of the firm view that the evidence was properly evaluated by the trial court as evidenced by the impugned judgment which considered the evidence from both sides as it is revealed at page 4 to 7 of the said judgment.

For the forestated reasons, this court finds no need to disturb the trial court's decision. Consequently, the appeal is hereby dismissed for want of merit.

Ordered accordingly.

**DATED at ARUSHA** this 6<sup>th</sup> day of February, 2023.



  
**N.R. MWASEBA**  
**JUDGE**