

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 161 OF 2022

(Original Criminal Case No. 386 of 2012)

BETWEEN

SAID KHALFAN MAKINDA APPELLANT

Versus

THE REPUBLIC RESPONDENT

JUDGMENT

07th June & 19th July, 2023

MWANGA, J.

This is an appeal by **SAID KHALFAN MAKINDA** against the judgment of the District Court of Morogoro convicting him to two counts namely; Forgery contrary to Section 333,335 (a) and 337 of the Penal Code, Cap. 16 R.E 2019 and Obtaining money by False Pretense contrary to Section 302 of the Penal Code, Cap. 16 R.E 2019.

The factual position as it emerges out of a confused mass of evidence adduced at the trial court, may be briefly stated. In the first count, it was alleged that on 24th day of January, 2012 at the offices of Matto and Company Advocates along Boma Road Morogoro Municipality with intent to defraud did forge a sale agreement entered between Yusuph Hamisi Kitumbo and Said Khalifan Makinda @Karume Mustafa, a fact which he knew to be untrue. In the second count, the allegations are that the appellant with intent to defraud did at the same place personate himself to be the said Khalifan Makinda, the owner of Plot No. 802, Block BB Kiwanja cha Ndege, Morogoro Municipality while it is not true. In the third count, the appellant with intent to defraud on the same date and place obtained Tshs. 8,000,000/= from Yusuph Kitumbo. Eventually, he was sentenced to serve 5 years imprisonment for each count respectively.

Aggrieved with the decision of the trial court, the appellant filed the instant appeal on eight (8) grounds and five (5) supplementary grounds of appeal. The same were argued by way of written submission.

Seemingly, the appellant and respondent focused on the 8th ground of appeal. The appellant contended that, the prosecution had failed to prove the case beyond reasonable doubt. The appellant made reference to

the case of **John Nkize Versus Republic** [1992] TLR 213 and **Joseph John Makune Versus Republic** [1986] 44. According to the cited cases, the prosecution has a duty to prove the case beyond reasonable doubt; no duty is cast on the accused to prove his innocence. The appellant also cited the case of **Republic Versus Kerstin Cameron** [2003] TLR 84 where the court held that conviction must be based on strength of the prosecution evidence and not on weakness of the defense case.

On her part, the learned State Attorney, Ms. Nura Manja conceded this ground of appeal. According to the learned State Attorney; **one**, the sale agreement between the appellant and buyer was tendered and admitted for identification purpose. At no point, the same was admitted as exhibit in court Likewise, the purported death certificate of one Abdallah Alfani and clan minutes were admitted for identification purposes. Hence, they lack evidential value. **Two**, police loss report which was tendered and admitted as exhibit P7, letter of offer as exhibit P8 which contained Form Nos. 29, 30 and 35 were tendered and admitted in court without being read out aloud before the court. Ms. Nura, relied on the case of **Semeni Mgonela Nthwanza Versus Republic**, Criminal Appeal No. 49 of 2019 where the Court of Appeal held that the omission to read out the contents

of exhibit lacks evidential value and, in this case, it was expunged from the record.

Moreover, the learned State Attorney also conceded to the fact that the trial Magistrate did not consider the defense evidence. Henceforth, she invited this court to step into the shoes of the trial court and asses the evidence accordingly.

In light of the aforesaid facts, it can be seen that both parties focused on discussing the 8th ground of appeal; that the prosecution failed to prove the case beyond reasonable doubt.

I have gone through the proceedings and submission of the respective parties. Indeed, the proceedings were conducted without considering the well-established procedures, particularly on two areas. **One**, the value or weight accorded to documents tendered and admitted for identification purposes. See, **Rashid Amir Jaba and Another**, Criminal Appeal No. 204 of 2008 CAT (Unreported). **Two**, the documents which were tendered and admitted as exhibits without the same being read out aloud to the court. For instance, death certificate of one Abdallah Alfani, clan meeting minutes and were admitted for Identification purposes as 'ID 1', police loss report – Exhibit P7, long term letter of offer – exhibit

P8, Exhibit P8 which contained form No. 29, 30 and 35 were all tendered in court but were not read out before the court.

For the documents tendered for identification purposes, the court of appeal in the case of **Semeni Mgonela Chiwanza Versus Republic**, Criminal Appeal no.49 of 2019, held that; -

"The omission to read out contents of exhibit made the exhibit to lack evidential value and was expunged from the record"

As rightly contended by Ms. Nura, since the exhibits were not read out before the court the same had no evidential value to be relied upon and, therefore, shall be expunged from the record. In the case of **Gode Cleophance Versus The Republic**, Criminal Appeal No. 41 of 2019(unreported), the court of Appeal held that; -

"There were three exhibit which when tendered before trial court and admittedly namely; the certificate of seizure, valuation form and inventory form. However, all these documents were tendered but not read in court to allow the appellant to know the contents and challenge them. This procedure error is contrary to the agreed principles of laws which have been stated by the higher court."

Similarly, in the case of **Mbaga Julius Versus The Republic**, Criminal Appeal No. 131 of 2015 (unreported), the court of appeal stated that;

"Failure to read out documentary exhibit after their admission renders the said evidence contained in that documents, improperly admitted, and should be expunged from the record."

The above position was also emphasized in the decision of this court in **Ayub Rashid Membe Versus The Republic**, Criminal Appeal No. 35 of 2022(unreported). The fact that charges against the appellant were solely relied on the documentations so expunged from the record, nothing is left to condemn the appellant. In that regard, therefore, I have found no reason to proceed with the determination of other grounds of appeal.

In the upshot, the appeal is allowed. Decision of the Trial Court is quashed and set aside.

Order accordingly.



H. R. MWANGA

JUDGE

19/07/2023

COURT: Judgement delivered in Chambers this 19th day of July, 2023 in the presence of the Appellant in person and Ms. Nura Manja, learned State Attorney for the Respondent.



H. R. MWANGA

JUDGE

19/07/2023