

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

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 11 OF 2022

*(Originated from the Decision of the District Court of Kigamboni in Criminal Case No.
37 of 2017 dated 26th October 2022, Hon. J. W Mgaya, RM)*

ASHA ALISENI ABDALLAH @ MONICA SIMON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

17th & 28th June, 2023

MWANGA, J.

In the District Court of Kigamboni at Kigambani in the Mwongozo Mahusika area, the appellant, **ASHA ALISENI ABDALLAH @ MONICA SIMON**, who purportedly owned a piece of land, was charged with three counts. The first count was Obtaining money by pretense contrary to Section 302 of the Penal Code, Cap. [16 R.E 2019]. The particulars of the offence were that on 6th June 2018 at Mwongozo Mlimbika area within Kigamboni District, the appellant and her two co-accused, namely

Fadhili Hamisi Makunde and Salehe Maringo Ndaji did obtain Tshs. 24,000,000/= from one Paulo Mtinya Zephania by falsely pretending that she was the lawful owner of the sold plot, the facts she knew were untrue. The second count was forgery contrary to Sections 333, 335 (a), and 337 of the Penal Code was in respect of the appellant alone. The particulars revealed that on the 18th day of May 2018 at Kigamboni Primary Court within Kigamboni District in Dar es Salaam Region, with intent to defraud or deceive, did forged affidavit purporting to show that it was genuine that her documents concerning ownership of her plot have lost, the fact she knew to be untrue. The third count was Uttering false documents contrary to Section 342 of the Penal Code and was also preferred against the appellant alone. The particulars revealed that on 3rd June 2018 at Mwongozo Mlimbika area within Kigamboni District in Dar es Salaam Region did fraudulently utter an affidavit to one Paul Mtinya Zephania purporting to show that it was genuine that her documents concerning ownership of her plot have lost, the fact which she knows to be untrue.

After a full trial, the court discovered that the prosecution had successfully proved the case beyond reasonable doubt against the appellant on both counts. Therefore, the appellant was sentenced to

seven years imprisonment for each count, which was imposed to run concurrently. The appellant was aggrieved and therefore appealed on two main grounds;

1. The trial magistrate erred in law and fact because the dispute was civil.
2. That the trial magistrate erred in law and, in fact, by considering the loss report and affidavit of the appellant herein are forged and convicted her under Section 333, 335 (a), and 337 of the CPA [Cap 16 R.E 2022].

The appellant was represented by Advocate Simba Pius Kipengele, and Nura Manja, the learned State Attorney, represented the respondent. The appeal was argued by way of written submission.

Submitting on the 1st ground of appeal, Mr. Simba argued that the case against the appellant was civil because the charge came up after the claim by the appellant that she owned a plot that she sold to one Paul Mtinya Zephania. It was the counsel's view that the prosecution had a duty to prove that the appellant herein did not own that piece of land and, therefore, by pretense, she managed to sell it to the claimant, Paul Mtinya Zehania. Additionally, that the claimant ought to call the appellant in the said land dispute as his witness, the act which was not done.

The counsel contended further that, the fact that the appellant was not joined in the case in the land dispute at Ward land Tribunal where the issue of ownership was being determined, she was denied the right to be heard. Therefore, it turns this matter into a civil matter instead of a criminal case because the ownership issue is still undetermined. The counsel cited the case of **Juliana Francis Mkwabi Versus Lawrent Chimwaga**, Civil Appeal No. 531 of 2020 (Unreported), to support his argument.

Per contra, the learned State Attorney refuted the arguments of Mr. Simba. She believed that the appellant pretended to be the owner of a piece of land and finally did obtain Tshs. 24,000,000/=. According to her, the Land Ward Tribunal resolved the ownership issue, which decided that the land was owned by one Martha D. Kejo and not the appellant.

As to the second ground of appeal, Mr. Simba submitted that the affidavit sworn by the appellant was attested by the magistrate at the District Court of Kigamboni. Still, the prosecution failed to call the said magistrate to testify. On top of that, since the police issued the loss report, the police were supposed to be called to testify to the report's authority. The counsel contended further that failure to reach those key

witnesses cannot eliminate the doubt that the document is genuine or forged. The counsel supported the argument in the case of **Bakari Mwalimu Jembe Versus Republic, 278/2017** (Unreported) that the appellant ought to be aware that the documents were forged. According to him, Knowledge was essential.

In reply, Ms. Nura Manja argued that the appellant did not cross-examine PW1 and PW2 and that the loss reported and affidavit were unrelated to the sale of the plot of land. She believed that failure to cross-examine a vital matter was tantamount to its admission. The learned State Attorney cited the case of **Nyerere Nyague Versus Republic**, Criminal Appeal No. 67 of 2016 (Unreported), and the possibility of **Cyprian Athomas Kibogoyo Versus Republic**, Criminal Appeal No. 88 of 1992, where it was held that failure to cross-examine a witness on important matter ordinarily implies the acceptance of the truth of the witness evidence.

Admittedly, the learned State Attorney supported the contention that the affidavit and loss report were only tendered for identification. Therefore, it was wrong for the court to convict the appellant based on the evidence not proved to the court to form part of court records.

After having revisited the grounds of appeal and carefully considered submissions of the learned counsel and State Attorney, the central issue in the grounds of appeal is whether the evidence on records constitutes the fact that the act committed by the appellant was of a civil nature and, if yes, what would be the proper forum.

The Criminal Procedure Act was amended in Section 4 of the Written Laws (Misc. Amendment) Act, No. 1 of 2022, by inserting subsection 3 to the effect that where a matter is of a civil, admirative, or criminal nature, exhaustion of the remedies in civil or administrative domains shall be mandatory before the pursing of the criminal process.

As pointed out by the learned counsel, Mr. Simba, there was a claim by the appellant that she owned a plot of land that she sold to one Paul Matinya Zephania. **Two**, the prosecution had a duty to establish that the appellant was not the owner. **Three**, the appellant was not called as a witness in the dispute involving the complainants, Paul Matinya Zephania and Martha D. Kejo, at the Ward Land Tribunal. **Four**, failure to reach the appellant as witnesses in that land disputed there was denial of the appellant the right to be heard. **Five** that the question of ownership is still unresolved to its finality.

On her part, Ms. Nura Manja learned that the State Attorney submitted mainly on two areas. **The** land ownership issue was resolved at the Ward Land Tribunal, where Matha D. Kejo owned the land. **Two**, the appellant pretended to be the plot owner and consequently obtained Tshs. 24,000,000/=.

On a fair reading of the relevant provision of the law, it at once becomes more apparent that the facts and evidence placed before the trial court constituted elements of civil. Part of the civil element was a dispute about the land sold to the complainant, Paul Matinya Zephania. The appellant was not made part of the case involving the complaint or a witness. It was unclear why the appellant was not accorded the right to be heard in the dispute, which substantially involved her as the purported owner or seller of the disputed land.

Whether the appellant pretended to be the land owner or not could only become conclusive if the appellant had been accorded the right to be heard. Whether Martha Kejo was declared owner of the land is evidence that the case against the appellant was civil. Under Section (3) of the CPA as amended in Act No. 1 of 2022, parties were supposed to exhaust existing civil remedies before invoking the criminal process.

I have further observed that using the word "shall be mandatory" is intended to be a functional must and not optional.

Given the above, the appeal filed by Asha Aliseni Abdallah @ Monica Simon is allowed. The conviction and sentence of the trial court is quashed and set aside. Since the 1st ground of appeal has been answered in the affirmative, the second ground of appeal is also worthy.

Order accordingly.



H. R. MWANGA

JUDGE

28/06/2023

COURT: Judgement delivered in Chambers this 28th day of June 2023, in the presence of the appellant in person and Nura Manja, learned State Attorney for the Respondent.



H. R. MWANGA

JUDGE

28/06/2023