IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CONSOLIDATED CRIMINAL APPEALS NO. 189 OF 2023 AND 279 OF 2023

(Appeal from the decision in Criminal Case No.51 of 2021 of the Resident Magistrates Court of Dar es Salaam at Kisutu)

JOHN ALFRED KYENKUNGU .....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

JUDGMENT

Date of Last Order: 17/11/2023

Date of Judgment: 23/11/2023

MWAKAPEJE, J.:

This is a consolidated Criminal Appeal of cases No. 189 of 2023 and 279 of 2023, both from Criminal Case No. 51 of 2021 of the Resident Magistrates Court of Dar Es Salaam at Kisutu. The Appellant in Criminal Appeal No. 189 of 2023, John Alfred Kyenkungu, is aggrieved of both conviction and sentence, while in Criminal Appeal No. 279 of 2023, the Director of Public Prosecutions is aggrieved with the sentence.

One John Alfred Kyenkungu, the appellant cum respondent in Criminal Appeals No. 189 of 2023 and 279 of 2023, respectively, was

charged with four counts of the offence of forgery contrary to sections 333,335(a), (d) (i) and 337 of the Penal Code [Cap. 16 R.E. 2019] in the Resident Magistrates Court of Dar es Salaam at Kisutu. The trial court convicted and sentenced him to serve the community for 18 months.

Briefly, it is stated that the said John Alfred Kyenkungu and one Said Nassoro Said are joint owners of a piece of land with a Certificate of Title No. 25480 Plot No. 516 Block B, situated at Mikocheni area of Kinondoni District in Dar Es Salaam. The plot's name was later changed the name of the said Plot to Mikocheni Shopping Mall. In 2012, the duo rented the plot to various businesses.

It was until 22 April 2019 that the twosome's relationship started going south. On the material date, Said Nasoro Said saw an auction advertisement in the Daily News indicating that Title No. 25480 Plot No. 516 Block B, the property of Mikocheni Shopping Mall, would be sold on 20 April 2019. Upon enquiry, he was informed that Equity Bank ordered the sale because the same was used as a mortgage to secure a loan amounting to **Tsh. 350,000,000/=.** He also discovered that his name and purported signature were used to obtain the loan. The matter was reported to the police, and John Alfred Kyenkungu was arrested and charged accordingly. A case against him was proved by nine witnesses

who satisfied the trial court that a case against him was proved beyond a reasonable doubt; hence, conviction and sentence were pronounced accordingly. Aggrieved with the conviction and sentence, he appeals to this Court on the following six grounds of appeal.

1. *That the trial magistrate erred in law and fact in convicting and sentencing the Appellant in all four counts of the offence of forgery as charged, while the same was not proved beyond a reasonable doubt.*
2. *The trial magistrate erred in law and fact in convicting and sentencing the Appellant in four counts of the offence of forgery on account that he is the one who had asked for the loan and submitted the alleged forged documents to the Bank, while there was no adequate evidence, adduced to that effect.*
3. *That the trial court erred in law and fact, by convicting and sentencing the Appellant based on an uncorroborated prosecution evidence of PW1 expert witness.*
4. *The trial court erred in law and fact in convicting and sentencing the Appellant with the offence of forgery relying on this Certificate of Title (Mikocheni Shopping Mall title deed), while the*

said Certificate of Title was not among the alleged forged documents.

5. *The trial magistrate erred in law and fact by proceeding to the defence case without first ruling on a prima facie case as to whether the accused had the case to answer or not.*
6. *That the trial court erred in law and fact by not giving reasons why the defence closing submissions filed in Court were not considered in the judgement, despite the order to file the same being issued and being complied with by the defence side.*

The Director of Public Prosecutions, on the other hand, being aggrieved by the sentence, had only one ground of appeal, which is;

1. *That the learned trial magistrate erred in law and fact for sentencing the Accused/Respondent to serve community services contrary to the law.*

At the hearing of this appeal, Mr Derick Kahigi learned Advocate, represented the Appellant cum Respondent (John Alfred Kyenkungu). At the same time, Mr Clement Masua and Tumaini Mafuru, learned State Attorneys, represented the Republic (Respondent cum Appellant). At the beginning of his submission, Mr. Derick Kahigi abandoned the 3rd, 5th and 6th grounds of appeal.

On the first ground of appeal, he contended that the case against his client was not proved in terms of section 3(2)(a) of the Tanzania Evidence Act [Cap. 6 R.E. 2019]. He submitted that his client was charged with four counts of forgery. The offence has three elements which must be proved for one to be convicted of forgery. The said elements are the making; of false documents with the intent to defraud or deceive. Therefore, one had to prove that his client made a document that was false and was made with the intent to defraud. He referred to the case of **D.P.P. vs Hanna Pondo Kasambala (Criminal Appeal 464 of 2017) [2020] TZCA 1837.** He contended that his client did not make the said documents, i.e. Title deed (exh. P2), minutes of the Board of Directors meeting (exh P8), Landform No.40 of the mortgage of the right of occupancy (exh P7) and corporate guarantee (exh P4) and neither were the said documents false. He was of the opinion that since there was no proof that the Appellant made the said document and since the documents were genuine, it was apparent that there was no intention to defraud.

Concerning the second ground of appeal, Mr Derick was of the view that the conviction was based on the fact that his client was the one who submitted the said documents and applied for the loan. He thought the

trial court could have dealt with whether his client applied for the loan from the said Bank. Mr. Derick stated that the one who borrowed from the Bank was Jamaa Fast Food, a limited liability company. He was of the contention that there is no proof that his client submitted the documents and applied for the loan; instead, the documents were prepared by PW3 and regarding the minutes of the Board, PW5 submitted the documents.

On the fourth ground of appeal, Mr Derick submitted that the trial magistrate turned himself into a prosecution witness by comparing his client's signature on the Certificate of title with that of PW2 and proceeded to convict. He stated that the documents for which his client was alleged to have forged were clear, and there was no certificate of title instead, Mortgage of the Right of Occupancy, 2014; Minutes of the Board of Directors; land Form No. 40 of Mortgage of the Right of Occupancy; and Corporate Guarantee of Equity Bank (T) Ltd. Mr Derick exclaimed his client's conviction was based on the documents, not on the list of documents alleged to have been forged. He concluded by praying that his appeal be allowed, his conviction and sentence be quashed, set aside, and his client be freed.

On the other hand, Mr Clement Masua, a learned State Attorney on the first ground of appeal, submitted that the prosecution proved the case

per section 3(2) of the Evidence Act with its nine witnesses. According to him, PW2 stated that their company, i.e. Mikocheni Shopping Mall, owned land with the Certificate of Title No. 18152 in the Mikocheni area. On 10 April 2019, he got information through a newspaper that the same would be disposed of for defaulting payment of a loan facility. Following up, it was revealed that the title deed in the hands of the Appellant was used to secure a loan from Equity Bank involving him and the Appellant, which was not the case. PW2 (complainant) reported the matter to the police and informed them that he was not involved in the process since he had never signed any document to secure a loan from Equity Bank.

Mr Masua further stated that PW1 corroborated the evidence of PW3, the investigating officer in the Forensic Bureau Department, who noted that PW2 did not sign the loan agreement form. PW3 also stated that he prepared the documents that the Appellant signed and purported to be PW2, which was not the case. Hence, the signature of PW2 was used to secure the said loan. The same is corroborated by PW5, who confirmed that the Appellant sent the title deed to the Bank. He confirmed that the Appellant lodged all necessary documents to the Bank to secure the loan. Indeed, the documents for the loan were prepared by PW3, who initiated the process of securing the loan. The Appellant signed the

documents, and another person was introduced as PW2, which was not the case. Since the testimony of PW2 was corroborated by the evidence of other witnesses to prove a case against the Appellant, he was a trustworthy and credible witness. He referred to the case of **Charles s/o Kassim @ Kitobe vs Republic (Criminal Appeal 546 of 2021) [2022] TZCA 581.**

On the elements of forgery, Mr Masua was of the opinion that for the same to be committed, one has to author the document, the document should be false, and the intention in the end is to defraud. He contended that being the author of the document does not end at the preparation stage. PW3's preparation of the document does not make him criminally liable. Mr. Masua stated that signing alone makes one to be the author of the document. He believed that if preparation amounted to forgery, most personal secretaries would have been held criminally liable. According to him, in proving the offence of forgery under section 335(d) of the Penal Code, which provides that signing amounts to the making of the document.

On the second element of forgery, Mr Masua was of the opinion that when a document is signed by a person who is not authorised to sign, it causes the document to be false. PW2 was exonerated from signing the

document. On the third element of forgery, Mr Masua was of the opinion that PW2 got information through a newspaper that their property would be auctioned after default payment of a loan facility. PW5 stated that the documents were sent to the Bank by one "Graham", an officer from the Appellant's company under his employer's instructions. He, therefore, prayed the first ground of appeal to be dismissed as it has no merit at the case was proved as required. He referred this Court to the case of **Mukhusin s/o Kombo vs Republic (Criminal Appeal 84 of 2016) [2017] TZCA 242 (4 April 2017)** to stress his point regarding modes of poof of the offence of forgery.

He was, therefore, of the opinion that since PW1 exonerated PW2 to have signed the loan agreement and bearing in mind that the same was neither involved in securing the loan nor surrendering the title deed, which was in possession of the Appellant whose signature was on the document, it is clear that the Appellant how he managed to obtain loan from the Bank.

Regarding the second ground of appeal, it was the submission of Mr Masua that the trial court's decision was not based on page 7 of the judgement but on prosecution witnesses. He further stated that the prosecution knows Jamaa Fast Food Company Ltd and Mikocheni

Shopping Mall Company Ltd are legal entities operated by their respective Directors. The Director of Jamaa Fast Food is the Appellant who sent the documents, including the title of Mikocheni Shopping Mall, to the Bank to process the said loan. According to Mr Masua, sending the company's documents to the Bank to secure a loan requires the consent of other Directors. On page 9 of the judgment, the Court ruled that since the Appellant owns Jamaa Fast Food Company, he went to secure the loan. He prayed not to disturb the trial court's findings as the same was based on section 312 of the Criminal Procedure Code [Cap. 20 R.E. 2022].

On the fourth ground of appeal, Mr Masua submitted that the complainant's complaint is not in the title deed but in the signature used to secure the loan from the Bank. He stated that PW2 did not sign the documents to secure a loan from the Bank. He firmly believes that the Appellant forged the documents as all surrounding circumstances point fingers toward him. Mr Masua prayed for the appeal to be dismissed, the evidence evaluated, and the sentence increased where possible.

In his rejoinder, Mr. Derick Kahigi, counsel for the Appellant, reiterated what he stated in his submission in chief that the three elements of forgery were not proved and insisted that Jamaa Fast Food Co. Ltd is the one that secured the loan from the Bank. The one who sent

the documents to the Bank, according to PW5, was Graham. He finally submitted that the grounds upon which the appeal lies are meritorious; hence, the appeal should be allowed.

On the other hand, Mr. Clement Masua and Mr. Tumaini learned that state attorneys argued that the trial magistrate erred in sentencing the Respondent to community service for 18 months. He noted section 25 of the Penal Code on types of sentences. The sentence for the offence of forgery is provided under section 337 and is up to seven years. He is of the opinion that the trial court had discretion to sentence the Respondent up to seven years. Despite sentencing being the Court's discretionary power, the same ought to be exercised judiciously, legally and reasonably while abiding by the rules of procedure in the circumstances of the case. Reference was made to the case of **Masamba Msiba@Msiba Masai Masamba vs Republic, Criminal Appeal No. 138 of 2019 C.A.T. – D.S.M.**

Mr Masua was of the contention that the trial magistrate did not act judiciously because after the Respondent was convicted and after considering mitigating factors, he sentenced, after being moved by the Respondent that if possible, the sentence be that of community service,

that the Respondent is aged, approximately 70 years and has health challenges.

Despite stating that the offence committed was serious, caused a loss to the Bank, and affected the economy of PW2 in the judgment, the trial magistrate used section 339A of the C.P.A. to sentence the Respondent. According to Mr Masua, the section is not absolute; therefore, the Respondent was to be released under the provisions of the Community Service Act or on entering a bond with or without sureties. No bond or sureties were recorded to ensure the Respondent would be found. Also, according to section 3(1), (2) & (3) of the Community Service Act, no community service officer was summoned by the Court and given an inquiry order to satisfy whether the Respondent deserved the sentence. Mr. Masua exclaimed whether there were arrangements to execute the Court's order and whether the Respondent voluntarily offered the said community service. He remarked that there were no such findings. He was of the opinion that section 339A was not complied with and was not acted upon judiciously. Also, section 3(1), (2) & (3) of the Community Service Act was not complied with since the Respondent was not sentenced to 3 years, nor was he sentenced to 5 years imprisonment but remained with some years to be discharged. Age on matters of forgery

does not matter since it is assumed that the Respondent knew the consequences. He concluded by stating that the Court's discretion must be protected. In the circumstances, he prayed the sentence to be varied as the one provided earlier was illegal.

Mr Tumaini Mafuru, learned State Attorney, was of the view that the Respondent knew the consequences of his action and knew that he would affect the victim. He was of the opinion that the sentence imposed should not remain the same. Therefore, he prayed for the sentence to be set aside, and instead, the same should be imprisonment.

Mr Derick, on the other hand, attacked the appeal by stating that the same is misplaced because it is against the decision of Hon. P. Kyaruzi, Senior Resident Magistrate, dated 30 June 2023, in criminal case No. 51 of 2023. Still, they appeal against the judgement of 23 April 2014, which the Respondent has never been a party to. He, therefore, prayed the petition of appeal to be declared defective as the same is incurable since the same refers to a non-existing judgment and did not comply with the provision of section 380 of the C.P.A.

Apart from that, Mr Derick was of the view that the sentence imposed complied with section 25(h) of the Penal Code. The same has been provided for sentences under the Penal Code and other laws. In the

appeal, he stated that the trial court applied Section 339A to sentence the Appellant. The section stipulates that for a person convicted and the sentence is not death, the Court can order him to serve a community sentence, according to the Community Service Act, Cap. 291. He was of the opinion that the trial magistrate was correct to award the said sentence. He considered the age and factors preceding the commission of the offence, i.e. late 60s, young, and he is the first offender.

Mr Derick further stated that the trial court complied with the requirements of the Community Service Act, including inquiring about the Respondent's status in the community and signing a bond even before passing a sentence. The process involved all the stakeholders, and the records speak for themselves. He stated that what was said by the Appellants was a misconception unless the contrary was proved. He, therefore, prayed for the ground of appeal to be dismissed.

Mr Clement Masua, in his rejoinder, stated that it was a slip of the pen when a date, i.e. 23 April 2023, was mistakenly written as the date of judgment. The errors were human, and the appeal cannot be illegal considering the reference is made to the same case, i.e., Criminal Case No. 51 of 2021, with the same parties, Court, and trial magistrate. Mistakes are curable by considering section 388 of the C.P.A. since they

did not affect the Respondent, and there was no miscarriage of justice. Therefore, the prayer that the appeal be dismissed should be rejected.

On the fact that the Community Service Act was complied with, he stated that this Court is a court of record; it is the first appellate Court to visit the proceedings in the trial court and find out what transpired. According to him, neither the proceedings nor court records indicate that the said Act was complied with. In the end, he commented that the trial Court's discretion was not applied judiciously as far as the principles of the law were concerned. He also attacked the interpretation under by the counsel for the Respondent that section 339A of the C.P.A. that the young age of the Respondent was considered in awarding the sentence. According to Mr Masua, the Appellant does not belong to the youth group. He therefore prayed that their appeal be allowed in terms of section 366(1) (b) of the Criminal Procedure Act.

Mr Mafuru, on the other hand, was of the view that the counsel for the Respondent is an officer of the Court. He ought to assist the Court in rendering justice and not otherwise. He stated that it does not make sense that one has been convicted and then proceed with community service on the spot. He was, therefore, of the view that the counsel for the Respondent should assist the Court as to where this practice comes from

and what the basis of community service is. He concluded that the definition of youth does not go to the age of the Respondent.

After consideration of the grounds of appeal and submissions by the parties, the questions that I will respond to as I sail through the grounds of appeal are whether the prosecution proved its case beyond reasonable doubt and whether the sentence was according to the law.

Mr Derick, on the first ground of appeal, was of the firm view that the trial court erred in convicting and sentencing the Appellant while the prosecution did not prove its case beyond reasonable doubt. According to him, it was not established that the Appellant made the documents; the same was false, and there was the intention to defraud. He was of the view that the documents referred were not forged since they were all genuine, i.e. title deed, Minutes of the Board of Directors' meeting, landform No. 40 of the mortgage of the right of occupancy and corporate guarantee.

Mr Masua vehemently disputed by referring to section 3(2) of the Evidence Act that the prosecution performed their obligation accordingly, which is why they obtained a conviction. The Court believed all the nine prosecution witnesses and was ultimately convicted. One of the elements of forgery he was of the opinion that being an author does not end at the

preparation stage but at the signing of the same. He further stated that a person not authorised when signs that becomes a false document and the same was intended to defraud.

On the first part of the first ground of appeal, I would like to point out a principle of law that the prosecution has to prove a case beyond a reasonable doubt; see the case of **Gabriel Simon Mnyele vs Republic, Criminal Appeal No. 437 of 2007 (C.A.T.) (unreported).** The general principle regarding witnesses is that every witness is entitled to credence and should be believed and their testimony accepted unless there are good causes of not believing so; see the cases of **Mohamed Said Matula v. The Republic [1995] T.L.R. 3** and **Goodluck Kyando v. R, [2006] TLR 363.** In the end, the evidence or record will determine how the case will end.

Regarding the elements of forgery, as rightly stated by Mr Derick, the same is making a false document with intent to defraud. I do not, therefore, agree with Mr Derick that it is stated that a title was forged. The title was not contested. What is contested are the names and signatures on the documents, which were tendered to purport to be those of PW2, which was not the case, and the same obtained the loan from the Bank. The title was used as collateral to get the loan. I, therefore,

agree with Mr Masua that authorship does not end at preparations but instead the signing of the document; in this case, the Appellant did sign the loan agreement and received money from the Bank. In forged names and signatures, the victim is often the person whose name and signature have been falsified without his knowledge, and in this case, PW2.

In forgery, therefore, one may say that the focus is always on the person who engaged in the deceptive or fraudulent conduct, whether it involves creating, altering or using the documents. PW3 testified that he prepared the documents for authorised signatories to sign. PW5 testified to having the Appellant sign the documents. PW1 stated that PW2 was not involved in signing the loan documents.

Concerning the second element that the document was false, it was proved that the signatures appearing on the mortgage of the right of occupancy, Minutes of the Board of Directors's meeting, landform No. 40 of the mortgage of the right of occupancy and corporate guarantee purported to be one Said Nasoro Said (PW2) and his signature were forged. The Appellant herein knew that the fact was false; see the case of **Director of Public Prosecutions vs Weng Tak Fung (Criminal Appeal 271 of 2018) [2019] TZHC 57 (9 October 2019).** I, as well, tend to agree with the trial court's findings that he presented the

documents to the Bank to secure a loan while knowing that PW2, his co-director in Mikocheni Shopping Mall, has not consented to the use of their Certificate of Title as a loan security for Jamaa Fast Food Co. Ltd.

The last element in forgery is the intention to defraud. The term defraud was defined by this Court in **Jones Ndunguru V Republic [1984] TZHC 20,** where the Court quoted with approval the decision of BUCKLEY, J in **Re London and Globe Finance Corporation, [1903] 1 Ch. 728.**

> *"To deceive is, I apprehend,* ***to induce a man to believe that a thing is true which is false*** *and which the person practising the deceit knows or believes to be false.* ***To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury.*** *More tersely, it may be put* ***that to deceive is by falsehood to induce a state of mind;*** *to defraud is by* ***deceit to induce a course of action."***

The ultimate goal of deceiving or defrauding is gaining something at the end of the day. In the case at hand, the Appellant obtained the loan in the name of Jamaa Fast Food Co. Ltd while knowing that PW2 neither signed nor consented to the application of the Certificate of Title No. 18152, the property of Mikocheni Shopping Mall to be used as a

security for securing the said loan from Equity Bank. Therefore, the case **D.P.P. vs Hanna Pondo (supra)** referred by Mr. Derick is distinguishable from the circumstances of the present case. In the former, the accused had no information on the existence of the documents she was accused to have been forged. In the present case, the Appellant knew that the documents he endorsed and submitted to the Bank for the loan application contained false information and did not contain the signature of PW2, his Co-Director in Mikocheni Shopping Mall Co. Ltd.

In the second ground of appeal, it was the Appellant's contention that there was no evidence adduced in the account that he applied for the loan. Mr Derick believed that Jamaa Fast Food Company Ltd obtained the loan and not the Appellant. Mr Masua, on the other hand, was of a different opinion when he stated that as the Director of the Jamaa Fast Food Company, the Appellant could not escape liability in criminal doings.

I agree with Mr. Dereck that Jamaa Fast Food Company Limited's liability separates a company from its owners or shareholders. However, Mr. Derick should know better that there are cases where the Court may decide to pierce the corporate veil, thereby holding the shareholders or directors personally liable for the company's actions. In an old case of **H L Boulton (Engineering) Co. Ltd v. T J Graham and Sons Ltd**

1915] AC 713, the theory of the corporate veil was explained by stating that,

> *"A company, in many ways, may be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are* ***directors and managers*** *who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."* [Emphasis supplied]

The company veil is, therefore, uplifted if a company is involved in fraudulent activities or is used for illegal purposes; the Court may lift the corporate veil to expose those responsible. In the case at hand, Jamaa Fast Food Company borrowed. However, the collateral used to access the said loan is the Certificate of Title No. 18152 of the property of Mikocheni Shopping Mall, which was in possession of the Appellant. The Appellant and PW2 are Directors in the Mikocheni Shopping Mall, while the Appellant is the Director of Jamaa Fast Food Company. The Appellant used the said

Certificate of Title belonging to Mikocheni Shopping Mall without the co-owner's consent to secure the loan from the Bank. The same could not have been used if he did not release it.

PW5 banker testified that the Certificate of title was brought to the Bank as security for the loan by the Appellant. PW5 further testified that the Appellant brought a resolution of Directors, which showed that the Directors consented to the particular Certificate of Title to be offered as security for the loan. However, he confirmed that he never saw PW2. According to the evidence on record by PW1, PW3, PW4, PW5 and PW9, the Appellant endorsed their signatures on the document to authorise a loan from the Bank. By signing the same, the Appellant indicated that he affirmed its contents, signifying his intent to be bound by the terms of the documents. PW8, from BRELA, confirmed that company decisions cannot be made without directors. Therefore, whatever the Appellant did without the consent of a fellow Director and obtained a loan there from purporting to indicate that the other Director consented, that amounted to forgery.

In short, the testimony by PW1-handwriting expert; PW2, the Complainant; PW3- an Advocate who prepared loan documents for signing by the respective directors PW4, a legal officer of Equity Bank; PW5, the then loans Manager at Equity Bank; PW9, the investigator, all

point fingers to the Appellant that he was the one who sent the documents to the Bank, signed and obtained a loan for Jamaa Fast Food Co. Ltd. Hence, this ground fails because the Appellant knew that his fellow Director did not know what he was doing with the Certificate of title. It was, therefore, justifiable for the trial court to hold the Appellant liable for forgery. This ground of appeal is dismissed.

On the fourth ground of appeal, the Appellant was convicted for relying on this Certificate of Title (Mikocheni Shopping Mall title deed), while the said Certificate of Title was not among the alleged forged documents. What I see in the proceedings and judgment being repeated repeatedly is that the title was used as collateral; what was forged were the documents accompanying it towards obtaining the loan from the Bank. On page 5 of the judgment, we see the trial magistrate framing issues to be determined. One of them was:

> "*whether the accused person with intent to deceive or defraud forged the names and signature of one Said Nasoro Said on the alleged documents, namely:* ***Mortgage of Right of Occupancy, 2014, Minutes of the Board of Directors, Land Form No. 40 of***

Mortgage of Right of Occupancy and Corporate Guarantee" [Emphasis supplied]

Therefore, to my understanding, what was being referred to on page 7 of the judgment was the documents stipulated on page 5. To me, that is a slip of the pen, which did not prejudice the Appellant. After all, throughout the proceedings, it was known that the documents being referred to as were forged included Mortgage of Right of Occupancy, 2014, Minutes of the Board of Directors, Land Form No. 40 of Mortgage of Right of Occupancy and Corporate Guarantee. At the end of the page, the trial magistrate commented that,

> *"it is clear that the accused who submitted the relevant documents to the bank, unfortunately he, says nothing about the genuineness of the same."*

This implies that the Appellant was not convicted solely on the one document with which the counsel for the Appellant wants to move this Court.

Moreover, on the issue of the Court comparing signatures and handwriting in proving forgery, Mr. Derick should be able to know better. According to the Evidence Act, there are three modes of proving forgery as provided for under sections 47, 49 and 75 of the Evidence Act. The

same was further expounded and emphasised in the case of **Mukhusin s/o Kombo vs Republic (supra)** while referring to the case of **D.P.P. vs Shida Manyama @ Selemani Mabuba, Criminal Appeal No. 285 of 2012 (Unreported)**. The Court of Appeal stated that:

> *"Generally, handwriting or signatures may be proved on admission by the writer or by the evidence of a witness or witnesses in whose presence the document was written or signed. This is what can be conveniently called direct evidence which offers the best means of proof. With such evidence, the prosecution need not waste its resources on the other methods. Often, such direct evidence has not always been readily available. To fill in the lacuna, the Evidence Act provides three additional types of evidence or modes of proof. These are* ***opinions of handwriting experts*** *(s. 47) and* ***evidence of persons who are familiar with the writing of a person who is said to have written a particular writing*** *(s. 49).* ***The third mode of proof under section 75 which is unfortunately, rarely employed these days, is comparison by the Court with a writing made in the***

presence of the Court or admitted or proved to be the writing or signature of the person." [Emphasis supplied]

I find nothing to fault the trial magistrate's findings from the preceding. Therefore, this ground lacks merits and is dismissed.

Regarding the question of sentencing, the same is guided by the provisions of the law. As rightly stated by the parties herein, section 25 of the Penal Code deals with types of sentences in the penal Code and other sentences recognised under certain laws. Section 25 of the Penal Code provides that:

"25. The following punishments may be inflicted by a court-

(a) death;

(b) imprisonment;

(c) corporal punishment;

(d) fine;

(e) forfeiture;

(f) payment of compensation;

(g) finding security to keep the peace and be of good behaviour or to come up for judgment;

(h) any other punishment provided by this Code or by any other law."

Section 337 of the Penal Code provides for seven years imprisonment as the punishment for forgery. The same provides that-

> *"337. Any person who forges any document is guilty of an offence and liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided,* ***to imprisonment for seven years.*** *"* [Emphasis supplied]

In the appeal at hand, the Appellant was sentenced to serve 18 months of community service as far as the Criminal Procedure Act is concerned. The question is whether the same was tenable in the nature and circumstances of the case. Before deliberating on that, it is better to look at the provisions of section 339A of the Criminal Procedure Act, under which the sentence was passed. Section 339A provides:

> *"339A.-(1) In case in which a person is convicted before any court of any offence not punishable with death either on its own motion, or application by the offender or any other competent authority, it appears to the Court before which he is convicted that, having regard to the youth, character, antecedents, or health condition of the offender or to the trivial nature of the offence, or to any extenuating circumstances under which the*

offence was committed, ***it is expedient to release the offender on community service under the Community Service Act,*** *the Court may instead of committing the offender to prison,* ***direct that he be released to community service on his entering into a bond,*** *with or without sureties, and* ***for a period to be specified by the Court in the community service order."*** [Emphasis supplied]

To my understanding, there are two aspects to be considered by the trial court before releasing the offender to community service. **First,** the Court has to determine under the Community Service Act. **Two,** the accused is released on community after entering into a bond. However, the two limbs have to consider the conditions set under section 3 of the Community Service Act, which provides that:

"3(1) where any person is convicted of an offence punishable by–

(a) Imprisonment for a term ***not exceeding three years,*** *with or without the option of a fine; or*

(b) imprisonment for a term exceeding ***three years but for which the Court determines a term of imprisonment for three years or less,*** *with or without the option of a fine, to be appropriate,*

the Court may, subject to this Act, make a community service order requiring the offender to perform community service." [Emphasis supplied]

Therefore, for one to be released to community service, he ought to have been convicted for an offence punishable by imprisonment for a term not exceeding three years or imprisonment for a term exceeding three years but for which the Court determines a term of imprisonment for three years or less.

Subsections (4), (5), and (6) of section 3 of the same Act provide steps to be taken by the Court before making an order to community service. *The same provides:*

"3(4) Where a court determines that a community service order should be made, it may, before making the order, ***direct a community service officer to conduct an inquiry into the circumstances of the case and of the offender and report the findings to the Court.***

(5) An inquiry under subsection (4) shall be conducted in such manner and the report shall be in such form and cover such matters as may be prescribed.

(6) A court shall not make an order under this section in respect of an offender ***unless the offender is present and the Court*** *is satisfied–*

(a) ***that the offender consents to the order being made;***

(b) that ***adequate arrangements exist*** *for the execution of the order and*

(c) after considering the report made under subsection (4) and, where necessary, ***after hearing the community service officer, that the offender is a suitable person to perform community service under the order"*** [Emphasis supplied]

In addition to the provisions of section 3(1),(2),(3),(4), (5) and (6) of the Community Service Act, the Community Service Regulations, 2004 provides for duties and roles of all officers in the process of community service sentence. Regulation 18 of the same offers obligations for Magistrates in the process as follows:

"18(1) the obligation of the Magistrate shall include the following:

(a) ***To hear the offender before making a community service order;***

(b) ***To hear the community service officer on the pre-sentence report;***

(c) To explain to the offender before making the order his obligations under a community service;

(d) To make a community service order based on suitability of the offender and the proposed public work;

(e) to appoint the supervision officer:

(f) to supply a copy of the community service order to the community service officer and to the offender;

(g) to deal with breach of community service orders;

(h) to deal with review and variation of community service order applications and make appropriate orders;

(i) *to deal with any person who wilfully interferes with the administration of the community programme or who contravenes the provisions of the law on community service."*

This Court managed to peep into the trial court records to see whether the procedure stipulated above was adhered to. When the case was heard on 20 June 2023, the trial court ordered that the social welfare officer bring an inquiry report with respect to the accused. The judgment was read on 28 June 2023, the Appellant was convicted, and a sentence was pronounced on 30 June 2023.

Looking at the trial court records proceedings, one could expect that after the Appellant was convicted, the Court could, therefore, determine that a community service order should be made. The same, however, has to be made after hearing the social welfare officer and the accused as per section 3(6) of the Community Service Act, Cap 291 and Regulation 18 of the Community Service Regulations, 2004. It is my opinion that the hearing that is meant by the provisions of this section and its Regulations require all involved parties to the case to be present and the proceedings to be reflected in the records of the court.

In the case at hand, apart from ordering the social welfare officer to bring an inquiry report, we see nowhere in court records that the report obtained by the social welfare officer was considered in terms of section 3(6) of the Community Service Act and that the Court heard the same.

Moreover, there are no records that section 3(9) of the said Act was adhered to. The section provides that:

> *"3(9) Before making an order under this section, the court sentencing an offender shall explain to the offender in a language that he understands–*
>
> *(a) the purpose and effect of the order and, in* ***particular, his obligations under section 4;***
>
> *(b)* ***the consequences specified in section 5 for failure to comply with the order or with any of the requirements of that section****, and*
>
> *(c) the powers of the Court under section 6 to review the order on application either by the offender or of a community service officer."* [Emphasis supplied]

The impression I get from the case at hand is that the procedures stipulated under the Community Service Act were not followed when the Appellant was sentenced to serve a community service sentence under section 339A. Worse enough, the order to serve a community service sentence was not dated. If all the procedures were strictly adhered to the letter, and the appellant informed accordingly, the chances for his

dissatisfaction could be negligible, bearing in mind that his prayer for a community service sentence was granted by the trial court when his mitigation was considered.

Similarly, when considering section 339A of the Criminal Procedure Act, one may be sentenced to serve a community service sentence. Criteria for ordering a community service sentence are that the offence should not be punishable by death, age (youth), character, antecedents, or health condition of the offender. The said criteria are, however, subject to the conditions under the provisions of the Community Service Act.

The prescribed offences are those whose punishment does not exceed three years imprisonment or those exceeding three years but for which the Court determines a term of imprisonment for three years or less. The offence for which the Appellant was convicted has a term of imprisonment of seven years. Section 3(1) (b) of the Community Service Act could have been applied if the procedure set under the same were applied correctly, which was not the case.

In the circumstances, therefore, it is my opinion that the trial magistrate did not exercise his discretion judiciously. He did not adhere to the principles of applying section 339A of the Criminal Procedure Act. Judicial discretion was well defined in the case of **Mwita Mhere and**

Ibrahim Mhere v. The Republic [2005] TLR 107, which was referred by the Court of Appeal in the case of **Masamba Musiba @ Musiba Masai Masamba vs Republic** (supra) thus:

> *"Judicial discretion is the exercise of judgment by a judge or court* ***based on what is fair under the circumstances*** *and* ***guided by the rules and principles of law;*** *the court has to demonstrate, however briefly, how* ***that discretion has been exercised to reach the decision it takes."***
>
> [Emphasis supplied]

Looking at the seriousness of the offence, I am mindful of the decision in the case of **John Mbua vs The Republic Criminal Appeal No. 257 of 2006 (Unreported)** that as the appellate Court, I should not interfere with the Magistrate's discretion to sentence unless the same acted on the wrong principle, as in the appeal at hand. It was stated in the said case that:

> *"It has been emphasised by this Court in numerous cases that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate as to sentence except in such cases where it appears that in assessing the sentence the judge or magistrate has acted upon some wrong principle, or*

has imposed a sentence which is either patently inadequate or manifestly excessive."

In the present case, however, the trial magistrate acted upon a wrong principle while applying section 339A in a community service sentence, knowing that the same was manifestly inadequate for the offence of forgery.

Therefore, considering the circumstances of the case, the Appellant's mitigating factors and taking into account that he is a first offender, and in terms of section 366(1)(b) of the Criminal Procedure Act Cap 20 R.E.2022], I set aside the sentence of 18 months community service and substitute thereof with a sentence of three (3) years imprisonment to be reckoned from the date of conviction. Consequently, uphold the conviction and dismiss the appeal by one John Alfred Kyenkungu.

G.V. MWAKAPEJE
JUDGE
23/11/2023

Right to appeal explained

Judgment is delivered in Court this 23 day of November 2023 in the presence of Mr. Clement Masua, learned State Attorney for the Republic and Mr. Derick Kahigi, Advocate for the Appellant and Appellant himself.

G.V. MWAKAPEJE
JUDGE
23/11/2023