

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

Criminal Revision No. 40385 of 2023

*(Original Criminal Case No. 194 of 2022 before the Resident Magistrate Court of
Kivukoni at Kinondoni)*

MAYUNGA RAMADHAN @ MADALALI THE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last order: 13/05/2024

Date of judgment: 20/05/2024

JUDGMENT

NGUNYALE, J.

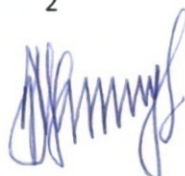
Before I move further, I wish to note the concern in the court registry; the appellant filed his petition of appeal or documents of appeal online, the same was registered as Criminal Revision instead of Criminal Appeal per documents filed. It seems the filing officer filed as a criminal revision instead of a criminal appeal. Unfortunately, the admitting officer of the court registry could not scrutinize the documents as a result the matter was admitted with a wrong case sub title. He had an option to return the documents but that oversight passed unnoticed. At the end of the day, it



remains as the fault of the court which had chance to direct alteration. The mistake is already in place, what is a proper way forward? In my view, I find that there is no harm to proceed with the determination of the matter as an appeal per the documents filed though it appears in the case management system with a wrong case sub title.

The appellant and PW1 Abdallah Segna Madalali (53) are blood brothers born from the same family. It was alleged by the prosecution that on 17th day of May 2021 the appellant sold a piece of land belonging to the family in a sale agreement dated 17th May 2021 purporting to be the owner of the plot. In the sale agreement he used the name and signature of PW1 contending to be the witness of the alleged sale. PW1 reported the incident to police, the appellant was arrested and arraigned before the court with the offence of forgery contrary to Section 333, 335 (a) and 337 of the **Penal Code** Cap 16 R. E 2019.

It was further alleged that the appellant on 17th day of May 2021 at Mbezi Msakuzi area within Ubungo District in Dar es Salaam Region, with intent to defraud or deceive did make contract for disposition of a right of occupancy dated 17th day of May 2021 purporting to show that it has been signed by one Abdallah Segwa Madallali as a vendor's witness the fact which he knew to be false.

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Upon conclusion of the trial, the trial court was satisfied that the offence was proved against the appellant beyond all reasonable doubt the standard required in criminal cases. The appellant was convicted as charged and sentenced to serve three years imprisonment per judgment dated 17th November 2023. The appellant was seriously aggrieved with the decision of the trial court, he preferred the present appeal premising six grounds of appeal. The grounds of appeal are; -

1. *That Hon trial Magistrate erred in law and in fact in convicting the appellant summarily without analyzing and evaluating testimony of all prosecution witnesses;*
2. *That Honourable trial Magistrate misdirected himself in convicting the appellant as charged without finding as to whether the charge was proved beyond reasonable doubt;*
3. *That Honourable trial Magistrate seriously erred in law and in fact in convicting appellant at time of making a ruling on application for disqualification without giving appellant last benefit of doubt to defend himself;*
4. *That the Honourable trial Magistrate misdirected himself in not ruling that summary conviction of appellant who is unrepresented lay man was against doctrine of fair trial, natural justice and due process of law.*
5. *That the trial Magistrate erred in law in not finding that the matter for which appellant was charged was of administrative and civil nature recourse out to have been commenced in civil trial and criminal ought to have been a matter of last resort;*



6. *That trial Magistrate seriously erred in law in imposing on appellant order of compensation in absence of a cogent and uncontroverted evidence appellant owed/complainant that amount;*

The appeal was heard by oral submission on 13th day of May 2024 where by the appellant was represented by Mr. Joseph Assenga learned Counsel and the respondent Republic was represented by Mr. Adolf Kisima learned State Attorney.

The 1st and 2nd grounds of appeal which are centered on the complaint that the offence was not proved beyond reasonable doubt. The appellant's Counsel argued the two grounds of appeal together. He submitted that the material witnesses were not called to testify before the trial court the fact which enable the court to draw inference against the prosecution side. PW1 said that he received a call from his sister but his sister was never called to testify as a witness, also it was in evidence that the farm was under the administrator of estate one Mrisho Mwanawande who also was not called to testify. It was the view of the appellant's Counsel that failure to call the mentioned witnesses was fatal, the fact that it was a fatal irregularity means the offence was not proved beyond all reasonable doubt.

The complaint on the third ground of appeal, the appellant complained



that the trial court did not rule upon his prayer against the trial Magistrate to self-disqualify himself. Non disqualification was inconsistency with the doctrine of fair trial in criminal justice. On the fourth ground of appeal, he complained that conviction was entered while he was denied a right to be heard. The court did not give him a right to be heard through defense hearing. The fifth ground of appeal, the appellant Counsel briefly stated that the circumstance of the matter suggest that the matter was purely of civil nature other than a criminal wrong. In the last ground of appeal, he complained that the order of compensation was not proper. He prayed the court to quash conviction and set aside sentence.

From the outset the respondent attorney resisted the appeal on ground that the offence was proved beyond all reasonable doubt. The prosecution proved how the appellant sold the family farm at a price of 45,000,000/= per the testimony of PW1 and PW2. The money was deposited in the account of the appellant. PW3 established that the sample signature from the appellant resembled to that in the agreement. On the complaint that material witnesses were not brought the State Attorney said that selection of witnesses is within the ambit of the prosecution side and Section 143 of Evidence Act is open that there is no specific number of witnesses for proving a specific fact. On the complaint that the Magistrate could not



disqualify himself the State Attorney submitted that there was no good cause for the Magistrate to do so. The Magistrate stated clearly in the ruling why he proceeded with hearing the case. About nature of the case, the State Attorney insisted that the case is purely criminal in nature per Section 333 **Criminal Procedure Act** which means the appellant made a false document with intend to deceive. All elements of forgery were proved. The disputed document was made by the appellant, it was a false document and it was forged by the appellant. The complaint that he was not availed a right to be heard, the learned State Attorney submitted that the same is wrong. The appellant was given enough time for his defense but he could not use such right, he cannot complain that he was denied a right to be heard in a circumstance where he had such chance which he waived.

In rejoinder, the appellant Counsel said that no witness witnessed the appellant committing the offence of forgery and the proceeds of sale were not held in the appellant account.

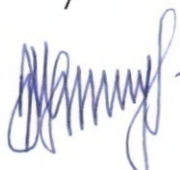
Having heard the parties, I proceed to answer the appeal guided by law and practice giving weight to evidence adduced during trial. It is a settled principle of law that the criminal charge should be proved to the required standard. The standard is beyond all reasonable doubt. In the case of



Kilamei Ramadhani vs. Republic, Criminal Appeal No. 2004 this court sitting at Dar es Salaam held inter-alia that, the standard of proof is beyond reasonable doubt, and if there is any doubt then the case must be resolved in favour of the appellant, on that it is not required that the appellant should prove his innocence.

In the instant case the court is going to weigh out the evidence on record in order to be satisfied as to whether the offence was proved beyond reasonable doubt. The same will be sufficiently established by considering the ingredients of the offence of forgery. I will reevaluate the evidence before the trial court to find out if at all the ingredients of forgery were proved to the required standard. The case of **DPP versus Shida manyama @ Seleman Mabuba**, Criminal Appeal No. 285 of 2012 is very elaborate on the ingredients of forgery discerned from the provisions establishing the offence; the court firmly stated that in order to prove the offence of forgery the prosecution should establish that the appellant authored the document; that the respective document is false and that he authored or forged it for the intention of defrauding or deceiving.

Therefore, for the offence of forgery to be proved to the satisfaction of the law, the prosecution side is duty bound to prove that **one**, the disputed signature and names in the agreement were authored by the

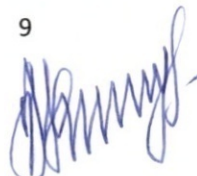


appellant **two**, the agreement was a false document and **three**, the appellant had forged the disputed agreement with intend to defraud or deceive. Answering the 1st issue is simple, according to the evidence on record the appellant sold the suit farm to the purchaser on 17th May 2021 at a price of 45,000,000/= . That fact is proved by the testimony of PW1 who received first-hand information that his relative (the appellant) had sold that piece of land and PW2 who witnessed part of the final process towards sell of the disputed land. PW2 testified that the appellant told him that he has been instructed by his relatives to sale a piece of their land located at Mbezi Msakuzi. He sold the same to Leons Ng'eresha. PW2 demanded the accused to bring the minutes proving that his relatives had consented to that sale. On 17th May 2021 the accused went there with a young man by the name of Abdallah alleged that he was his relative. The appellant and the buyer concluded the sale and agreed on mode of payment of such purchase price. They agree that, the money will be paid through the account of the appellant. The evidence of PW1 and PW2 makes the court to believe that the appellant is the one who authored the agreement containing the alleged forged signature.

The second issue is whether the document was a false document or not. The appellant Counsel submitted that the offence was not proved beyond



all reasonable doubt because the material witnesses were not called. He said that the sister of the accused who had told PW1 that their land has been sold unlawful by the appellant was not called to testify in court and the administrator of the deceased estate was not called to testify in favor of the prosecution side. The prosecution dismissed the argument of the appellants' Counsel relying on two premised of argument. One there is no required number of witnesses necessary to prove a specific fact during trial because the prosecution side has discretion to choose witnesses for proving their case two, the document was false document. It is my considered view that the prosecution evidence is wanting for the court to be satisfied that the said document is a false document. PW1 testified that the appellant on 17th May 2021 sold the family farm which is under administration of estate by the administrator one Mrisho Mwanawande Madalali. PW2 in his testimony said that he inquired the appellant to provide him with minutes or consent of his relatives to sell the suit land. In his further evidence he could not prove as to whether such consent was obtained or not. The appellant Counsel submitted that the fact that the administrator was not called as a witness it was a fatal problem. I think the prosecution case fall short in proving whether the document was a false document or not. There is no evidence which prove that the appellant had no right to sell the disputed land. The present evidence is



wanting on that fact. If one says the appellant was selling his own plot, how can it be refuted in absence of the evidence of the administrator who has legal mandate over the deceased estate. The testimony of PW2 that the said land was the family property is hearsay evidence which is inadmissible. The testimony of PW3 that the farm is under the administrator ought to be proved by the testimony of the administrator or the letters of administration of estate. In that circumstance I decline to rule that the sale agreement was a false document as submitted by the learned State Attorney as the prosecution failed to call the administrator to prove that the farm is under his administration and there were no reasons adduced as to why the administrator of the estate was not called. This position was well enunciated in the case of **Azizz Abdalah versus Republic** [1991] TLR 71 where it was held:

"The general and well-known rules are that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

The last issue is whether the respondent had forged the disputed agreement with intend to defraud or deceive. The fact that the document



is not a false document automatically the third issue cannot be established. The intention of the appellant whether he had a guilty intention or not has not been proved in evidence. The evidence of the administrator would have assisted the court to determine whether the suit land was the property of the appellant or the deceased estate under the administration of the appointed administrator. Having said and done, I am settled in my mind that the offence was not proved beyond all reasonable doubt. The testimony or expert opinion of PW3 attempts to establish that the disputed signature resembles to that of the appellant. But such evidence does not prove that the appellant had no justification to sell the disputed plot. The evidence of the prosecution did run short of proving the ingredients of the offence of forgery. The prosecution evidence through PW2 tells the court that there was another person by the name of Abdallah during sell, there is no further evidence which establish his role during the process of sale. Even samples of his signatures were not taken to the expert of handwriting in order to establish without doubt that the appellant was the only person with an opportunity to sign the document as a vendor and a witness and nobody else.

The testimony of PW1 was to the effect that his name and signature were forged by the appellant on 21st May 2021 in Dar when he was in Mwanza.

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The argument that the signature and name were forged was corroborated by PW2 the local leader at the place where the sale agreement was done.

My interest goes to the testimony of PW2. In his testimony he said; -

"So on such date on 17/05/2021 came with a young man introduced by Abdallah. He said that he had forgotten his passport size at home. He didn't had ID.

The accused and the buyer agreed will deposit the agreed price to the accused account and on the same date Abdallah will handle his ID to the buyer..... I told them that I saw Abdallah on that day. Mbuga said Abdallah Madalali was not in Dar es Salaam at that time."

In their submission the appellants submitted that no witness testified to have seen the appellant committing the offence of forgery the argument which was considered by the State Attorney as an afterthought. There is no further evidence which elaborate the role of the young man by the name of Abdallah. It means the appellant and the said Abdallah had an opportunity to witness the sale agreement by signing. Such opportunity is a big doubt to the prosecution case. The circumstance is doubtful if the accused or the said Abdallah forged the documents with intention to deceit or defraud. In that view the offence was not proved to the required standard which is beyond reasonable doubt. The analysis made above gives irresistible feedback that the 1st and 2nd grounds of appeal are merited in favor of the appellant. I subscribe to the submission of the

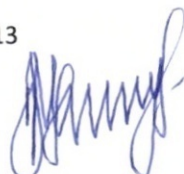


appellant Counsel that the offence was not proved beyond all reasonable doubt.

In the third ground of appeal the appellant submitted that; the trial court did not rule upon his prayer against the trial Magistrate to self-disqualify himself which was inconsistency with the doctrine of fair trial. This argument was strongly contested by the respondent attorney. He submitted that the magistrate was satisfied that there was no good cause suggesting disqualification of a Magistrate. In the records the appellant wrote a letter to the trial Magistrate on 18th September 2023 seeking the Magistrate to disqualify himself from presiding over his case for reason that he was denying him enough time for defense. He was not availed enough time for his defense case like the time availed to the prosecution side. The Magistrate on the same day pronounced ruling refusing to disqualify from handling the case because there was no sufficient reason supporting the prayer of recusal from presiding over the case. The ruling stated in part; -

"... The reason stated by the accused does not carry substance. The matter was fixed for defence on 16/08/2023, the accused did not call any witness. On 16/8/2023 the accused was absent; he sent a letter of notice of absence and the matter was adjourned to 30/8/2023.

On 30/8/2023 accused person didn't appear and no any reason was



given for his non-appearance, hence the matter was adjourned to 5/09/2023.

On 5/9/2023 accused appeared. He was not ready for defence. He prayed for adjournment on the reason that has engaged an advocate who on such date was appearing at the High Court. The court adjourned the matter to today where accused had no such advocate. He came with a new story praying me to step down handling this case. The accused's reason has no substance..."

The above situation establish that the trial Magistrate was very lenient for the appellant to testify in his defense case but the accused person did not use it. The complaint that the trial court did not adhere to rules of fair trial has no merit because the appellant had enough time for his defense but he never used it. The accused person was availed enough time for him to exercise his right to be heard, but he abstained from using such right. In the circumstance he cannot be heard to complain that he was denied a right to be heard. I am aware that the right to be heard is fundamental, once it is denied vitiates proceedings. In the present case there is no evidence suggesting that the appellant was denied such right. Instead, he is the one who waived his right to be heard unnecessarily without good cause. Therefore the 4th and 5th grounds of appeal have no merit. They are worth of being dismissed for want of merit.


The last ground of appeal is about the order of compensation, I find no



reason to labour much on it because the court has already formed a settled opinion that the offence was not proved beyond all reasonable doubt. Essentially, the court ordered the appellant to refund his siblings the remaining amount of Tshs. 5,000,000/= because the other proceeds of sale he had deposited to the family account after they detected such sale. At this stage, the appropriate order will be pronounced shortly.

Consequently, the court has been satisfied that the offence of forgery contrary to Section 333, 335 (a) and 337 of the **Penal Code** Cap 16 R. E 2019 was not proved beyond all reasonable doubt the standard required in criminal justice. Conviction is hereby quashed, sentence and orders set aside. I order immediate release of the appellant **MAYUNGA RAMADHAN @ MADALLAL** unless lawful held with another good cause. Order accordingly.

Dated at Dar es Salam this 20th day of May 2024.


D. P. Ngunyale

Judge

Judgement delivered this 20th day of May 2024 in presence of the appellant in person and Mr. Adolf Kisima learned State Attorney for the respondent.



D. P. Ngunyale

Judge

