IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 38789 OF 2023

(Arising from Criminal Case No. 346 of 2020 in the District Court of Kinondoni at Kinondoni (Hon. H.S. Msongo, PRM) dated 5th October 2023)

MELCHIORY S/O BLASIUS KAMATA.....1ST APPELLANT

AGNESS D/O BLASIUS KAMATA.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of last order: 23rd January 2024
Date of Judgement: 8th February 2024

MTEMBWA, J.:

In the District Court of Kinondoni, the Appellants were jointly charged with the offence of Forgery contrary to sections 333, 335 (d) (1) and 337 of **the Penal Code Cap 16 RE 2002 (now RE 2022)** in the first count. The 2nd Appellant was in addition, separately, charged with the offence of uttering false documents contrary to

sections 342 and 337 of **the Penal Code (supra)** in the second count.

In the first count, it was alleged that, the Appellants, on diverse dates between 1st March 2012 and 16th March 2012 within the Region and City of Dar es Salaam, with intent to defraud or deceive, forged an affidavit dated 16th March 2012 purporting to show that, one HAMIMU HAMISI HAKIRA @ MOSI being a beneficiary of the estate of the late HAMISI HAMIMU HAKIRA situated at Plot No. KDN/MKR/KHW/16/93 Kilimahewa Street, in Kinondoni Municipality, agreed and authorized the 2nd Appellant to dispose it.

In the second count, it was alleged that, the 2nd appellant, on 16th March 2012 at Magomeni Primary Court within Kinondoni District in Dar es salaam Region, knowingly and fraudulently uttered to SOPHIA D/O KAPTEINI MWAIPOPO, a primary Court Magistrate (as she then was) a false document to wit; affidavit dated 16th March 2012 purporting to show that, one HAMIMU HAMISI HAKIRA @ MOSI being a beneficiary of the estate of the late HAMISI HAMIMU HAKIRA situated at Plot No. KDN/MKR/KHW/16/93 Kilimahewa Street, in Kinondoni Municipality, agreed and authorized the 2nd Appellant to dispose it.

The Appellants pleaded not guilty to the offences charged. Consequently, prosecution paraded five (5) witnesses and tendered five (5) exhibits. The Appellants testified themselves and tendered a number of documents admitted and marked as exhibit D1 collectively. Having evaluated the evidence adduced during hearing, the trial court convicted the 1st Appellant in the first count and was sentenced to serve three years imprisonment. The 2nd Appellant was not found guilty in the first count. She was in the second count convicted and sentenced to serve two years under ***Community Service Act, Act No. 6 of 2002.***

Dissatisfied, the Appellants have filed before this Court a Petition of Appeal with the following grounds;

1. *That the learned trial Magistrate totally erred in law and in fact for her failure to draw adverse inference against the prosecution for their failure to call witnesses especially one Hon. Sophia K. Mwaipopo who attested the alleged forged Affidavit which was the subject matter of charges.*
2. *That, the learned trial Magistrate grossly erred in law and fact for her failure to find that the charge remained unproved on the ground that there was clear variance between the charge and evidence adduced during the trial.*
3. *That, the learned trial Magistrate grossly erred In law and fact for her failure to find that there were clear contradictions in evidence which go to the root of the charge.*

4. *That, the learned trial Magistrate totally erred in law and fact for her failure to find that the prosecution witnesses totally failed to prove the ownership of the property, the subject matter of the charge, as indicated in the particulars of the offence.*
5. *That, the learned trial Magistrate erred in law and fact for convicting and sentencing the Appellants by relying squarely on expert evidence of handwriting.*
6. *That, the learned trial Magistrate erred in law and fact for her failure to properly examine, analyze and evaluate entire evidence adduced during the trial and finally she reached at a wrong conclusion.*
7. *That, the learned trial Magistrate erred in law and fact to convict and sentence the Appellants based on the weakness of their evidences.*
8. *That, the learned trial Magistrate erred in law for introducing extraneous matters in the Judgement which were not testified by the witnesses during the trial.*
9. *That, the learned trial Magistrate erred in law and fact to convict and sentence the Appellants while the Prosecution totally failed to prove the charges beyond the required standard of proof, that is beyond reasonable doubt.*
10. *That, the learned trial Magistrate grossly erred in law and fact for imposing heavier punishment to the Appellants without taking into account the circumstances of the forgery and mitigating factors.*

During hearing of this appeal, the Appellants were represented by **Mr. Nafikile Mwamboma**, the learned counsel and the Republic was represented by **Ms. Salome Matunga**, the learned State Attorney. Hearing proceeded orally.

When the matter was called up for hearing, Mr. Mwamboma abandoned the 4th ground of appeal. On the other hands, he prayed for leave to add one more ground of appeal. On her part, Ms. Salome did not object. Consequently, by leave of this Court, I allowed the appellants to add one more ground of appeal.

Taking up the podium, Mr. Mwamboma submitted that the gist of the accusations before the trial court concerned an Affidavit that was said to have been forged and falsely uttered before Hon. Mwaipopo, the learned primary Court Magistrate of Magomeni Primary Court. He then proceeded to argue the grounds of appeal.

Arguing on the 1st ground of appeal Mr. Mwamboma complained that the learned trial Magistrate totally erred in law and in fact for her failure to draw adverse inference against the prosecution for their failure to call witnesses especially one Hon. Sophia K. Mwaipopo who attested the alleged forged Affidavit which was the subject matter of charges. He added further that there were no reasons advanced for such failure. That in view of ***section 62 of the Evidence Act***, the Honourable Magistrate had direct evidence. As such, the trial Court was supposed to draw an adverse inference for such failure, he added.

Mr. Mwamboma added further that under ***section 143 of the Evidence Act,*** the Republic has discretion to decide as to who should be called as witness. But if the witness is material, mandatorily, the Republic is supposed to call such witness. He submitted further that, in such circumstances, it could appear, the Republic did not want the truth to be divulged because, the said witness was within the reach of the Republic. He cited the cases of ***Maneno Matibwa Francis @ Babio v. Republic, Criminal appeal No. 35 of 2021 (2023) TZCA Tanzlii, Swed Ismail Msangi V. Republic, (Criminal Appeal No. 572 of 2019) (2023) TZCA 129 Tanzlii, Luthgnasia Simon Mush V. Republic (Criminal Appeal No. 209 of 2012) TZCA 17531 Tanzlii*** and ***Haika Chesam Mgao V. Republic (Criminal appeal No. 37 of 2021) (2024) TZCA 6 Tanzlii.***

On the 2nd ground of appeal, Mr. Mwamboma complained on the variance between the Charge and the evidence. He cited case of **Francis Fabian @ Emmanuel Vs. Republic (Criminal Appeal No. 261 of 2012) (2023) TZCA 17936 Tanzlii** where it was observed that the charge must, in any way, tally with the evidence adduced. It was further noted by the Court that a charge sheet is a heart, brain and blood of criminal justice and fair trial as it plays a due role of

informing the accused person on the nature of the accusations and allow him or her to prepare his proper defense. He submitted further that the charge and the evidence, in any case must tally otherwise, the offence cannot be seen to have been proved to the required standards. He cited also the case of ***Erick Mathias @ Yaulimwengu v. Republic criminal Appeal No. 245 of 2021) (2023) TZCA 17955 Tanzlii.***

In the present case therefore, Mr. Mwamboma noted that, the affidavit said to have been forged, purported to show that one HAMIMU HAMIS HAKIRA @ MOSI being the beneficiary of the estate of the late HAMIS HAMIMU HAKIRA, situated at Plot no. KND/MKR/KHW/16/93 Kilimahewa street in Kinondoni municipality agreed and authorized AGNESS B. KAMATA (2nd Appellant) to dispose for sale the said plot on his behalf. But in the affidavit that was tendered as Exhibit P2 collectively, the estate mentioned relates to HAMIMU MOHAMED HAKIRA and not HAMISI HAMIMU HAKIRA. He said, these are two different persons.

Mr. Mwamboma continued to note that, according to the testimonies of PW1 (the complainant), the concerned landed property was registered as MKR/KMH/154. PW2 (the victim) mentioned the

concerned landed property to be registered as MKR/154 while Exhibit P2 (affidavit in question) mentioned the same to be registered as Plot No. KND 028233, ARIDHI NA. KND/MKR/KHW/16/93.

On the 3rd ground of appeal, the Appellants complain that the learned trial Magistrate grossly erred in law and fact for her failure to find that there were clear contradictions warranting prosecution evidence or charge to flap. Mr. Mwambona added further that according to PW1's testimonies, the victim (PW2) is 10 years old but later on, she testified that the victim is 11 years old. That at page 34 of the proceedings, PW1 testified to the effect that the victim aged 14 years old. But the Honourable trial Court considered the victim to be of the age of 10 years. This contradiction goes to the root of the matter because the Honourable Magistrate believed that, by the age of the victim, he could not have signed the Affidavit (Exhibit P2), Mr. Mwamboma observed.

Mr. Mwamboma added further that, at pages 37 and 54 of the Proceedings, PW2 testified that the 1st and 2nd Appellants went to Morogoro for signing the Document (sale Agreement). At page 54, PW4 testified that the one went to Morogoro was the 1st Appellant and someone else known as HAWA. Mr. Mwamboma was of the views

that such contradictions, raise doubts as to the accuracy and the same should be resolved in favour of the Appellants.

Arguing on the 5th ground of appeal, Mr. Mwamboma submitted that the learned trial Magistrate erred in law and in fact for convicting and sentencing the Appellants by relying squarely on expert evidence of handwriting. He cited the case of ***Tito Makazi V. Republic (Criminal appeal No. 532 of 2017) TZCA 437 Tanzlii*** and ***Michael Mwakalula Njumba & Another V. Republic (Consolidated Criminal Appeal No. 376 of 2020 and 276 2020 (2022) TZCA 457 Tanzlii*** where it was observed that the Court is not bound by the expert evidence or opinion. That it becomes important when the opinion is on the issues which cannot be perceived by human senses. In the present case, the subject matter was an affidavit attested before the Magistrate as such, the expert opinion was not required in the circumstances. He added further that an expert should give reasons as to his conclusion but in this case, no reasons were given.

On the 6th ground of appeal, the Appellants complained that the Honourable trial Court failed to analyse properly the available evidence on records. He referred this Court to the case of ***Jackson***

Stephano @ Magesa & Another V. Republic (Criminal Appeal No. 130 of 2020 (2022) TZCA 323 Tanzlii. Mr. Mwamboma added that, looking at the Judgement, the Honourable trial Magistrate made a summary of the evidence and that he did not analyse the evidence in connection with the offences charged. That the discussion pertaining to the age of the Victim (PW2) was out of context as it was not an issue in respect to the charge. He was of the view that, although the victim (PW2) was not of the age of majority, but the affidavit in question was attested before the Honourable Magistrate.

Submitting on the 7th ground of appeal, Mr. Mwamboma submitted that the trail Magistrate convicted and sentenced the Appellants on the weakness of the defense. He added further that the trial Magistrate relied much on the fact that the appellants failed to testify as to how the victim (PW2) signed the said affidavit. To Mr. Mwamboma, that was shifting of the burden of proof. He cited the case of ***Edward Nyegela V. Republic (Criminal appeal No. 321 of 2019) (2022) TZCA 136 Tanzlii*** where it was observed that the accused is supposed to be convicted on the strength of the prosecution evidence and not on his weakness.

Arguing on the 8th ground of appeal Mr. Mwamboma submitted that the trial magistrate erred in law and in fact by introducing extraneous matters in the Jugdement. He added, example, that at page 22 of the Judgement, the trail Magistrate observed that according to PW2 and PW4 when the documents was sent to the village for signature, she refused to sign. He said, such facts cannot be traced from records. He cited the cases of ***Vallel Palutala V. Republic (Criminal Appeal No. 102 of 2019 (2023) TZCa 17701 Tanzlii*** and ***Geofrey Ntapanya & Another v. DPP (Criminal appeal No. 232 of 2029 (2022 TZCA 22 Tanzlii.*** He added that the effect of including extraneous matters is to vitiate the proceedings.

On the 9th ground of appeal, Mr. Mwamboma submitted that the Appellants were convicted in the circumstances where the matter was not proved beyond reasonable doubts. On the offense to which the 2nd Appellant was charged with, there was no elements of falsely uttering the document. That the word ***"uttering"*** means to present or produce. In the evidence, nowhere it was testified that the 2nd appellant falsely uttered the said document. The 2nd Appellant denied to have falsely uttered the document. According to Exhibit P4, the

Affidavit was uttered or prepared by the Primary court of Magomeni. The offence of uttering the document was therefore not proved to the required standards.

On the 10th ground of appeal, Mr. Mwamboma submitted that the trial court failed to consider the circumstances of forgery and mitigating factors adduced. He cited the case of ***Edina Wilson V. Republic (Criminal Appeal No. 294 of 2019) TZCA 17363 Tanzlii*** where it was observed that the accused is supposed to be considered in his mitigation even if he or she is the first offender. The 1st Appellant advanced, as mitigating point, his ill health but still, he was convicted to serve three years in prison. That was too much, Mr. Mwamboma added.

Arguing on the ground of appeal that was added by leave of this Court as aforesaid, Mr. Mwamboma submitted that there was a serious mishandling of the Affidavit in dispute, that is, Exhibit P2 collectively. He added that, it was not established by evidence how it reached the Police station. Mr. Mwamboma submitted further that the said affidavit was tendered by PW3 but then, the one who investigated the case was PW5. That even PW5 did not testify as to how the said affidavit got to his hands. He referred this Court to

pages 42, 46 and 51 of the proceedings and added that PW5 gave the said Affidavit to PW3 for examination but then, the same was remitted to the former. He was of the views that therefore no chain of custody regarding the said affidavit was established by evidence.

Mr. Mwamboma doubted the authenticity and or accuracy of the said Affidavit on the pretext that the same was tempered and or uttered by a free hand. He then referred this Court to pages 82 and 101 of the proceedings where the Appellants testified that at the time of signing the alleged affidavit before the Primary Court Magistrate, the same was affixed with pictures of the beneficiaries. But at the time of tendering it, two pictures were missing. Mr. Mwamboma cited the case of ***Mussa Ramadhan Binde & 2 Others V. Republic (criminal Appeal No. 347 of 2020 (2022) TZCA 235.***

Lastly, Mr. Mwamboma implored this Court to allow the appeal, set aside the conviction and sentences and allow the Appellants to go at large.

In reply, Ms. Matunga submitted that, there has been no proper number of witnesses to prove the offence in view of ***Section 143 of the Evidence Act***. To her, a number of witnesses is immaterial and

it is upon the prosecution to decide as who should be called to testify. She added further that, as long as the matter was proved to the required standards, it is immaterial to ask as to who was called and who was not.

The learned state attorney added further that the evidence of PW1 (complainant), PW2 (victim), PW3 (forensic expert), PW4 (the mother of the victim) and PW5 (the investigator) sufficed to prove that the appellants committed the offences to which they were charged. There was therefore no need to call another witness, she indicated. She cited the case of ***Said Ally Mkong'oto v R, Criminal Appeal No. 133 of 2009, Court of Appeal at Tanga,*** where it was observed that it was not necessary for the prosecution to call other witnesses as long as the Court was satisfied that the single witness was telling the truth. As such, she beseeched this Court find that the ground is baseless.

On the 2nd ground of appeal, Ms. Matunga submitted that it's not true that the evidence adduced on records did not tally with the Charge. She added further that PW2 testified that he never signed the affidavit in dispute consenting to the 2nd Appellant to sell the disputed House. That PW1 made a follow-up and discovered that the house in

question was sold and noted further the presence of a forged affidavit and a sale agreement. She added also that the affidavit facilitated the sale of the said landed property.

Ms. Matunga narrated further that, PW3 (forensic expert) testified that he conducted investigation of the affidavit and other documents given and discovered that the one who signed the Affidavit in the name of Hamimu Hamis Hakira was not PW2 but the 1st Appellant. That it was revealed further by the prosecution evidence that, the 1st Appellant and another woman by the name of Hawa went to PW4 in Morogoro and wanted her to sign the documents for the sale of the alleged land. As such, Ms. Matunga observed that the first count was proved to the required standards.

Ms. Matunga argued further that, the second count was proved to the required standards too as according to PW5, the 2nd Appellant used the forged documents to sale the alleged land. The charge therefore was proved and in fact tallied with the evidence, she added.

Replying on the 3rd ground of appeal, Ms. Matunga submitted that lapse of time may impair or affect the memory of the witness. She said, however, that was a minor contradiction that do not go to

the root of the matter at hand. Ms. Matunga observed that at the time when PW1 was testified, she was 54 years old and as such it was difficult for her to compute the age of PW2 in the circumstances. She identified the contradictions pointed out by Mr. Mwamboma and observed that the same were very minor that did not cause the prosecution evidence to flap. She cited the case of ***Dickson Elia Shapwata & another Vs. R, Criminal appeal No. 92 of 2007, Court of Appeal of Tanzania at Mbeya*** where the Court noted that in evaluating discrepancies and omissions, it is undesirable for the Court to pick out sentences and consider them in isolation of the rest of the statements. That the Court has to decide whether the contradictions are only minor or they are going to the root of the matter.

Replying to the 5th ground of appeal, Ms. Matunga submitted that in forgery cases, what was supposed to be proved is that there was a person who was supposed to sign the document and that person in fact did not. As a result, another person signed. It cannot be proved by naked eyes that the signature has been forged or not. She added that it is therefore important that an expert conducts some expert works to prove that the document was really forged. She cited

Section 205 (1) Criminal Procedure Act and ***section 47 of the Evidence Act*** and concluded that the trial Court evaluated all the evidence available on records.

Ms. Matunga combined the 6th and 7th grounds of appeal and argued them all together. She alluded that the trial Court before conviction, evaluated the available prosecution evidence that left no stone unturned. She added that it is therefore not true that the trial Court did not analyse rather summarized the evidence. She concluded that the evidences were evaluated in line with the offences to which the appellants were charged.

Replying to the 8th ground of appeal, Ms. Matunga was very brief. She submitted that the issue before the Court was forgery and falsely uttering the document and thus the ground of appeal is baseless. She added that, the prosecution evidence paraded five (5) witnesses and in the end, the Court satisfied itself that the appellants committed the offences to which they were charged. There were, therefore, no extraneous matters introduced.

On the 9th ground of appeal, Ms. Matunga submitted that PW5 testified that the Affidavit (Exhibit P2 collectively) was forged by the

1st Appellant and used by the 2nd Appellant who was an administrator to sale the House. She added that, it was impossible for a a person to prepare an affidavit without details to fill in. As such, the Primary Court Magistrate at Magomeni Primary Court was moved to prepare the said Affidavit by the 2nd Appellant and others who are still at large. She concluded that, thus, it is clear that the 2nd Appellant used the Affidavit while knowingly that it was forged and the 1st Appellant signed the affidavit on behalf of PW2 without authority.

On the 10th ground of appeal, Ms. Matunga differed with Mr. Mwamboma in regard to the fact that the trail court erred by imposing heavier punishments without considering the circumstances and the mitigating factors. She added that, ***Section 337 of the Penal Code (supra)*** provides for seven (7) years imprisonment as maximum punishment. That the 1st Appellant was sentences to serve three (3) years in prison while the 2nd Appellant was sentenced under ***Community Services Act (supra)*** for two years. She was of the views that the trial Court considered the mitigating factors before sentencing the Appellants as such, thus, the sentences were lenient and not heavier as alluded.

In reply to the additional ground of appeal, Ms. Matunga had this to submit. That the chain of custody may be established orally, not necessarily by a recorded of written document. She added that, according to PW1, in the course, she discovered that the affidavit used was forged and as such he reported the matter to PCCB for investigation. That, as it can be seen from page 63 of the proceedings, PW5 received the case file from Inspector Sospeter who received the complaint from PW1. That, it could appear, By that time, Inspector Sospeter was transferred to another duty station. Thus, PW5 took over the matter and proceeded to investigate on the issue and in the course, he collected the handwriting specimens of the Appellants and submitted the same to the Forensic Bureau for investigation.

That at the Bureau, the examination or investigation was done by PW3. That on completion, the bureau remitted the report together with specimens to the police station. Ms. Matunga reminded this Court of the position of law that every person who possess the knowledge on the document may tender it. She then added that there was no broken chain of custody in the circumstances.

Lastly, Ms. Matunga, by way of passing, replied to the Appellants' complaint that the Affidavit (Exhibit P2 collectively) had no affixed pictures of Zaituni and Hamis. She was of the firm opinion that the signature alleged to have been forged belonged to PW2 and not otherwise. Therefore, that the presence or absence of the pictures could not affect the allegations that PW2's signature was forged, she concluded.

Ms. Matunga, then, beseeched this Court to dismiss the Petition of appeal for want of merits.

Rejoining on the 1st ground of appeal, Mr. Mwamboma conceded that the Republic, by law, is not bound with who to call as witness but where there is a material witness, he or she should be called otherwise the court may draw an inference adverse. He distinguished the case of **Ally said (supra)** and added that Hon. Mwaipopo was a material witness in the circumstance of this case.

On the 2nd ground of appeal, Mr. Mwamboma insisted that there is variance between the evidence adduced and the Charge. He reiterated that, the charge mentions the person by the name of HAMIS HAMIM HAKIRA while the Affidavit mentions the person by the

names of HAMIMU MOHAMED HAKILA. He reminded this Court that, in such circumstances, the charge remained unproved.

On the 3rd ground of appeal Mr. Mwamboma, specifically on contradictions, submitted that the contradictions pointed out were all major once and differed with Ms. Matunga that attaining 54 years of age necessarily impairs the memory. He added that the contradictions raise doubts as to the authenticity and accuracy of the testimonies. Lastly, that, doubts in criminal cases are resolved in favour of the accused, he added.

Rejoining to the 5th ground of appeal, Mr. Mwamboma insisted that expert evidence was not necessary in the circumstance of this case. He added that, it is when the thing cannot be perceived by human senses, expert evidence is needed. He insisted further that Hon. Mwaipopo was there at the time when the document was forged as alleged, therefore she could have been called to testify. But then, he faulted the expert evidence as he did not testify as to how he arrived at the said conclusion.

On the 6th, 7th and 8th grounds of appeal, Mr. Mwamboma opted to reiterate what he submitted in chief. On the 9th ground of appeal,

he submitted in brief that the offence of uttering could have been committed against the buyer and not Hon. Mwaipopo as alleged.

Rejoining on the 10th ground of appeal as to whether the sentence was too much, Mr. Mwamboma agreed that seven (7) years imprisonment is the maximum punishment but a person may be even sentenced to serve one hour imprisonment. He concluded that, considering mitigating factors advanced, three (3) years of imprisonment and two years conditional discharge were too much and of high scale.

On whether the chain of custody was properly established, Mr. Mwamboma agreed that chain custody of evidence may be established by oral account but in this case none was established. He added that it was not established as to where the Affidavit, the subject of the charge, came from and that, even if it came from the court records, such evidence is lacking. Mr. Mwamboma insisted that it was not established either when and where Inspector Sospeter got the Affidavit (exhibit P2 collectively).

Evaluating on what was submitted by Ms. Matunga, the learned counsel submitted that, according to the records, the said affidavit was remitted to the police station and thus it was not established as to where PW3 got the affidavit or document for tendering. He doubted the authenticity of the said affidavit. He emphasized that, as per the defense testimonies, the said affidavit was tempered with. He then implored this Court to allow the appeal.

Indeed, in ***Daniel Matiku Vs. Republic, Criminal Appeal No. 450 of 2016, Court of Appeal of Tanzania at Mwanza,*** the Court reinstated the everlasting salutary principle of law that;

> *.....a first appeal is in the form of a rehearing. Thus, the first appellate court, has a duty to re-evaluate the entire trial evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact.*

Guided by the above principle, I have dispassionately considered rival submissions by the learned counsels for both parties and thoroughly examined the court records. As rightly prefaced by Mr. Mwamboma which Ms. Matunga finds to be correct, the central issue that controlled the proceedings at the trial Court is the Affidavit that was admitted as Exhibit P2 collectively. I will therefore look into the

authenticity of the said Affidavit and then, should the almighty God bless me, I will look into other grounds of appeal. For that reason, I will first determine the last ground of appeal that was added upon leave of this Court, styled whatever but nearly, whether the chain of custody in respect to Exhibit P2 collectively (Affidavit) was established to the satisfaction of the Court.

I need not to overemphasize here that, in the first count, it was alleged that on diverse dates, the Appellants forged an affidavit dated 16th March 2012. In the second count, it was alleged that, the 2nd appellant, on 16th March 2012 knowingly and fraudulently uttered to SOPHIA D/O KAPTEINI MWAIPOPO, a primary Court Magistrate (as he then was) a false document to wit, an affidavit dated 16th March 2012.

During hearing, the said affidavit was tendered by PW3, one Fatuma Rajabu Mbwana from Forensic Bureau, science Laboratory document examination section, and, together with other documents, was admitted as Exhibit P2 collectively. In his testimonies, PW3 admitted to have received the said Affidavit from PW5, one Assistant Inspector Michael. At page 46 of the typed script of the trial Court Proceedings, PW3 was recorded as follows;

After completion of investigation, I retuned those documents together with investigation report to the authority required me investigation through the police who brought those documents.

According to PW5, on 24th August 2016, he was assigned to a case file relating to forgery of an affidavit. He added further that in the case file, there was information regarding a forged affidavit that was filed in Probate Cause No. 295 of 2011 in the Primary Court of Magomeni. He then participated in recording the statements of the suspects and witnesses. He took the specimen of handwritings and sent the same to Forensic bureau to for examination.

From what I have observed herein above, it is difficult to understand where did the said Affidavit came from or if I may put it clear, under whose custody the affidavit was kept. It is not established whether the same came from the Court, Appellants or any witness. Such explanation, reasonably, could have been given by PW1 (the complainant), PW3 and or PW5. It was apparent that the source and movement of such incriminating document be established. It was therefore dangerous for the Court to act on the document which its origin or source was not established either by a written document or oral account.

PW5 perfectly gave an oral account on how Exhibit P5 (proceedings in Probate Cause No. 295 of 2011) came to his hands but then failed to account on how an Affidavit (Exhibit P2 collectively) got its way to him. With respect that was tantamount to double standards.

Moreso, PW3 testified that, after she had completed examination, she remitted the affidavit together with the report to PW5, one Assistant Inspector Michael. But then, she failed to account how the same got to her hands for the second time for tendering. Such explanation was necessary for the Court to assess its authenticity. It goes without saying therefore that, to avoid turning the Courts into a rubbish bin, Courts should avoid acting on the documentary evidence of which the source or origin has not been established.

As alluded by Mr. Mwamboma, the Appellants complained on the authenticity of the affidavit on the pretext that, the affidavit they know was affixed with pictures of all signatories as opposed to the one tendered in Court which seems to lack two pictures. Since the evidence, whether oral or written on source of the said affidavit and

how it got its way to PW3 for tendering was not established I am unable to endorse that it was the same Affidavit.

As such, it was therefore mandatory to established by evidence a chain of custody of Exhibit P2 collectively (Affidavit) to enable the Court to assess its authenticity. In ***Paul Maduka and 4 Others Vs Republic, Criminal Appeal No. 110 of 2007 Court of Appeal of Tanzania at Dodoma,*** the court noted that;

> *The chain of custody requires that from the moment the evidence is collected, it very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.*

I agree with Ms. Matunga that chain of custody may be established by oral account of a witness. In ***Republic V. Mussa Hatibu, Criminal Appeal No. 131 of 2021, Court of Appeal at Tanga,*** the Court noted;

> *On our part, we agree that there was no proper documentation in respect of exhibits P4 (a) and (b). We are also of the view that, chain of custody can be established by oral account of witnesses as we have held in our previous decisions, some of which have been cited to us by the learned State Attorney.*

From the records, I agree with Mr. Mwamboma that the chain of custody, whether by writing or oral account in respect to Exhibit P2 collectively (Affidavit) was not established. There can be a possibility that unknown person or institution handled the same to PW5 at the time of investigation but that would be a fanciful possibility that should not deflect the course of justice (see ***Magambo Paul & Another Vs Republic (1993) TLR 220).*** In the premises, Exhibit P2 collectively (an affidavit) is hereby caught in a web of illegalities. I therefore proceed to expunge it from the records.

Having so acted as I have done, the next question would be whether the accusations of forgery and falsely uttering the document will still be provable considering the remaining evidence on records. In my considered opinion, the remaining evidence will not suffice to warrant a conviction against the appellants because, as prefaced before, the accusations were premised on the said Affidavit. The prosecution evidence will apparently collapse. It will therefore be a wastage of time and too academic to discuss other grounds of appeal in the circumstances of this case as by doing so, will not anyhow serve the day.

In the upshot, the appeal is allowed. The conviction and sentence meted against the Appellants by the trial Court are quashed and set aside. The 1st Appellant, one Melchiory Blasius Kamata, is to be released from prison forthwith unless lawfully held. Since the 2nd Appellant, one Agness Blasius Kamata is not in prison, there will be no order for her release.

I order accordingly.

Right of appeal fully explained.

DATED at **DAR ES SALAAM** this 8th February 2024.

H.S. MTEMBWA

JUDGE