Handwriting expert evidence

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 40 OF 1994

(ORIGINAL DISTRICT COURT OF ILALA AT KISUTU CRIMINAL CASE NO. 954 OF 1992)

UD. 7132 WO II SIMON MWAIJANDE - APPELLANT

VERSUS

THE REPUBLIC - RESPONDENT

J U D G E M E N T

KALEGEYA, PRM (EXT. JURISD.)

The Appellant, Simon Mwaijande, was charged together with three others (Khadija Mwachali, P.7997 Lt. Renatus Rocus Hossa, and Sgt. Issa Mingole) who were acquitted. He was convicted and sentenced to three years imprisonment on each of the 6 Counts with which he was charged. Sentences were ordered to run concurrently. Aggrieved he filed this appeal.

Before the trial Court the Appellant was charged with 2 counts of making false documents c\s 335(d)(1) and 337 of the Penal Code (Counts 1 and 4); 2 counts of uttering false documents c\s342 of the Penal Code (Counts 2 and 5) and stealing by person employed in public service c\s 270and 265 of the Penal Code (3rd and 6th counts). In brief, the charges alleged that on 25\6\90 while working with the Tanzania Peoples Defence Forces Headquarters (Dsm), with intent to defraud or deceive the Appellant falsely wrote and signed Railway Warrants No. I\788972 for shs. 36,250/= and No. I\788980 for shs. 43,500/= in the name of Major Masumba (Counts 1 and 4 respectivelly); proceeded to utter the same to Khadija w\o Mwachali of Tanzania Railway Corporation booking office (counts 2 and 5) and stole the cash indicated thereto (counts 3 and 6). Appellant in defence denied

having forged the signatures nor stole the sums indicated, and in fact, he alleged to have been on leave when the warrants were forged.

In his petition of Appeal, which he adopted in whole during the hearing of his appeal, the Appellant complained that the trial court erred in law and fact in convicting him without corroborative evidence; violated the provisions of ss. 34 B and S.68 of Tanzania Evidence Act, 1967 by admitting a photocopy report of the handwriting expert and without giving him opportunity to object or concede; failing to consider his alibi that he was on leave having given notice under s. 194(4) of CPA; that the specimen signatures sent to the handwriting expert were not established to have been his; that conceding that he was the author of the list of soldiers appearing on the reverse side of the warrant was not conceding that he was also the author of the forged signature, that is the signature of the authorising officer; that PW2 and 3 on whose testimony his handwriting was said to have been identified were not shown the disputed document (Exh. A); that no evidence was led to show that the listed names on the warrants were fictions and tickets issued were not used by persons entitled to them; that only one warrant No. 788972 of 25\6\90 was produced in Court hence only three counts would be relevant if at all, and finally that the trial Court having admitted poor prosecution of the whole case should not have proceeded to fill in the gaps.

Miss Chinguwile, Learned State Attorney, responding to the Appellant conceded that convictions on Counts 4, 5 and 6 were incorrectly found as the relevant Exhibit, travel Warrant, was

not produced before the Court but firmly supported convictions and sentences on Counts 1 - 3. The learned State Attorney observed that the handwriting on Warrant No.788992 was proved to be that of Appellant as amply identified by PW2, supported by PW3 - 5 and PW7, handwriting expert.

I should start by saying that indeed counts 4 - 6 as strongly contested by the Appellant and conceded by the learned State Attorney have no base to stand upon as the very document, Warrant No. 1\788980, which forms the core of the afore-mentioned charge was not tendered in evidence. On this score it is unnecessary to consider whether the offences would have been proved if it was tendered.

Now turning to counts 1 - 3, with respect to the learned State Attorney, the numerous flaws in the prosecution case, substantially touched upon by the Appellant in his petition of Appeal, cannot leave them standing either. Indeed it was not without reason that even the trial Magistrate himself conceded as such:-

> "The case was poorly prosecuted may because of changing prosecutors unnecessarily. As a result a number of important information which would have been of assistance to the Court remained wanting". (Whether for this reason or another the results are the same) (emphasis mine).

With respect to the trial Magistrate I take the above quoted statement to mean that this lacuna made him fail to appreciate the whole matter up to the standard required in law, in which case, the resultant factor would have been acquittal. The

Appellant's complaint that he filled up the gaps instead is not without substance. Other glaring flaws inherent in the evidence tendered are as follows:-

Though the learned trial Magistrate in his judgement says that the documents in dispute were taken to the Identification bureau "for examination after taking the suspect's specimen of handwriting and signatures", as rightly pointed out by appellant, there is no where on record where it is thus indicated. It is not clear as to how, when and by whom were the Appellant's specimen signatures and writings taken! PW1 who is quoted by the trial Magistrate as having testified on this simply said "The signatures and handwriting specimen of suspects were taken to the handwriting expert" and in cross examination he clarifies "TPDF intelligence Headquarters are the ones who sent your handwriting specimen to the handwriting expert". When he (PW1) was resummoned to the tender the original handwriting report he said, "These documents were brought to us by the Army officers and we worked upon them by sending them to the identification Bureau". Apart from the vivid uncertainty and contradictions of what took place with the documents the known procedure on such matters is to have the very person who supervised the making of the specimen writings, and the one who conveyed them to the handwriting expert testify; on the other hand the handwriting expert would also testify and establish from whose hands he received the very documents. The purpose is to establish an inter-connection between the author of the specimen signatures and the expertise of the handwriting expert lest there occurs a mix up of specimens. In the present case, on how he came to receive them,

PW7, the handwriting expert, simply said, "I remember on 5\12\90 I received a parcel from a TPDF headquarters"!. The glaring ommission in the inter-connection need not be stressed.

Not only the above destroys the value of the handwriting expert evidence. There is more, and surprising, to this. PW7, the handwriting expert, simply deposed and talked of similarities of handwriting characteristics between various documents treading merely on a copy of his report. He did not have the specimen signatures\writings nor the disputed documents before him in Court! The prosecution simply applied to have a copy of his report and a copy of his covering letter tendered allegedly because the original could not be traced! While copies in befitting circumstances can be admitted under s. 67 (1)(c) of the Evidence Act (if loss of the original could be established) the procedure employed here is completely wrong and un-acceptable in law. First, a handwriting expert is supposed to demonstrate in Court how the handwriting characters on Specimen writings and disputed documents look similar or dissimilar by pointing out the same on the very documents. He can't simply produce the report (which even in this case is just a copy of his report). Both the Court and accused have to appreciate this demonstration and not to simply receive the report otherwise lazy or conniving experts would throw innocent persons into peril. Handwriting expert evidence is one of the pains taking kind of evidence and need not be rushed through for whatever cost or reasons and it is the duty of the court to see to it that this is done in a perfect and accurate manner. No wonder the trial Court subsequently realising that it had failed in its duty resummoned PW1 (Investigator

though be-latedly) who not only tendered the originals of both the handwriting Expert Report and his covering letter but also the alleged Specimen and disputed writings!.

Unfortunately this last gesture of recalling PW1 could not save the boat. Actually it complicates things further for this time PW1 contradicts himself by stating that the said documents were sent by them (him inclusive) to the Identification Bureau which contradicts his earlier statement that the same were sent by the TPDF headquarters; and obviously their production by him do not add any credit to an empty report (Exh.P1) which PW7 had produced without any demonstration. A proper procedure here would have been to recall PW7 who apart from tendering the original of his report would have demonstrated how he arrived at his conclusions. Thus the prosecution closes its case without linking the Appellant with the specimen writings, the disputed writings and the handwriting expert Report. For clarity, on the non-linkage between Appellant and the disputed writings, although in his judgment the learned trial Magistrate said

> "PW2 - 4 who worked with the 1st accused in the office identified the handwriting on the Warrants, Exh. P2, as being similar to that of first accused who was responsible with booking of transport for travelling soldiers"

the Court proceedings, of his own recording, totally contradicts him. The Record shows that PW2 - 4 simply testified on "warrants" which were not before them them: Exh. P2, surfaced before the Court for the first time on the last day when the prosecution closed its case by recalling PW1. That was long after PW2 - 4 had

testified (PW4 testified on 9\10\92 while PW1 was recalled on 4\10\93). The Prosecution ought to have been conversant (and with respect the court ought to have given guidance) with the well established procedure in cases where witnesses are required to testify on a document or object which would subsequently be tendered as Exhibit. The procedure is not simply to refer to it theoretically as was the case here but to have it physically so that it is referred to by the witness before the Court (either by display or describing it) and then have it put in custody of the Court after marking it as a "Court Identification Exh. number so and so", awaiting proper time and proper witness to tender it as full Exhibit. Only then would the Court record, "Court identification Exh. so and so now admitted and marked as Exh....." or words to similar effect. Thus whether this is what Appellant had in mind when he complained of "lack of corroboration" what is clear is the gravity of this in further disentergration of the prosecution case.

Secondly, from the way the evidence of PW7 was received, and commented upon by the learned trial Magistrate, it would seem that the court treated the experts' report as conclusive in itself without anything more. In his judgement the learned trial Magistrate, concluding on Appellants' guilt, stated, among others,

> "...PW7 hammered the last nail on the coffin when, as handwriting expert, pointed out the results of his expertise examination, which in our opinion point out the 1st accused as the author of these documents".

As no demonstration on similarities or dissimilarities were made

by PW7 the above finding could only be influenced by just looking at the report as final, impeachable, and not appreciating how to treat a handwriting expert Report in law. It is not enough for a handwriting expert to merely refer generally to his methods but has to explain to the court the particular features of similarity or dissimilarity so as to enable the court weigh their relevant significance. Only then can he give his opinion to enable the court make its finding. And the acceptable practice is for such experts to make photographic enlargements of specimen writings and those on disputed documents in order to vividly enable the court make its own comparison and analysis and arrive at its own independent finding.

Just for future guidance, the following observations quoted with approval in THOBIAS MBILINYI NGASIMULA v REPUBLIC (1980) TLR 129 are very helpful indeed (the observations of SPRY, J., as he then was, in Salum v. Republic (1964) E.A. 127, at p.128).

> "I think the true answer was given by the Bishop of Lincoln case, that 'it is not possible to say, definitely that anybody wrote a particular thing'. I think an expert can properly say, in an appropriate case, that he does not believe a particular writing was by a particular person. On the positive side, however, the most he could ever say is that the two writings are so similar as to be in-distinguishable and he could, of course, comment on unusual features which make similarity the more remarkable. But that falls far short of saying that they were written by

the same hand.

The learned Judge made those observations after he had cited the following language of Lord Hewart in his summing up in R.v. Padmore (1930), 46 T.L.R. 365 22 Cr. App.Rep.36:

> Let me say a word about handwriting experts. Let everyone be treated with proper respect but the evidence of handwriting experts is sometimes rather misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is a person who, habituated to the examination of handwriting practised in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That, and more than that, is his legitimate province".

Thus the handwriting expert Report (evidence) should be treated bearing in mind the following:-

(a) that it is only an expert's opinion.

(b) that the expert must demonstrate in details by displaying before the Court how he reached his findings - physically pointing out similarities or dissmilarities in the writings on documents before the Court (specimen writings and disputed documents), and as much as possible use photographic enlargements.

(c) that the court should arrive at its own finding after appreciation of the demonstration and should not simply

take the report whole sale without analysis or appreciation of its own.

Indeed the whole case having been so poorly prosecuted, with respect to the trial Court, the only obvious finding which would have saved the energy, time, stationery and agony on appellant would have been an acquittal. With the demonstration of key flaws in the prosecution case as indicated above I find it unnecessary to go into the other complaints raised by the Appellant in his appeal. As the Appellant will have served his sentence by now, the convictions are quashed and the sentences set aside as a matter of record.

(L. B. Kalegeya)

PRM WITH EXTENDED JURISDICTION

9\8\1996

Delivered today the 16th day of August, 1996 in the presence C. HAMBO, State Attorney and presence\ Absence of Appellant.....

(L. B. Kalegeya)

PRM WITH EXTENDED JURISDICTION

16/8/96