

TANZANIA / JUDGMENT

20171213 TZHC Mbeya

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r IN THE HIGH COURT OF TANZANIA IN THE DISTRICT REGISTRY OF MBEYA AT MBEYA
CRIMINAL APPEAL NO.09 OF 2017 (A rising from Criminal Case No. 8 of 2016 Resident
Magistrate's Court of Mbeya) GOAGOA APPELLANT VERSUS
THEREPUBLIC RESPONDENT

JUDGMENT

Date of last order: 0911012017 Date of Judgment: 1311212017 Dr. M. C. Levira, J The appellant, Athumani Goagoa was charged at the Resident Magistrate Court of Mbeya with 6 counts. 1st and 4th counts Forgery contrary to Sections 333, 335(a) and 337, 2nd and, 5th counts uttering False Document contrary to Section 342, 3rd and 6th counts Obtaining Money by False Pretences contrary to Section 302, all the offences found under the Penal Code Cap 16 Revised Edition 2002. Upon full trial, he was convicted as charged and sentenced to serve 5 years imprisonment in each Page 1 of 3 count. The sentence was ordered to run concurrently. Aggrieved by the trial Court's decision he lodged this appeal. The appellant has lodged seven grounds in his petition of appeal: That the trial magistrate erred in law and fact in convicting the appellant for the first count without the same being proved by the complainant. That, the trial magistrate erred in law and fact in relying on the evidence of the witness having an interest. That, the trial magistrate erred in law and in fact in convicting the appellant on weak, contradictory and unreliable evidence of the prosecution. That, the trial magistrate erred in law and in fact in relying on the opinion of the PW5 an expert without adhering to the principles governing expert evidence. S. That, the trial magistrate erred in law and fact in disregarding the defence of the appellant.

6. That, the trial magistrate grossly erred in law and in fact in ordering payment of compensation amounting to Tshs. 200,000/= and Tshs 500,000/= to ones, Rusimbi and Page 2 of 13
- Mahenge respectively without adhering to the principles of awarding compensation in criminal cases.
7. That, the trial magistrate erred in law and in fact in imposing a sentence which is harsh and contrary to the principles of imposing sentence. The appellant was represented by Advocate, Dr. Lwambano and Advocate Kamru Habibu while the Republic/respondent was represented by Learned State Attorney Mr. Mtenga. I have gone through the trial's court record, the

grounds of appeal presented and the long submissions by both parties. I will start with the first ground. The appellant has faulted the trial court for convicting him without the complainant testifying in court over the offences he allegedly committed. In addition to this ground, advocate Kamru added that it was wrong for the trial court to convict the appellant without the person called Claudio Rusimbi to testify in court. On the other hand, this averment was challenged by Mr. Mtenga that although the witness did not testify but the offence was proved beyond reasonable doubt as the necessary elements of forgery were proved. That it was the Page 3 of 13 appellant who forged the document, that it was not genuine and the appellant had intent to defraud. He added that the evidence of PW3 which was corroborated by PW1 and PW5 shows the appellant made the sticker and received the money which was not for Zanzibar Insurance Company. As earlier stated the appellant was charged and convicted with 6 counts whereas the first count is forgery, second count is uttering false document, and third count is obtaining money by false pretence which are alleged to have been committed to a person named Claudio Rusimbi. First of all, there is no doubt that from the evidence of PW 1, PW3 and the appellant himself, the appellant was an agent of Zanzibar Insurance Company until June 2014 where he ceased to be an agent of the company. The charge sheet shows on various dates between April 2014, and January 2015 he forged the sticker with serial number 6167277 purporting to have been issued by Zanzibar Insurance to Claudio Rusimbi. Page 4 of 13 The 1st count of forgery was committed to a person named Claudio Rusimbi. The evidence of PW1 shows Claudio Rusimbi and Kelvin Mahenge (PW2) on different occasion reported to her over the alleged forgery which led her to report to PW3 and as a result the matter was reported to the police and appellant was arrested. But it is very unfortunate-that the said Claudio Rusimbi did not testify in court. The Law under the provision of Section 333 of the Penal Code (supra) states that forgery is making of false document with intent to defraud or to deceive. The word deceive has been explained by the trial Magistrate in his judgment at page 14 emanating from the decision of this court in Shauri Mshinga Bakari Vs. Republic, Criminal Appeal No. 23/2004 High Court, at Tanga (Kipenka J; as he then was), as to induce a person to believe a thing or something is true which is false, the person who does the deceit knows or believes it to be false. In this case, the said Claudio Rusimbi who is said to have been induced with the document did not testify in court. PW1 and PW3 testimony shows the sticker with serial No. 6167277 which was Page 5 of 13 issued to Claudio Rusimbi by the accused person does not belong to Zanzibar Insurance Company. On the other hand, there is a document named "KUKABIDHI VITABU VYA BIMA" which was admitted as "Exhibit P3" in record which shows the accused person handed over the stickers to PW1 after he ceased to be an agent. But my interest is on the stickers with Serial No. 61677201 - 6167300 in which the said forged sticker falls under this returned item. I have noted that PW1 in her evidence said in the letter to the accused he wrongly wrote 61677201 - 61677300. However, there was no further explanation as to what was correct. PW1 and PW3 testified that Claudio Rusimbi was not given Cover Note and receipts this testimony however was not backed up by the complainant himself therefore, remains to be a hearsay which is not admissible in court. We are all aware that expert evidence needs to be corroborated. Therefore, the evidence of PW5 as an expert needed

corroboration. In the absence of that, that evidence alone is not enough to sustain the appellant's conviction on forgery. Under the circumstance and, in the absence of the complaint, Claudio Rusimbi can 2nd and 3rd counts of uttering false Page 6 of 13 document and obtaining goods by false pretence stand against the accused? From the above discussion there have been a lot of questions in regards to the said document. It is therefore not possible to sustain such counts in the absence of the complaint because all we have in record is hearsay evidence of PW 1 and PW3 that they were told by Claudio Rusimbi. As for the 3rd count of obtaining goods by false pretence, since the complainant did not testify in court and no any witness saw the accused person receiving such money apart from the evidence of PW1 and PW3 that the complainant told them. Such evidence is not sufficient enough to hold the accused person liable with the offence of obtaining money by false pretence. It was crucial for the said person to testify in court to substantiate the witnesses' testimony. Having said that, I do not agree with the submission by learned State Attorney Mr. Mtenga that 1st, 2d and 3rd count against the accused/appellant were proved beyond reasonable doubt. Page 7 of 13 Coming -to the 4th, 5th and 6th counts, the appellant has been charged for committing forgery, uttering false document and obtaining money by false pretence respectively against the complainant Kelvin Mahenge PW2 in the record. As for the 4th count of forgery PW2 is alleged to have been issued a sticker with serial No. 3998664 by the accused/appellant on 08/07/2014 after he ceased to be an agent of Zanzibar Insurance Company. The evidence of PW2 shows he reported it to the office and it was later noted that the sticker was from the missing book in which the appellant was supposed to return. Both PW1 and PW3 evidence shows the sticker was from the missing book in which the appellant ought to have returned after cessation of work as an agent. The evidence further shows the complainant was only given a sticker without cover note and receipt as it is supposed to be. The fact which was corroborated by PW2, complainant. Furthermore, the sticker which is Exhibit P2 in records shows that it was issued on 08/07/2014 to PW2 complainant after the Page 8 of 13 appellant had long ceased to work. The evidence of PW5 as an expert further reveals the signatures taken from the appellant by PW4 as an investigator and the signature from the alleged forged sticker "Exhibit P2" are similar. In terms of letter formations and other things like stroke formation between one and another one letter are similar, Learned advocates for the appellant have cited the case of The DPP Vs. Shida Manyama @ Seleman Mabuba, Criminal Appeal No. 285/2012 on how expert evidence should be treated. Regarding to what has been committed in the current case to PW2, the evidence of PW5 was corroborated by PW1 and PW3's evidence. Furthermore, the sticker was issued in July after the appellant ceased to be an agent and there 'is no doubt that from the evidence of PW2 it was the appellant who issued him the said sticker and the said sticker was from the missing book which the appellant was supposed to returned but, he did not as per PW1 and PW3 evidence. It is therefore safe to say the appellant issued a forged sticker to PW2 with an intend to defraud. Page 9 of 13 It is also on record that PW2 gave Tshs. 130,000/= to the appellant for the said Insurance cover and, since the sticker was a forged one no doubt that the appellant obtained money by false pretence. I have gone through the appellant's defense, he does not deny working as an agent with Zanzibar Insurance Company but there is no

further justification as regards to exhibit P2, his signature and the money he gave PW2 who knew him as an agent of Zanzibar Insurance. I am aware that the accused person cannot be convicted basing on the weakness of his defence. See Richard Athanas Vs. The Republic, Criminal Appeal No 115/2002 Court of Appeal at Dar es Salaam. (unreported). It was held that: "An accused person is convicted of a criminal offence because of the cogency of the prosecution evidence against him; not because the defence evidence is weak or even untrue". But in the instant case the evidence from prosecution was enough to hold the appellant guilty of 4th , 5th and 6th counts. Page 10 of 13 Learned advocates for the appellant have complained about the sentence imposed and compensation which the appellant was ordered to pay an amount of Tshs. 200,000/= to Claudio Rusimbi and Tshs. 500,000/= to Kelvin Mahenge. It is on record the appellant was found guilty in all 6 counts and sentenced to 5 years' imprisonment in each count but, the sentence was ordered to run concurrently. Basing on the aforementioned discussion the sentence and compensation of Tshs. 200,000/= for the 1st, 2nd and 3rd counts are set aside. As for the 3rd , 4th and 5th counts the appellant has been imprisoned for 5 years in each and compensation of Tshs. 500,000/=.

Compensation is the discretion of the court; however, this court finds justifiable to award an amount Tshs. 200,000/= instead of 500,000/=. As of sentence it is very clear that any person who is found guilty of forgery is liable to seven years' imprisonment as well as obtaining money by false pretence. I have noted that the trial Magistrate sentenced the accused/ appellant 5 years' imprisonment instead of 7 years but, I will not interfere with the sentence of 5 years in each count by Page 11 of 13 the trial Magistrate since it did not exceed the statutory sentence. That being said, the appeal is partly allowed on 1st, 2nd and 3rd counts and dismissed on 4th , 5th and 6th counts. - Dr. M. C. Levira Judge 1 13/12/2017 \ Page 12 of 13 Date: 13/12/2017 Coram: Hon. Dr. M. C. Levira, J Appellant: Present For Appellant: Dr. Lwambano and Mr. Kamru - Advocates Respondent: For the Republic: Mr. Rogers State Attorney C/C: Margareth Mhagama Mr. Rogers — State Attorney: Hon. Judge, the matter is coming for judgment, we are ready. Court: Judgment delivered in the presence of Dr. Lwambano and Mr. Habib Kamru Advocates and the appellant this 13' day of December, 2017. Right of Appeal Explained. Dr. M. C. Levira Judge 13/12/2017 Page 13 of 13

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