

TANZANIA / JUDGMENT

Ayubu Hangali v

COURT
TANZLII

DECIDED
26 November 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI CRIMINAL APPEAL NO. 17718 OF 2024 (Originating from Criminal Case
No. 151 of 2023 in the District Court of Babati) AYUBU
HANGALI.....APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

28th October and 26th November 2024 MIRINDO, J.: At the age of six Ayubu Hangali came to live with his relatives, one Kononi Karesi and Aksay Inkay who were husband and wife at Endabeg Village, now Hewasi Village in Babati District within Manyara Region. Kononi Karesi died in 1986 and Aksay Nkay in

1992. Buri Kononi, their surviving daughter who was married returned to her parents’ compound in 2021 and found it being occupied by Ayubu Hangali. She sued Ayubu Hangali before Babati District Land and Housing Tribunal but the Tribunal declined to continue with the hearing of the dispute because Buri Kononi alleged that a document attached by Ayubu Hangali in his defence was a forged one. The Tribunal directed Ayubu Hangali to produce the original document which the Tribunal submitted to the 1 police for investigation. Subsequently, five persons including Ayubu Hangali were charged before Babati District Court with forgery and Ayubu Hangali was in addition charged with uttering a false document. Four persons were convicted on their guilty pleas for forgery while Ayubu Hangali denied both charges. At the conclusion of the trial, Ayubu Hangali was convicted on both counts and sentenced to four years imprisonment on each count and the sentences were ordered to run consecutively. Ayubu Hangali has now appealed to the High Court on four grounds of appeal having obtained leave of this Court to amend his earlier petition that contained six grounds of appeal. He was represented by Mr. Joseph Masanja, learned Advocate. Mr. Benedict Kapela, learned Senior State Attorney and Ms. Anifa Ally, learned State Attorney, appeared for the respondent Republic. The first, second and fourth grounds of appeal are essentially against the weight of evidence adduced at the trial court. Mr. Masanja, learned Advocate, called upon this Court to re-evaluate the evidence and make fresh findings on the available evidence. The learned Senior State Attorney, Mr. Kapela observed that it is the duty of the first appellate court to review the evidence but

maintained that the trial court properly evaluated the evidence. There is no doubt, as both counsel argued, that this is a first appeal and it is the duty of this Court to re-evaluate the evidence and arrive at its own conclusions. The genesis of the charges against Ayubu Hangali is a handwritten agreement between Ayubu Hangali and Aksay Nkay dated 15 October 1989 through which Aksay 2 Nkay gifted Ayubu Hangali a portion of land measuring three and a half acres situated at Endabeg area. The agreement was supposedly witnessed by five persons. It is the contention of the learned Advocate, Mr. Masanja that source of this agreement is unknown and how it reached the Police Forensic Bureau in Dar es Salaam. Mr. Kapela pointed out that it is clear that the agreement was tendered in Land Application No. 36 of 2021 before the Babati District Land and Housing Tribunal. Mr. Kapela added that a letter was addressed to the Tribunal requesting a copy of the disputed document and that document was sent for forensic analysis. An answer to this issue is to be found in the testimony of the third prosecution witness, Hezron Elli Mwihava, a Chairman of Babati District Land and Housing Tribunal. He testified that when the land dispute came for hearing Buri Kononi raised an objection that a document attached to the written statement of defence was forged. He adjourned the hearing of the matter and directed Ayubu Hangali to bring the original document. The third prosecution witness tendered in court the proceedings in Land Application 36 of 2021 that were admitted as exhibit PE1. They are typed proceedings dated from 31 August 2021 to 1 August 2024. It is true that there was a claim on 14 June 2022 that the document attached to the written statement of defence was a forged one, Ayubu Hangali was on 14 June 2022 ordered to bring the original document and that on 29 June 2022, Ayubu Hangali brought the original document as ordered. On 25 August 2022 it was directed that a letter be written to the police asking them to investigate on the authenticity of the 3 document. Nevertheless, pleadings were not availed to the trial District Court to show that the document was actually pleaded. The original document submitted to the Tribunal was not admitted and so it did not form part of the Tribunal proceedings. These uncertainties were nonetheless resolved by the testimony of Ayubu Hangali who said that when he appeared before the Tribunal with his agreement, Buri Kononi complained to police. There is the testimony of the second prosecution witness, E.8080 Detective Sergeant Jimmy and the fourth prosecution witness, Assistant Inspector Peter Joseph Ngazagu. Their testimonies is that the agreement was sent to the Forensic Bureau in Dar es Salaam from Babati Police Station. For these reasons, I agree with Mr. Kapela that the complaint has no merit. Ms. Ally, learned State Attorney, elaborately argued that both charges of forgery and uttering the false document were proved beyond reasonable doubt. In either charge, it must be proved that the document was false in the sense that it was forged. The learned State Attorney stated there was evidence of falsity of the agreement through the testimony of the fourth prosecution witness who examined the fingerprints in the deed of gift that was produced as exhibit PE 9 by comparing samples of the fingerprints of the accused persons. The question that falls for consideration is the existence of credible evidence of fingerprint analysis tending to show that the handwritten agreement dated 15 October 1989 is a false document. In addressing this question, I will re-evaluate the evidence of 4 the second and the fourth

prosecution witnesses. The second prosecution witness, E.8080 Detective Sergeant Jimmy was responsible for collection of fingerprints and he told the trial court that: After we wrote the statements of five suspects, we took fingers print from all accused and who wrote [sic] on the controversial document we took his or her handwriting. I can try to remember, here I see only one accused who is Ayubu Hangali, the other four were Leonard Bacho, Tssnmfu [sic], Katalina [sic] Nada, Rehema Tlaghwe [sic], the six [sic] one we don't have his sample since he already died even before dealing this case [sic] investigation. This portion of evidence is at once vague and inaccurate. Being the only prosecution evidence on the collection of fingerprints, the account of the second prosecution witness does not inform who actually collected the fingerprints. Nor does it name the procedure for collecting the fingerprint samples. Proper collection and preservation of fingerprints is critical for fingerprints development which boils down to maintenance of chain of custody to ensure their quality for analysis. Not only should the method used to collect fingerprints be established but also the clarity of the fingerprints for analysis should be known as was held by the Supreme Court of India in *Mohan Lal and Another v Ajit Singh* 1978 AIR SC 1183: There is no gainsaying the fact that a majority of fingerprints found at crime scene or crime articles are partially smudged, and it is for the experienced and skilled fingerprint expert to say whether a mark is usable as fingerprint evidence. Similarly it is for a competent technician to examine and give his opinion whether the identity 5 can be established, and if so whether that can be done on eight or even less identical characteristics in an appropriate case. In *Mashaka Pastory Paulo Mahengi alias Uhuru and Others v R* (Criminal Appeal No. 49 of 2015) [2016] TZCA 52 fingerprint evidence was declared unsafe partly because there was a break in the chain of collection, transmission and preservation of the fingerprints. It seems in the instant case that the fingerprints were lifted but there is nothing on record to show the method used and whether the method used was trustworthy and a tested one. Neither the second nor the fourth prosecution witness testified about the chain of custody of the fingerprints. Besides, the account of the second prosecution witness is irreconcilable with the testimony of the fourth prosecution witness. The latter witness testified receiving the following "exhibits": (i) hati ya "mauziano" ya shamba dated 15 October 1989; (ii) "exhibit" D1-D3 (sample of fingerprints of Ayubu Hangali); (iii) "exhibit" E1-E3 (sample of fingerprints of Katharina d/o Nada); (iv) "exhibit" G1-G4 (sample of fingerprints of Tsamfu d/o Nangay) and exhibit "H1-H4" (sample of fingerprints of Rehema d/o Tlagwe. His description matches with that provided in the covering letter of 9 November 2022 from the Officer Commanding Babati District, Assistant Superintendent of Police, Songalieli Jwagu. The letter was admitted as exhibit PE 2 is consistent with the testimony of the fourth witness that the fingerprints of Leonardu Bacho was not collected inconsistent to what was stated by the second prosecution witness. In addition, Ms. Anifa Ally contended that witnesses to the deed of gift pleaded guilty to taking part in the forgery. Ms. Anifa, singled out the appellant's mother, 6 Katarina Nada, one of the persons who pleaded guilty to forgery, as incapable of falsely accusing her son It remains to consider the fingerprints examination report entitled in Kiswahili as "Ripoti ya Uchunguzi wa Alama za Vidole kwa Mujibu wa Kifungu 204 cha Sheria ya Mwenendo wa Makosa ya Jinai Cap. 20

R.E. 2019” that was admitted as exhibit PE 8. The findings of the report are the right thumb of Tsamfu d/o Nangay marked as X3 in the handwritten agreement (exhibit A) matches with fingerprint samples of Tsamfu d/o Nangay in exhibit G1-G4. The rest of the fingerprints in exhibit A marked as X1, X4 and X5 of Ayubu Hangali Hangali, Katharina d/o Nada, Rehema Tlagwe, respectively do not match with their fingerprints samples labelled as D1-D3, E1-E3, and H1-H4. I have several misgivings about these findings. The appellant, Ayubu Hangali, signed the agreement by letters “AH” which are highlighted by an ink pen. Yet the fingerprints report states in Kiswahili that:

- c. Alama ya kidole iliyopo kwenye kielelezo “A” iliyoanishwa kwa herufi “X1” Hailingani na alama za vidole zilizopo kwenye Kielelezo “D1-D3” ambazo ni Sampuli za Vidole zenye jina la AYUBU S/O HANGALI. [Emphasis original] As stated earlier, at the commencement of the trial four accused persons pleaded guilty to the charge of forgery. In the course of the guilty pleas, the trial court admitted the cautioned statements of the second accused person, Leonardi s/o Bacho, and the fourth 7 accused person, Rehema d/o Tlaghwe. Rehema s/o Tlagwe confessed signing the handwritten agreement after it was brought to him by the appellant, who is his son. The trial court took into consideration this cautioned statement on the assumption that it was difficult for a mother to testify against his son. I am not so convinced. This cautioned statement does not support the fingerprints examination report. Either the quality of the fingerprint submitted to the Forensic Bureau was of poor quality or Rehema d/o Tlagwe aged 69 years at the time the cautioned statement was recorded in 2022 had begun to lose her memory or she was simply a liar. The cautioned statement of Leonardi s/o Bacho was not a complete confession because Leonardi Bacho pleaded that he prepared the handwritten agreement because Ayubu Hangali told him that the original “title deed” was misplaced and he concluded that: ..Hivyo kama mpango wa kuzurumu hilo shamba aliyetengeneza ni yeye AYUBU s/o HANGALI na si mtu mwingine yeyote. It was a partial confession whose completion depended on facts set forth in section 3
- (1) (a) or (d) of the Evidence Act [Cap. 6 R.E. 2022]. Those subsections provide that:
- (a) words or conduct, or a combination of both words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence; or
- (d) a statement containing affirmative declarations in which incriminating facts are admitted from which, when taken alone or in conjunction with the other 8 facts proved, an inference may reasonably be drawn that the person making the statement has committed an offence; The statement of Leonardi Bacho cannot “alone” stand as a confession. T amount to a confession, his partial statement must be supported by other facts. There is nothing on record for such a conclusion. Assuming that both statements were complete confessions and were tendered in a joint trial, they could still be considered as co-accused confessions under section 33 of the Evidence Act which must as a matter of law be corroborated. Could the guilty pleas be considered against the appellant? This was the view of Ms. Ally, learned

State Attorney and the learned trial Senior Resident Magistrate. The answer to this question is found in the instructive case of Saidi Hatibu v R [1984] TLR 280 where Samatta J held that a guilty plea is a judicial confession relevant in a joint trial where the person who pleaded guilty is summoned to testify against the remaining accused [at page 83]: It is a correct proposition of law, of course, that an accused is not a competent prosecution witness; the prosecution cannot call one co-accused to give evidence against another. But once the proceedings have been finalised, it is competent for the prosecution to call the accused as their witness against the remaining accused person/s. There is no objection in justice or reason to that being done, because the accused is then no longer in the proceedings. But the matter does not end here. A person who entered a guilty plea and is subsequently called as a prosecution witness is considered to be an accomplice witness whose evidence under section 142 of the Evidence Act, as frequently construed by 9 courts, requires corroboration. Judicial reaffirmation of corroborative evidence for accomplice evidence is to be found in several cases including Daniel Maogege and two Others v R, Criminal Appeal 164 of 1989: ...Judicial pronouncements from respectable sources have it that this rule has become so integral a part of the administration of criminal law as almost to have acquired the full force of law.... The Court of Appeal in Edward George Lekule v R, Criminal Appeal 13 of 2002, quashed a conviction grounded on uncorroborated accomplice evidence: As a matter of practice amounting to a rule of law there was need to have other evidence to corroborate the caution statement, exhibit P3. There was no such evidence and the learned judge failed to warn herself of the dangers of founding conviction on uncorroborated accomplice evidence, namely, exhibit P 3, the cautioned statement DW 1. The only possible corroborative evidence was that fingerprints identification but as demonstrated above it is of doubtful quality and there is no evidence to support the charges of forgery and uttering the false document. It follows that I disagree with Mr. Kapela, Senior State Attorney, and Ms. Ally, State Attorney, that the respondent's case was proved beyond reasonable doubt. Having reached this conclusion, it is unnecessary to consider the third ground of appeal that was argued by Mr. Masanja in connection with regularity of the preliminary hearing. But I would like to say a word about the sentences imposed by the trial court. In imposing consecutive sentences of four years imprisonment, the trial court took into account rehabilitative, deterrent and retributive factors. The trial court, nevertheless, overlooked the provisions of section 168 of the Criminal Procedure Act [Cap. 20 R.E. 2022] generally and its judicial interpretation. Subsections (1) and (2) of the Criminal Procedure Act introduces the general rule that imprisonment sentences shall run concurrently. Subsection (1) relates to sentences imposed by the High Court while subsection (2) is in connection with those of District and Resident Magistrates' Courts. The import of section 168 (2) has been discussed in the leading case of Hadija Ally alias Sarah Martin Simbaulanga v DPP, Criminal Appeal 33 of 1988, the appellant who entered guilty pleas for charges of conspiracy to commit an offence contrary to and four counts of stealing was sentenced to seven years imprisonment on each of the five counts. The trial Court of Resident Magistrate of Dar es Salaam ordered the sentences to run concurrently. On appeal to the High Court, the concurrent sentences were set aside and substituted for an order directing the sentences on the four counts of theft to run

consecutively and the sentence of seven years imprisonment on the first count of conspiracy to run concurrently. As a result, the accused was sentenced to twenty-eight years imprisonment. On a second appeal, the Court of Appeal affirmed the sentences upon being satisfied that there were reasons to support both orders. In a judgment delivered by Nyalali CJ, the Court of Appeal seized the opportunity to clarify the statutory regime of concurrent and consecutive sentences under section 168 (2). The Court observed that the general rule under section 168 (2) is that sentences should run consecutively unless there are special reasons to order concurrent sentences - a 11 state significantly similar to that in India-different from that in England where sentences are presumed to be concurrent unless otherwise ordered: ...It seems to us that where a subordinate court convicts an accused person of one or more offences at one trial and proceeds to impose a sentence of imprisonment in respect of each offence, it has two courses of action open to it Firstly, it may make no order regarding the manner in which the sentences are to be served by the convict. In such a case, the punishments will run consecutively by operation of law stipulated under sub-section 2 of section 168 of the Act. ...Secondly, the court, in sentencing a convict to two or more sentences of imprisonment may expressly make an order concerning the manner in which those sentences are to run. When it does so, the general rule requires it to direct the sentences to run consecutively unless there is reason to direct otherwise. This general rule is derived from the ordinary meaning of the words used in sub-section 2 of section 168 of the Act... The Court further observed that this general rule is subject to some exceptions in which case the court may order the sentences to run concurrently: Firstly, an accused person is liable to be charged on more than one counts only in circumscribed situations. By law, the only circumstances when it can be done is where the offences concerned are based on the same act or omission or are a part or form a series of offences of the same or similar character as provided under section 133(1) of the Criminal Procedure Act, which deals with joinder of offences. Secondly, the courts in this country have consistently held that where an accused person is convicted at one trial with more than one offence, then if such offences are committed in the same transaction, any sentences of imprisonment that the court may impose must be directed by the court to run concurrently unless there are exceptional circumstances....Thirdly, a sentencing court does not act mechanically in 12 deciding the appropriate sentence. So, where a convict has to be punished with several sentences of imprisonment at one trial, the court in assessing sentences imprisonment at one trial, the court in assessing the individual sentences may have to run consecutively or concurrently. The Court of Appeal affirmed the decision of the High Court having being satisfied that there were grounds to ground both concurrent and consecutive orders. One exception to the general rule of concurrent sentences as reaffirmed in Hadija Ally is that where an offender commits several offences at the same time, it is appropriate to impose concurrent sentences: R v Kasongo 2 TLR 47; R v Sawedi

(1946) EACA 97; Lucas v R (1953) 20 EACA 304; Anacleti v R (1973) LRT No 34. This is not to say that all such cases call for concurrent sentences as was held by the Court of Appeal in Baguani Mhina Jumbe v R, Criminal Appeal 120 of 1993; Abdallah v R, Criminal Appeal 11 of 1981,

and Mlay v R, Criminal Appeal 71 of 1990 where the Court of Appeal opted for concurrent sentences. In the instant case, the reasons in support of the consecutive sentences consisted of reformation of the offender, retribution of the offender, and deterrence to the appellant because of the prevalence of forgeries in land cases. In the circumstances of this appeal, the real reason was that of prevalence but the rest are common rationales for sentencing and add to the choice between concurrent and consecutive sentences. Nevertheless, there was nothing before the trial court to justify a finding of prevalence of forgeries in land disputes and ordering consecutive sentences. 13 For the totality of these of reasons, I allow the appeal. The conviction is quashed and the sentence set aside. Unless he is otherwise withheld in custody, the appellant, Ayubu Hangali, be released from custody forthwith. DATED at BABATI this 26th day of November 2024. F.M. MIRINDO JUDGE COURT: Delivered in chambers this 26th day of November 2024 in the presence of the appellant in person, appellant's counsel, Mr. Joseph Masanja and in the presence of Mr. Jackson Mayeka, State Attorney for the respondent. B/C: Ms. Anna Mathayo (RMA) present. F.M. MIRINDO JUDGE Right of appeal explained. F.M. MIRINDO 14 JUDGE 15

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