

TANZANIA / JUDGMENT

bakari mwalimu jembe vs republic

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IN THE COURT OF APPEAL OF TANZANIA ATTANGA (CORAM: MUSSA, I.A, LILA, I.A. And MKUYE, I.A.) CRIMINAL APPEAL NO. 278 OF 2017 BAKARI MWALIMU IEMBE APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal against conviction and sentence from the judgment of the High Court of Tanzania at Tanga) (Masoud, I.I dated the 27th day of February, 2017 in Criminal Appeal No. 129 of 2016 JUDGMENT OF THE COURT zo" & 2ih February, 2019 MUSSA, J.A.: In the Resident Magistrate's Court of Tanga, the appellant and another stood jointly arraigned for three counts which were all predicated under the relevant provisions of the Penal Code, Chapter 16 of the laws, R.E of 2002 (the Code). More particularly, on the first count, the arraignment was for making a false document contrary to sections 333, 335(a), (d), (i) and 337 of the Code. The particulars were that on a given date, time and place, the appellant and the co-accused, with intent to defraud, did make a false document, to wit, cheque leaf number 55549 date n° April, 2011 for Shs. 21,000,000/= which was, purportedly, drawn in favour of FINCATanzania Ltd. On the second count, the statement of offence was for uttering a false document, contrary to sections 342 and 337 of the Code. The particulars were that on the 15th day, of April, 2011 at the NMB, Muheza Branch, within the District of Muheza, the appellant and the co-accused, knowingly and fraudulently, uttered a forged document, to wit cheque leaf number 55549 for Shs. 21,000,000/= which was deposited to account No. 4172509227 belonging to Julius John Singano. The third count was for stealing, contrary to sections 258(1) and 265 of the Code, the particulars of which were that on the 15th day of April, 2011 at the NMB, Muheza Branch the appellant and the co-accused stole a sum of Shs. 21,000,000/=, the property of NMB Madaraka Branch. Throughout the trial proceedings, the appellant stood as the first accused, whereas the co-accused person, namely, Julius John Singano was the second accused person. We shall henceforth refer the latter as "the second accused". When the charge was read over and explained to them at the commencement of the trial, they both denied the charge, whereupon the prosecution featured 9 witnesses and a host of documentary exhibits. The case for the prosecution was, almost entirely, derived of the narrative of the second accused in his cautioned statement (exhibit P1) which was tendered during the trial through the testimony of No. E. 7800 Detective Sergeant Omari (PW2). In nutshell, the second accused stated therein that, among other things, he operates the business of printing T-shirts. Sometime in the year 2011, he said, the appellant approached him and pressed an order

for the printing and delivery of 2211 T-shirts for and on behalf of FINCA. The appellant, it was further said, is a petty contractor dealing with wood products and, having agreed with the appellant on the T-Shirts order, the second accused was credited in his NMB, Muheza Branch account, a sum of Shs. 21,000,000/= by FINCA, through cheque No. 55549 which was, allegedly, presented to him by the appellant. It was a further claim by the second accused that the appellant was in his company throughout the presentation of the cheque up to its encashment. A little later, it came to light that the cheque, that is, No. 55549 was, actually, forged and did not, in the first place, originate from FINCA. A 3 report was relayed to the police, and hence the investigations which gave rise to the arraignment of the appellant and the second accused. On the whole of the evidence, the trial court was obsessive with the view that both the appellant and the second accused had complicity over the matter by way of a common intention. In the upshot, both were convicted save for the first count to which they were absolved of responsibility and the twosome were, accordingly, acquitted. Upon conviction, they were sentenced to respective jail sentence of seven (7) and three (3) years for the 2nd and 3rd counts. Dissatisfied, it was only the appellant who sought to impugn the decision of the trial Court but, the High Court (Masoud, J.,) found no cause to vary the verdict of the trial Court. Still aggrieved, the appellant presently seeks to overturn the decision of the High Court through a memorandum which is comprised of eight points of grievance, namely:- " 1. That, both the learned trial magistrate and the appellate judge erred in law and in fact by relying on confession statement of the 2nd accused to implicate the appellant which was obtained illegally and recorded out of the prescribed time. 4

2. That; both the learned trial magistrate and the appellate judge erred in law and in fact to convict the appellant through confession statement of the 2nd accused without complying section 33(2) of the evidence Act [Cap. 6 R.E 2002].
3. That; both the learned trial Magistrate and the appellate judge erred in law by failing to analyze that the charge of uttering false Document and stealing was defective against the appellant.
4. That; both the learned trial Magistrate and the appellate judge erred in law and in fact by failing to analyze that; PW6(Bulk office Officer) ought to deal with approval of payment Exh. P. 8 and P.9 which are over the drawing amount: therefore she has a good chance to prevent the alleged offence, but it was apparent that PW6, PW3 and 2nd accused were the same mission.
5. That; both the learned trial Magistrate and the appellate judge erred in law and in fact to believe and hold as a fact that the Exh. P. 13 cheque no 55549 issued by FINCA to the second accused was forged without considering the same cheque was signed by the bank officers and was paid to the 2nd accused.
6. That; both the learned trial Magistrate and the appellate judge erred in law and in fact by failing to cogitate the evidence adduced before him as no evidence implicate the appellant with the alleged offence.

7. That the sentence imposed to the appellant was excessive.
8. That the prosecution did not prove their case against the appellant to the standard required by law. " At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Messis Peter Maugo and Waziri Magumbo who are, respectively, learned Principal State Attorney and State Attorney. Mr. Magumbo who argued the appeal, commenced his submission with the contention that he would resist the appeal save for the conviction on the third count which cannot be sustained on account of being predicated on a defective charge;1. It is noteworthy that whereas the particulars of the third count allege that the stolen money was the property of NMB, Madaraka Branch, the evidence was to the effect that the money belonged to FINCA. As we engaged him in a dialogue, in the course of arguing the appeal, the learned State Attorney conceded that the cautioned 6 statement(exhibit P1) was, after all, improperly adduced into evidence as it was belatedly recorded contrary to section 50(1) of the Criminal Procedure Act, Chapter 20 of the Laws R.E. 2002(the CPA). On account of the shortcoming, Mr. Magumbo urged us to expunge the cautioned statement from the body of the evidence. Admittedly, having done so, all what remain of the case for the prosecution are mere skeletal allegations which do not in any way point the guilt of the appellant. It is apposite for us to note that on a charge of uttering a false document, the prosecution is enjoined to prove:-
 - (a) The document was false in the sense that it was forged;
 - (b) The accusedknew that it was forged; and
 - (c) The uttered intended to defraud. (see Joseph Mukuha Kimani v. Republic [1984J EKLR) In the matter under our consideration, although it was established that the cheque was forged, it was far from being established that it was the appellant who uttered the cheque to the Bank, let alone the fact that there was no material to impute that the appellant was aware of the forgery. 7 To this end, we are satisfied that the appellant's conviction cannot be sustained and, accordingly, his appeal is meritorious. The conviction and sentence are, respectively, quashed and set aside with an order that the appellant should be released from prison custody forthwith unless he is detained for some other lawful cause. It is so ordered. DATED at TANGA this 2ih day of February, 2019. K. M. MUSSA JUSTICE OF APPEAL S. A. LILA JUSTICE OF APPEAL R. K. MKUYE JUSTICE OF APPEAL I certify that this is a true copy of the original. 8

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