

TANZANIA / JUDGMENT

20101210 TZHC Dar es Salaam

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IN THE HIGH COURT OF TANZANIA (AT DAR ES SALAAM) CRIMINAL APPEAL NUMBER 120 of 2009 (Originating from Resident Magistrate's Court of Dar es Salaam at Kisutu Cr Case No. 845/2005- A.W. Mahay-RM) \ I JUMA WAHi.\ ...,... ~. \ APPELLANT vs REPUBLIC RESPONDENT

JUDGMENT

Date of last Order: 20-10-2010 Date of Judgment: 10-12-2010 JUMA, J.: !,---, ..., •. Appellant together 'with one Faterna Semseka . were 'jointly ' \. •t charged in the Court of the Resident 'M~gistrate at Kisutu, Dar es Salaam (Crimi~al Case No. 845 of 2005), on .1 st cqunt of conspiracy to defraud, contrary to section 306 of the Penal Code; he was I . charged alone on second count of forgery contrary to sections 333 and 335 (d) of the Penal Code. Appellant in the third count was alone was charged with the offence of obtaining goods by false pretences contrary to section 302 of the \Penal Code and, ' , ' ••• ; ! together with another, on fourth count, of•. uttering a false •. document c•ohtrary to section 342 of the Penal Cod~. "J 1 In the count of conspiracy, it was alleged that sometime in 2004 the Appellant and Fatuma Semseka conspired to defraud one Irenai Ivo Ngowi by falsely pretending that they were putting their Plot Number 368 Block G Mbezi Medium Density for sale. This, according to prosecution, was false. In count of forgery, it was alleged that between January and September 2004 with intent to defraud or deceive they forged a certificate of occupancy title number 377 537 for Plot Number 368 Block G Mbezi Medium Density. Particulars of personating count were that on 4th September 2004 Appellant falsely represented himself before C.K. Kariwa Advocates that he was Gilliad Assenga the real owner of Plot Number 368 Block G Mbezi Medium Density. This representation was false. In the count of obtaining by false pretence, it was particularized that the Appellant and others on 6th September 2004 with intent to defraud obtained Tshs 6,500,000/= from Irenai Ivo Ngowi as payment for Plot Number 368 Block G Mbezi Medium Density. Seven prosecution witnesses testified and ultimately the trial court found the appellant guilty in all four counts and sentenced him to serve seven years in prison (for conspiracy to defraud), ten years (for forging title to land), three years (for obtaining by false pretence) and seven years (for uttering a false document). The trial court ordered the sentences to run concurrently. As a result of the concurrent sentence the appellant is now serving a 10 year prison sentence. 2 -J Feeling aggrieved, appellant has filed a four-page petition of appeal from which I can deduce seven grounds of complaints. First, the learned trial magistrate failed to take the appellant's plea before the start of the trial. In his

second ground, appellant relies on the case of *Hassani Mzee Mfaume V. R* 1981 TLR 167 to contend that particulars of the charge was not adequate to inform the appellant the nature of offence facing him leading to the failure of the magistrate to analyse or otherwise assess evidence adduced. Lack of logical reasoning in the judgment is the third ground of appeal. In the fourth ground, appellant alleges that the trial magistrate wrongly placed the burden of proof on the appellant. Fifthly, appellant is of the view that after taking over from his predecessor, trial magistrate did not comply with section 214 of the Criminal Procedure Act and this change of magistrates prejudiced him. In his sixth ground of appeal appellant contends that his conviction on the fourth count that he obtained TSHS 6 500 000 from Irenei Ivo Ngowi does not comply with evidence of PW 1 and does not comply with section 210 of CPA. That the doubt which should have gone in the appellant's favour. Lastly, appellant maintains that he was wrongly convicted on count numbers 1, 2 and 3 on basis of oral testimony without any corroboration. Before re-evaluation of evidence in light of grounds of appeal should first point out that the records of the trial court clearly show that the substance of the charge facing the appellant were clearly stated out to the appellant and appellant was asked 3 whether he admitted them. A plea of NOT GUILTY was properly recorded. The evidence on record show that sometime in August 2004 one Irenei Ivo Ngowi (PW 1) was looking for a plot of land to buy. PW 1 came to learn that the appellant and his wife had a plot they were selling at the price of five million shillings. PW 1 first met appellant's wife who took him to the Mbezi Beach plot intended for sale. PW 1 finally met the appellant at 10 a.m. on 29 August

2004. At this meeting appellant introduced himself as Gilliad Assenga, the owner of plot number 368 Block "G" Mbezi Medium Density Dar es Salaam. On the same day (i.e. 29 August 2004) appellant and his wife accompanied PW 1 to seek legal services of Advocate Kariwa. Mr. Kariwa who testified as PW2 asked to see and the appellant showed him the certificate of occupancy which indicated that the appellant was the owner of plot number 368 Block "G" Mbezi Medium Density Dar es Salaam. Appellant and PW 1 informed Advocate Kariwa that they had agreed the price of six million five hundred thousand shillings. Although PW 1 was prepared to pay the purchase price on 3 September 2004, appellant and his wife wanted an advance payment of one million shillings. PW 1 did have that advance sum with him but promised to pay and in fact paid it later that same day. PW 1 finally paid the remaining five million shillings on 3 September 2004. Advocate Kariwa prepared Sale Agreement on 4 September 2004 and asked the appellant to bring with him his 4 photograph which was glued on the Sale Agreement. Advocate Kariwa, appellant and his wife all signed the Sale Agreement and other land transfer documents. These documents were handed over to PW 1 on 19 September 2004. Having paid the purchase price, PW 1 wanted a formal hand over of the plot. He visited the house of the appellant one Sunday in October 2004. At the site of the plot PW 1 found an advertisement prominently displaying a warning to all and sundry to beware of conmen purporting to sell the plot. This was the moment when suspicions dawned on PW 1. He decided to contact the Ministry of Land to verify ownership of plot number 368 Block "G" Mbezi Medium Density Dar es Salaam. Following further advice of Advocate Kariwa, PW 1 reported the matter to police and appellant was arrested. It was at

police station where appellant pledged to refund the six million shillings in three instalments. In his defence, appellant had an explanation on how he obtained Tshs. 6 million from PW 1. Appellant claimed that he had borrowed that sum from PW 1 which he promised to pay back after three months with interests. Appellant also relied on the undertaking he made at the police station that he would repay back the loan. Appellant also denied presenting himself to PW 1 and PW2 as the owner of the plot number 368 Block "G" Mbezi Medium Density Dar es Salaam. Appellant's version of events was supported by one Fatuma Semseka who testified as DW2. 5 I have perused the evidence at trial court and I am satisfied that Mr. Kariwa the learned Advocate indeed prepared and witnessed the Sale Agreement and other land transfer documents. Mr. Kariwa confirmed that it was the appellant in the company of his wife (Fatuma Semseka) who signed the Sale Agreement as vendor of the plot and received six million shillings from PW 1, the buyer of the plot he purportedly sold. PW 1 visited the site of the plot which appellant had purportedly sold to him only to find a warning off buyers to beware of conmen. I also believe the evidence of Gilliad Assenga (PW3), the genuine owner of the plot of land the appellant purported to have sold to the complainant. PW3 testified how sometime on 12 October 2004 his brother in law informed him that his plot was on sale and the matter was already in police hands. PW3 also testified how he was summoned by police who were investigating the incident. There is also the evidence of Detective Corporal Nyagea whose investigation established that documents of title presented by PW3 showed that he (PW3) was the genuine owner of plot number plot number 368 Block "G" Mbezi Medium Density Dar es Salaam. Section 302 creates the offence of obtaining by false pretence,

302. Any person who by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen, commits an offence and is liable to imprisonment for seven years. 6 From evidence presented at his trial, I am satisfied the appellant committed the offence of obtaining by false pretence. There is ample evidence on record to manifest false pretences by the Appellant. Appellant prepared a false certificate of occupancy to falsely make up that he was the owner of plot number 368 Block "G" Mbezi Medium Density Dar es Salaam. Appellant signed Sale Agreement and land transfer documents which he successfully used to induce PW 1 to deliver six million shillings in exchange for a plot of land which in fact did not belong to the appellant. The genuine Gilliad Assenga testified in court and explained how he reported the false pretence to the police. There is also the evidence of the pledge which the appellant made to pay back the money he had falsely obtained from PW 1. I do not believe appellant's claim that the six million shillings which PW 1 delivered to the appellant was a loan. I am satisfied that the trial magistrate convicted the appellant on basis of sufficient evidence that proved the offence of obtaining by false pretence. With respect to the offence of forgery for which the appellant was charged and convicted, charge sheet cites sections 333 and 335

- (d) of the Penal Code. Upon closer examination of section 335, it is my belief that the correct provision was section 335-(b) but not section 335 (d) of the Penal Code. Section 333 of the Penal Code defines the offence of forgery to be the making of a false document with intent to defraud or deceive, 7
333. Forgery is the making of a false document with intent to defraud or to deceive. Section 335 provides when a person can be said to have made a document for purposes of offence of forgery. Section 335 (b) provides,
335. Any person makes a false document who-
- (a)
- (b) alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document; The appellant was charged with the offence of forgery of a certificate of occupancy bearing title number 37537 for plot number 368 Block "G" Mbezi Medium Density Dar es Salaam. To prove the offence for which the appellant was charged, prosecution had to prove first, that appellant made that false certificate of occupancy. Secondly, prosecution had to prove that the appellant made that false document by altering it without authority with intent to defraud or to deceive. The punishment for the offence of forgery is provided for by section 337 of the Penal Code which states,
337. Any person who forges any document commits an offence, and is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for seven years. 8 , I have re-evaluated evidence presented at the trial of the appellant in light of sections 333, 335-(b) and 337 of the Penal Code which in their totality create and provide punishment of the offence of forgery for which the appellant was charged with. Although the maximum possible punishment prescribed under section 337 is imprisonment for seven years, the appellant was sentenced to serve 10 years. This sentence of 10 years could only be sustainable if the offence falls under the categories of forgeries punishable by possible maximum sentence of imprisonment for life. In terms of section 338 of the Penal Code, forgeries of documents of title to land or forging of judicial record, or forging power of attorney are amongst such categories of forgeries,
338. Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker, is liable to imprisonment for life and the court may in addition order that any such document be forfeited to the United Republic. am of the considered opinion that the appellant was not prejudiced by the sentence of 10 years because it is a punishment that is envisaged under section 338 of the Penal Code. Particulars under the charge of forgery for which the appellant was charged clearly drew appellant's attention to the fact that he was accused 9 of forging a certificate of occupancy title number 377537 for Plot Number 368 Block G Mbezi Medium Density. Appellant was in the

circumstances of his trial properly sentenced to serve 10 years in prison because he made a false certificate of occupancy by altering a certificate of occupancy. This offence under section 338 of the Penal Code attracts a maximum punishment of life. Appellant made the false alteration despite the fact that he was not a Land Officer with any authority to alter the Certificate of Occupancy. The alterations by the Appellant had the effect of convincing both the Advocate and PW 1 believe that they were dealing with real owner of the plot on sale and this convinced PW 1 to part with six million shillings. The elaborate alteration in addition showed that the certificate of occupancy was witnessed by Advocate Kalolo in 1981.

According to Advocate Kariwa (PW2) in 1981 when Advocate Kalolo was alleged to have witnessed the certificate of title, Mr. Kalolo had not even joined the Faculty of Law to undertake his law degree. Using the name of Advocate Kalolo was a clear manifestation of the intention of the appellant to permanently deprive PW 1 of the six million shillings. There is no reason for me to interfere with the conviction for forgery and attendant sentence which the trial court had imposed on the appellant. The offence of personating for which the appellant was tried and convicted is created by section 369 of the Penal Code and attracts a maximum sentence of seven years in prison, 10 369.-(1) Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, commits an offence.

- (2) If the representation is that the offender is a person entitled by will or operation of law to any specific property and he commits the offence to obtain that property or possession thereof, he is liable to imprisonment for seven years. An offence of personating is committed where one person falsely represents himself to be another person all with intent to defraud. Where an offender falsely represents himself to be entitled under the law to a certain property, the resulting punishment may be up to seven years in prison. As against the appellant, prosecution alleged that he falsely represented himself to be one Gilliad Assenga with power to sell a plot of land. The trial magistrate after evaluation of evidence before him was in no doubt that appellant falsely represented himself to be Gilliad Assenga the genuine owner of plot number 368 Block "G" Mbezi Medium Density Dar es Salaam. The trial magistrate exercised his judicial discretion under section 369 (1) of the Penal Code and ordered the appellant to serve a three year prison term instead of seven year maximum that the provision prescribes. The trial magistrate concluded that appellant personated Gilliad Assenga from evidence of PW 1 who told the trial court how the appellant falsely introduced himself as Gilliad Assenga and how the appellant's wife introduced herself as Paulina Gilliad Assenga. 11 The trial court also evaluated the evidence of Advocate Kariwa who testified that appellant and his wife introduced themselves as Gilliad Assenga and Paulina Assenga respectively, which convinced Mr. Kariwa that appellant owned the plot and had the power to sell it. The trial court also relied on the evidence of genuine Mr. Gilliad Assenga who presented his genuine documents to prove his ownership of the plot of land. Finally, the trial magistrate relied on the evidence of PW4 (Detective Corporal Nyagea) who testified that officers from the Ministry of Land confirmed to him that the certificate of title which appellant had earlier presented before Mr. Kariwa was an imitation because the appellant

had personated the genuine Gilliad Assenga. From evidence, I am satisfied that the appellant was properly convicted for personating himself to be the genuine Gilli ad Assenga in order to defraud PW 1 of the six million shillings. I will not interfere with the discretion of the trial court in sentencing the appellant to serve three years in prison instead of the prescribed maximum of seven years. Appellant was charged, tried and convicted for the offence of conspiracy to defraud contrary to section 386 of the Penal Code. But section 386 of the Penal Code does not create the offence of "conspiracy to defraud." Conspiracy to defraud is an offence under section 306 of the Penal Code which provides-

306. Any person who conspires with another by deceit or by any fraudulent means affect the market price of anything publicly sold or to defraud 12 the public or any person, whether a particular person or not, or to extort any property from any person, is guilty of an offence and is liable to imprisonment for five years. Section 386 of the Penal Code for which the appellant was charged creates several distinct categories of conspiracies under paragraphs (a) to (g) of subsection (1). Assuming the appellant was charged under section 386, the charge sheet and the judgment of the trial court should have specified which of the categories of conspiracies the appellant was charged with. The relevant section 386 provides, 386.-(1) Any person who conspires with another to effect any of the following purposes, that is to say-
- (a) to prevent or defeat the execution or enforcement of any written law; or
 - (b) to cause any injury to the person or reputation of any person, or to depreciate the value of any property of any person; or
 - (c) to prevent or obstruct the free and lawful disposition of any property by the owner for its fair value; or
 - (d) to injure any person in his trade or profession; or
 - (e) to prevent or obstruct, by means of any act or acts which if done by an individual person would constitute an offence on his part, the free and lawful exercise by any person of his trade, profession or occupation; or
 - (f) to effect any unlawful purpose; or
 - (g) to effect any lawful purpose by any unlawful means, commits an offence. From my perusal of both sections 306 and 386 of the Penal Code I do not agree with the learned trial magistrate that the evidence 13 before the trial court was consistent with any of the offences created under either section 306 or 386 of the Penal Code. I have painstakingly perused the record; I find no evidence consistent with offence of conspiracy to defraud. What is clear here is that neither the prosecution nor the trial magistrate directed their respective mind to the essential ingredients constituting distinct offences created under section 386-(1) of the Penal Code. Had the trial magistrate in particular directed his mind to this provision; he would have noted that evidence before it addressed neither section 306 nor section 386-(1) of the Penal Code. For these reasons, the conviction for the count of conspiracy to defraud is

quashed and the attendant sentence of seven years in prison is hereby set aside. Appellant has taken as his ground of appeal that he was prejudiced by the change of trial magistrates. Appellant contends that the change of trial magistrate did not comply with section 214 of the Criminal Procedure Act which regulates convictions where proceedings are heard partly by one magistrate and partly by another. The relevant section provides, 214-(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings. Section 214 (1) of CPA allows a successor magistrate to take over and complete the trial from a magistrate who had heard and recorded any part of the evidence and who for any reason was unable to complete the trial. The successor magistrate is vested with the discretion where necessary to re-summon the witnesses and can even decide to recommence the trial. Appellant is correct when he contended that his trial was at first heard by E. Mingi (PRM) till 8 September 2006 when Chusi (RM) briefly took over. Chusi (RM) did not proceed with the case because she was travelling abroad for further studies. H.H. Msongo (RM) also could not proceed because she was also in charge of another case involving the appellant. It was on 27 March 2007 when A.W. Mahay (RM) substantially took over and begun to hear the defence witnesses including the appellant who testified as OW 1. The final judgment of the trial court was delivered on 12 April 2007 by the learned A.W. Mahay (RM). The power of High Court in appeal where a conviction resulted from proceedings heard partly by one magistrate and partly by another is provided for by subsection (2) of section 214 of CPA, 214-(2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial. High court in re-evaluation of evidence is supposed to determine whether appellant had been materially prejudiced by proceedings heard partly by one magistrate and partly by another. L.B. Mchome, J. in R. Vs. Phillip Minami, HC Criminal Revision No.1 of 2000 was faced with almost a similar situation where the partly heard case was heard by a Magistrate who was transferred. The new Magistrate ordered the case start afresh instead of addressing the accused in accordance with section 214 of CPA, 1985. Mchome, J. stated that the order of new Magistrate was illegal, he should have called the accused and address him in accordance to section 214(1) of Criminal Procedure Act. In this appeal before me, when the new Magistrate took up the hearing, the new magistrate did not call out on the appellant to draw his attention to the change of Magistrates under section 214- (1) of CPA. Despite this inadvertence of the new magistrate, my re- evaluation of evidence clearly satisfies me that the appellant was not prejudiced at all. Appellant was able to effectively put up his defence. And the new magistrate was properly guided by the evidence recorded by the predecessor

Magistrate. I am of the considered opinion that the accused was not materially prejudiced by change of trial magistrate. 16 In the upshot, the conviction by the trial Resident Magistrate Court is well supported by evidence that was presented before that court. Apart from quashing the conviction and resulting sentence for conspiracy to defraud, I found no ground to interfere with the conviction and sentences meted out for forgery, personating and obtaining by false pretences. I accordingly dismiss the appellant's appeal against his conviction and sentence for forgery, personating and obtaining by false pretences. Appellant shall continue to serve the 10 year concurrent prison sentence which the trial court had imposed on him. ~ ..- . l"•/j . I.H. Juma, · JUDGE 10-12-2010 17 I

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