

TANZANIA / JUDGMENT

lucas lawrence omwa vs republic

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM DISTRICT REGISTRY) AT DAR ES SALAAM
CRIMINAL APPEAL NO. 47 OF 2021 (Appeal from the Judgment of the Resident Magistrates Court
of Dar es salaam Region at Kisutu, Criminal Case No. 139 of 2018 before Hon. J.H. Mtega, PRM
dated 13/08/2020) LUCAS LAWRENCE OMWA..... APPELLANT
VERSUS REPUBLIC.....RESPONDENT

JUDGMENT

1st November, 2021 & 17th December, 2021 E.E. KAKOLAKI J. Before the Resident Magistrates Court of Dar es salaam at Kisutu, the above named appellant was arraigned facing charges on seven (7) counts. After full trial he was found guilty and convicted of the first six (6) counts while acquitted on the seventh (7) count, before he was sentenced to two (2) years imprisonment on each count and ordered to compensate the Republic a total sum of Tshs. 100,000,000/- (One Hundred Million Tanzanian Shillings). Sentence to run consecutively. On the 1st count the appellant was charged of Forgery; Contrary to sections 333, 335(a)(d) and 337 of the Penal Code, [Cap 16 R.E 2002], while the 2nd and 5th counts were on the 1 offence of Uttering False Document; Contrary to section 342 of the Penal Code. The 3rd and 4th counts were on the offence of Personation; Contrary to section 369 of the Penal Code, while the 6th count was of Obtaining Money by False Pretences; Contrary to section 302 of the Penal Code and the 7th count being on Money Laundering; Contrary to section 3(o) and 13(a) of the Anti-Money Laundering Act, No. 12 of 2006. It was prosecution case on the 1st count that, the appellant on unknown date and place within the City and Region of Dar es salaam with intent to defraud or deceive forged, a bank card with No. 04211012439-60, the property of one Yahaya Shabani Ally purporting to show that it was genuinely issued by Access Bank Tanzania, the facts he knew to be untrue. On the 2nd and 5th counts it was alleged, the appellant on the 09/02/2018 and 10/02/2018 at Access Bank Tanzania branches of Manzese and Lumumba within Kinondoni and Ilala Districts in Dar es salaam Region respectively, uttered forged bank card with Account No. 04211012439-60 issued to one Yahaya Shabani Ally to Tausi Juma Usanga and Grace Naiman Mpogolo, purporting to show that, it was genuinely issued to him by Access Bank Tanzania while knowing that fact to be untrue. And as to the 3rd and 4th it was contended on the mentioned dates in the 2nd and 5th counts, at same places and to the same 2 officers of Access Bank Tanzania, the appellant with intent to defraud

presented himself as Yahaya Shabani Ally the owner of Bank Card No. 04211012439-60 in order to fraudulently obtain money from the said account. In the 6th count it was asserted on the 09/02/2018 at Access Bank Manzese Branch the appellant with intent to defraud or deceive, obtained from Tausi Juma Usanga, a bank officer of Access Bank, Tshs. 100,000,000/- pretending to be Yahaya Shabani Ally the owner of Bank Card Account No. 04211012439-60, the fact he knew to be untrue. On the 7th counts as stated above the court acquitted him on that offence, so I don't find any need to refer its particulars herein. When the appellant was called on by the trial court to plead to the charges he denied any involvement whatsoever. The prosecution therefore had to call nine (9) witnesses and tender six (6) exhibits in a bid to prove its case while the appellant was the sole defence witness. Briefly, prosecution case was built on the evidence of visual identification (identification parade register exh. EP3) and the forensic report of handwriting expert (exh. EP 4). It was evidenced by PW1, Tausi Juma Usanga and chief cashier at Manzese Access Bank branch that, on the 09/02/2018 at about 15.00 hours the appellant appeared and presented before her a customer Bank Identity Card 3 with Account No. 04211012439-60 in the names of Yahaya Shabani Ally with intent to withdraw Tshs. 100,000,000/-. That, she complied with all withdrawal procedures including making entries of the account number for the purposes of checking in the system whether the customer before her is the owner of the account, whereby she satisfied herself by seeing his picture and signature in the bank system that resembled the ones on the customer bank identity card presented to her. Further to that she got confirmation and payment go ahead from PW2 Anna Seraphine, Acting Supervisor of Banking Services, Manzese Branch, who also according to her testimony had satisfied herself of the appellant's particulars in the bank system, before the said money was paid to him in cash. In that transaction PW1 issued the withdrawal slip which was signed by the appellant and tendered in court as exhibit EP1. PW1 also tendered for identification purposes the said forged customer identity card which was admitted as ID1 and further identified by PW2 during her testimony as the identity card of the person whom she also served on the 09/02/2018. Upon such payment the real owner of the account one Yahaya Shaban Ally got withdrawal notification by sms in his mobile phone and immediately reported it to the Access Bank customer care who instructed him to report the matter to Manzese Branch and later Magomeni 4 Police station which he did. He tendered his original customer bank identity card (exh. EP2) and stated he never withdrew the alleged money on the said 09/02/2018, which money he was later on refunded by the bank upon claim. The prosecution adduced further evidence through PW4 that, the appellant was arrested on 10/03/2018, by PW8, E. 5442 S/Sgt Julius in company of G. 7518 DC Enock upon report made at Central Police Station, when he attempted to present the same bank identity card to PW4, Grace Nayman Mpogolo, customer service officer at Lumumba Access Bank Branch, at about 11.45 hours who upon inserting the account numbers in the bank system the account appeared blocked. Upon being searched by PW9, the appellant was found in possession of a hat (Barakashia), one small mobile phone make TECHNO, one black bag containing glass holder and blue diary (exh. EP 6 collectively) and was issued with certificate of seizure (exh. P5) duly signed by him. The appellant was identified by PW1 and PW2 in the identification parade (exh. EP 3) conducted on 12/03/2018 at 12.30 hours by PW6 A/Insp. D. Mokimiryia as the person who appeared before them on 09/02/2018. As per PW7 SP. Chrisantus Kitandala, handwriting expert,

the appellant customer bank card ID1 and his handwriting specimen together with that of PW2 and PW3 and other documents such as withdrawal slip (exh.EP1) were 5 examined by him and in his report exh. EP 4 collectively concluded the signature in exh. EP1, ID1 and handwriting specimen collected from the appellant were written by one and the same person. On his side the appellant raised a defence of alibi contending that, on the 09/02/2018 he was not in Dar es salaam as he came from Arusha where he stays on 06/03/2018 by using Kidia one bus, in which his bus ticket was torn by PW 8 when arrested and seized. He claimed, his mission in Dar es salaam was aimed at meeting the prospective mineral buyer from Turkey as a small mineral dealer, and was asked to open the bank account for furtherance of the business deal in which Access Bank was his first option. That, on reaching Access Bank Lumumba branch, he was denied access something which angered him before he exchanged bitter words with the guards and workers there, hence his arrest. He denied to have been found in possession of the alleged customer bank identity card (exh. ID1) and participation in the identification parade as claimed by PW6. The trial court could not believe his story, in turn found the prosecution case was proved beyond reasonable doubt and proceeded to convict him on the six (6) above named counts and sentenced him accordingly. Further to that was ordered to compensate the said Tshs. 100,000,000/- to the Republic. It is from that 6 decision the appellant is aggrieved and has preferred this appeal raising eight

(8) grounds of appeal going thus:

1. That, the learned trial magistrate erred in law and fact to convict and sentence the appellant based on unreliable visual identification evidence yet there is no evidence adduced as to when the incident was reported by PW5 to suggest that there was prior description of appellant given at first instance.
2. That, the learned trial magistrate grossly erred in both law and fact by convicting the appellant based on PW1 and PW2 evidence yet failed to note that their evidence ought to have been cautiously acted upon as they were witnesses who had an interest to serve and were accomplices.
3. That, the learned trial magistrate grossly erred in law to convict appellant basing on PE1 (withdrawal slip) without considering that the bank statement was also a vital document for the court to satisfy whether PW3 Yahaya Shaban Ally was debited or credited with the same amount on 09/02/2018. 7
4. That, the learned trial magistrate erred in law and fact to convict appellant based on flawed identification parade evidence of PW1 and PW2 which lacked corroboration of CCTV footage of 09/02/2018.
5. That, the learned trial magistrate erred in law and fact to convict the appellant on count of forgery without considering that he was charged in duplicate in such count hence the statement of offence was defective for duplicity.

6. That, the learned trial magistrate erred in law and fact to sentence the appellant without considering the concurrent sentencing principle in the count No. 1,2,3,4,5 and 6 while all counts originated from the same transactions.
7. That, the learned trial magistrate erred in law and fact to convict the appellant considering the defective evidence.
8. That, the learned trial magistrate erred in law and fact to convict appellant on the case which was not proved beyond reasonable doubt. Basing on the strength of those grounds of appeal this court is invited by the appellant to allow the appeal by quashing the conviction and set aside the sentence and orders entered against him. 8 Hearing of the appeal proceeded viva voce and the appellant appeared unrepresented while the respondent proceeded under services of Mr. Adolf Kisima, learned State Attorney. When called to address the court on the merits of his appeal the appellant who urged the court to consider all of his eight (8) grounds of appeal, chose to hear first from the State Attorney for the Respondent while reserving his right to reply thereafter. Following that choice, Mr. Kisima who was contesting the appeal took the floor first and informed the court that, he was prepared to respond to the 1st,2nd,5th,6th and 7th grounds of appeal claiming that, the rest of the grounds were the repetitions. He argued, the prosecution proved its case against the appellant in all six (6) counts in which he was convicted with. Responding to the first ground on visual identification Mr. Kisima submitted, the appellant was identified by PW1 and PW2 at Access Bank Manzese Branch on 09/02/2018 as the client who withdrew Tshs. 100,000,000/- vide withdrawal slip (exh. EP1) while personating himself as Yahaya S. Ally holder of account No. 0421101243960, in a day broad light at about 3.48 Pm and before PW4 at Lumumba Branch on 10/03/2018 at about 11.45 am where he was arrested. He said all prosecution witnesses, PW1,PW2 and PW4 identified and 9 described the appellant as tall, black and slender who had put on a hat (barakashia) and black glasses, hence unmistakable identity. As regard to the second ground on failure of the trial court to consider cautiously evidence of PW1 and PW2 as witnesses with interest to serve he argued, their evidence was corroborated by that of PW4 who also identified the appellant at Lumumba branch and PW7 the hand writing expert through his report exhibit EP 4, who exhibited to the court that, it is the appellant who appeared before PW1 and PW2 in the bank at Manzese branch and signed the withdrawal slip exhibit EP1 as his signature therein has similar characters to the ones in the customer bank identification card exh.ID1, he was found in possession of at Lumumba branch when arrested. With regard to complaint of duplicity of charge of forgery as raised in the 5th ground of appeal, Mr. Kisima stated, the complaint was not genuine as the count of forgery was not in duplicity as alleged for being the first count only. Mr. Kisima moved to the 6th ground on the complaint of none consideration of the appellant's defence of alibi and countered, the court did consider it despite the fact that, the appellant did not comply with the legal requirement under section 194(4),(5) and (6) of the Criminal Procedure Act, [Cap. 20 R.E 2019], for failure to issue the Notice of reliance on such defence. And lastly 10 was on the 6th ground regarding the complaint of court ordering the sentence to run consecutively against the appellant where Mr. Kisima conceded the court was in error to so order as the

offences were committed in series. He relied on the case of Festo Domician Vs. R, Criminal Appeal No. 447 of 2016 (CAT-unreported). In his reply to the Respondent's submission, the appellant said there was no cogent evidence to prove his identification at the scene of crime as PW1 said they checked the CCTV camera and identified his face but the said CCTV images were not tendered in court to prove such identification if at all it was true. He argued, the claimed identification parade was never conducted as after his arrest on 11/03/2018 he was presented before PW1 and PW2 who were also in police lock up at Central Police Station and when asked if they know him, the two denied to have seen him before. If the said identification parade was really conducted occurrence book could have been tendered as well as the pictures taken during such exercise in compliance with PGO 232, the appellant stressed. As regard to what he was found in possession of, the appellant said, it was his bus ticket which was torn out by PW8. And lastly he argued, while the investigator claimed he confessed to have committed the offence through the cautioned statement, the same was never tendered in court to so prove. The appellant was of the submission that, the case against him was not proved beyond reasonable doubt and invited this court to so find, quash the conviction and set aside the sentence against him, the result of which is to release him from prison. I have taken time to consider both parties submissions as well as revisiting the impugned judgment, the evidence tendered by the prosecution and the defence entered by the appellant during trial. What is discerned therefrom as also alluded to above is that, the prosecution case hinges on evidence of visual identification by PW1, PW2, PW4 and the identification parade register exhibit EP 3 as well as the report of Handwriting expert exhibit EP 4 by PW7 which proved the handwriting (signature) in the withdrawal slip exhibit EP1 and the customer bank identification card exh. ID1, allegedly presented before PW1, PW2 and PW4 and found in possession of the appellant belonged to the appellant. The appellant on his side in the 1st, 3rd and 4th grounds of appeal and brief submission is challenging credibility of the evidence of visual identification by PW1, PW2 and PW4, identification parade register exhibit EP3 for want of corroboration from CCTV footage of 09/02/2018 and the withdrawal slip exh. EP1 for not being corroborated with the bank statement to prove that, the alleged money (Tshs. 100,000,000/-) was really withdrawn from Account No. 0421101243960 belonging to Yahaya S. Ally as alleged. The issue of identification of the appellant in this appeal has indeed taxed my mind to the great deal, more particularly on whether the identification parade was really conducted or not as alleged by the appellant. This comes from the settled principle of the law that, in cases involving contest in visual identification, prosecution evidence should leave no doubt that the appellant was correctly identified. See for instance the cases of Masudi Amlima v. R. [1989] TLR 25, Yohanis Msigwa v. R [1990] TLR 148 and Maliki George Ndengakumana Vs. R, Criminal Appeal No. 353 of 2014 (CAT-unreported). In this matter no doubt PW1 and PW2 were stranger to the appellant when allegedly fraudulently presented himself to them as one Yahaya S. Ally and holder of Account No. 0421101243960 before he successfully withdrew Tshs. 100,000,000/-. It is also in record that, after that incident together with PW5 the two witnesses reviewed the CCTV footage in the presence of the real owner of account PW3, thus identification of the appellant through them must have relied much on the identification parade (exh. EP3)

conducted on 12/03/2018 by PW6. A close look to PW6's evidence revealed that, on that day at 12.30 hours while in his office was approached 13 by the investigator PW8 and asked to conduct the identification parade to the appellant in which he complied with. However the identification parade register tendered by him in court (exh.EP3) shows the exercise was conducted at the same time 12.30 hours. When cross examined by the appellant as to how possible he managed to mobilize other persons in attendance to the identification parade and conduct it within the same time of 12.30 hours as written in exhibit EP3, PW6 responded, he managed to do so within a short period of time and it was before 12.30 hours. With that response, I find PW6's evidence is contradictory in itself as he could not have been approached by PW8 at 12.30 hour with a request to conduct identification parade and do all the necessary preparations within seconds before conducting it at the same time (12.30 hours) as indicated in exhibit EP3. It is from that finding, I entertain the appellant's doubt that, the alleged identification parade was either not conducted at all or was conducted with full of flaws, something which renders exhibit EP3 unreliable evidence. In that regard, I agree with the appellant's concern as raised in his 4th ground of appeal which ground was not countered by Mr. Kisima for the respondent that, under the circumstances PW1 and PW2 dock identification of the 14 appellant ought to be corroborated by CCTV footage of 09/02/2018, which evidence is missing. With the above findings on visual identification evidence, I now move to consider another point whether the handwriting expert report exhibit EP 4 as tendered in court by PW7 is credible and reliable evidence. It is in record that, PW7 on 24/05/2018 received from PW8 an envelope containing documents from Access Bank Tanzania, Identity Card (ID1), cash withdrawal slip of 09/02/2018 (exh.EP1) and other disputable signatures of the appellant, Yahaya S. Ally (PW3) and one Tausi Juma Usanga (PW1). Upon examination PW7 concluded that, the disputed signatures in the withdrawal slip exhibit EP1 and Access Bank customer Identity Card exhibit ID1 allegedly found in possession on the appellant were written by one and the same person, meaning the appellant. It is however not clear as to how the said exhibit ID1 landed into the hands of PW7 from PW8 for comparisons of the disputed handwritings (signatures in exhibit EP1 and ID1) as it is not one of the properties which were seized from the appellant as per the seizure certificate exhibit EP5, tendered in court by PW9, leave alone the fact that, the said customer bank identity ID1 was never been tendered in court as exhibit apart from being tendered for identification purposes only by PW1. 15 As per exhibit EP5 the properties which were found in possession of the appellant when arrested on 10/03/2018, were one hat (barakashia), black bag, one glass box, blue diary and one small mobile phone make TECHNO which were all tendered by PW9 as exhibit EP6 collectively. Further to that, it is noted neither PW1 nor PW3 stated in their evidence to have donated their handwritings specimen to form part of documents presented by PW8 to PW7 for examination as alleged by PW7. In absence of such evidence on how was the alleged ID1 obtained from the appellant and how it reached PW7 through the documents presented to him by PW8 and the fact that, the same has never been tendered in court as exhibit leaves this court with full of doubt on the authenticity of the handwriting expert report exhibit EP 5, hence a finding that the same could not be relied upon by the trial court to base conviction of the appellant. With

the above negative findings on visual identification evidence and handwriting expert report exh. EP3, the next question to this court is whether the prosecution case was proved beyond reasonable doubt as raised in the 8th ground of appeal. To start with the first count of forgery, I find the same was not proved for relying on the handwriting expert report exhibit EP3 whose authenticity is already doubted and for want of proof that, it is the 16 customer identity bank card with account No. 0421101243960 in the name of Yahaya S. Ally which was in fact forged, as the same was not tendered in court as exhibit. It is trite law that, evidence improperly adduced or not adduced at all should not be relied on by the court to base its decision. This proposition was stated in the case of Shemsa Khalifa and Two others Vs. Suleiman Hamed Abdallah, Civil Appeal No. 82 of 2012, (CAT- unreported) where the Court had this to say: "...we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court. We out-rightly are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold that this led to a grave miscarriage of justice." (Emphasis supplied) As alluded to above in this matter since the said customer identity bank card issued in the name Yahaya S. Ally alleged to have been forged was not tendered before the trial court, I hold it was improper for the trial court to rely on it when convicting the appellant on the charge of forgery. Thus the 17 1st count was not proved beyond reasonable specs. As to the 2nd and 5th counts on the offence of Uttering False Document, I also find the same to have not been proved on similar reasons assigned above when dealing with the 1st count as the said customer identity bank card (ID1) claimed to have uttered before PW1 and PW4 was never been tendered before the trial court. Therefore it was improper for the trial court to believe and act on untendered exhibit to base conviction of the appellant. See the case of Shemsa Khalifa and Two others (supra). Next for determination is the 3rd and 4th counts on the offence of Personation, where it was asserted by the prosecution that, the appellant with intent to defraud presented himself before PW1 and PW4 as Yahaya Shabani Ally the owner of Bank Card Account No. 04211012439-60 in order to fraudulently obtain money from the said account. For this offence to stand, prosecution evidence ought to have led that, it is the appellant and not someone else who appeared with the said customer identity bank card before PW1 and PW4 presenting himself as Yahaya Shabani Ally the owner of Bank Card Account No. 04211012439-60. In this matter since the appellant's identification relied much on evidence of identification parade register exhibit EP3 already found to be untrustworthy, hence a need of the evidence of PW1 and PW2 to be 18 backed with CCTV footage evidence, which evidence was not tendered in court for no apparent reasons, I am of the profound view that, the 3rd count of personation alleged to have been perpetrated on 09/02/2018 was not proved. As to the 4th count of 10/03/2018 claimed to be committed before PW4, I find the same also needed corroboration of CCTV footage evidence as PW4 made a mere dock identification of the appellant in a situation where she was not familiar with the face of the appellant before the incident date. I so find as in her evidence, PW4 who purported to identify the appellant in a broad day light

did not state the time she spent with him under observation before his arrest and whether she participated in the exercise of his arrest so as to give assurance to the court that the person she was identifying while in the witness box was none than the perpetrator of the crime. This in my opinion was important evidence as it is in compliance of the conditions set for proper identification as stated in a litany of authorities on visual identification such as *Waziri Amani v. R* [1980] TLR 250 and *Maliki George Ndengakumana* (supra), as in cases of this nature even recognizing witnesses often make mistakes or deliberately lie. See the case of *Masero Mwita @ Maseke and Another Vs. R*, Criminal Appeal No. 63 of 2005 (CAT-unreported). In absence of CCTV footage evidence to corroborate evidence by PW4, I find appellant's dock identification was unreliable and could not have been relied on by the trial court to base appellant's conviction on the 4th count as some of conditions for proper identification were not met. Lastly is on the 6th count of Obtaining Money by False Pretence where it was asserted that, on the 09/02/2018 at Access Bank Manzese Branch the appellant with intent to defraud or deceive, obtained from Tausi Juma Usanga a bank officer of Access Bank Tshs. 100,000,000/-, pretending to be Yahaya Shabani Ally the owner of Bank Card Account No. 04211012439-

60. In this count, the appellant submitted apart from withdrawal slip tendered as exhibit EP1, the prosecution ought to have tendered bank statement of the alleged account to prove that, the said money was withdrawn from the same account and on the claimed date. Mr. Kisima did not respond or comment anything on this important query. It is true and I agree with the appellant that, it was important for the prosecution to tender the said bank statement so as to prove the alleged money was withdrawn from the claimed account. This is so as this court is still wondering whether the alleged money was really withdrawn and what happened the appellant's picture and signature appeared in the bank system as holder of Account No. 20 0421101243960 in the names of Yahaya S. Ally before the approval was made by PW2 for withdrawal of Tshs. 100,000,000/-, while the real owner of the account is someone else and the signature and faces do not resemble. When cross examined on the where about of the bank statement of the said account, PW8 at page 95 of the typed proceedings confessed to have requested and receive it from Access Bank Manzese Branch as investigator but did not tender it in court as exhibit on the reason that, it was in the investigation file. In absence of the said bank statement to corroborate exhibit EP1 it cannot be safely concluded that, the alleged Tshs. 100,000,000/- was withdrawn from Account No. 0421101243960, leave alone the left doubt whether it was the appellant who withdrew it. It is from that background I hold, the 6th count was not also proved beyond reasonable doubt. With such conclusion I find the 8th ground of appeal has merit as the prosecution case was not proved against the appellant beyond reasonable doubt. This ground in my respective view disposes of the appeal and I see no justifiable cause to pursue the rest of the grounds as most of them have been answered in the due course. All that said and done, this appeal has merit and the same is hereby allowed. The conviction against the appellant is quashed and sentence and 21 compensation order meted on him are set aside. This has the effect of ordering his immediate release from prison forthwith unless otherwise lawfully held, which order I

hereby issue. It is so ordered. DATED at DAR ES SALAAM this 17th day of December, 2021. E. E. KAKOLAKI JUDGE 17/12/2021. Delivered at Dar es Salaam in chambers this 17th day of December, 2021 in the presence of the appellant in person, Mr. Cecilia Shelly, Principal State Attorney for the respondent and Ms. Monica Msuya, court clerk. Right of appeal explained. E. E. KAKOLAKI JUDGE 17/12/2021 22

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