

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 646 OF 2022

PATRICK ANTHONY KINGALU DICKSON A

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IN THE COURT OF APPEAL OF TANZANIA (CORAM: NDIKA, J.A., KEREFU. 3.A. And NGWEMBE. J.A.) CRIMINAL APPEAL NO. 646 OF 2022 PATRICK ANTONY KINGALU @ DICKSON A. KAYOMBO..... APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the decision of the High Court of Tanzania at Dar es Salaam) (Mwaosa*J) dated the 5th day of October, 2022 in Criminal Appeal No. 229 of 2021 JUDGMENT OF THE COURT 5th & 18th July, 2024 NGWEMBE. JA.: Before the Resident Magistrate's Court of Dar es Salaam at Kisutu, the appellant stood charged with five (5) counts, whereas three counts (first, second and third) were on forgery contrary to sections 333, 335 (a) and 337 of the Penal Code, Cap 16 (the Penal Code). On the said counts, it was alleged that the appellant did forge a staff identity card by the name of Dr. D. A. Kayombo; introduction letter with Ref. No. OUT/PF 248 dated 30th September, 2014; and a loan application letter with Ref. No. OUT/PF 248 dated 30th September, 2015. On the fourth count, the appellant was charged with the offence of uttering false document contrary to section 342 of the Penal Code. It was alleged that the appellant fraudulently uttered identity card; introduction letter; and loan application letter to the National Microfinance Bank (NMB) officers. On the fifth count, the appellant was charged with personating a public officer contrary to sections 35 and of the Penal Code. Allegedly the appellant was personating as an employee of the Open University of Tanzania (the Open University) to the NMB Officers. Upon being arraigned in court, the appellant pleaded not guilty to all charges, thus the prosecution led evidence through eight witnesses including; SP Chrisantus Kitandala (PW1) a police officer and expert of handwriting at Forensic Bureau of Police Headquarters Dar es Salaam whose testimony crystalized on his examination of those documents that they were forged. He prepared a report which was admitted in court as exhibit PI. Also, the forged documents were admitted in court and collectively marked as exhibit P2. Further, he testified that the forged documents and specimen handwriting in the NMB form and the identity card alleged to have been issued by the Open University had similar characteristics in letters, numbers and drawings. PW1 concluded that those documents were from the same person, thus forged. His testimony was supported by E 3037 D/Sgt Khama Ng'azi (PW4) an expert in handwriting from Police Headquarters in Crime Scene Section at Dar es Salaam. The contents of the evidence of Selina Masesa Irafay (PW2), a Director of Human Resources from the Open University clarified that the appellant was neither employed nor

worked with the Open University, thus all documents related to Open University like Employee's Identity Card and introduction letter to NMB were not from the said University. Similarly, the evidence adduced by Matern Victor (PW6) support the testimony of PW2, that the appellant never worked with the Open University. Hoio Nyanza (PW3), a loan officer from the NMB testified that the appellant appeared before the NMB Maktaba Squire Branch to open an account by filling the requisite forms at the end of the process, he successfully opened an account No. 2231009507 in the name of Dickson Adrian Kayombo and was issued with a temporary identity card waiting for a permanent ATM card. The permanent card was to be issued within four weeks from the date of opening of the said account. While PW3 was at Police Central, she found that her customer was not Dickson Adrian Kayombo, but his actual name is Patrick Anthony Kingalu. Similar testimonies were adduced by Joseph Fredrick Mshote (PW5) and Shavan Andrew Alexander (PW8), an ex-banker worked with the NMB. The evidence of E.6666 D/Sgt Arbogast Kashaija (PW7) was related to the arresting of the appellant at the NMB Bank House Branch and he prepared a seizure note which was admitted in evidence as exhibit P7. At the end of the prosecution, the appellant was found to have a case to answer, thus he defended alone whose evidence was directed that he was deceived by persons who were dressed in NMB T- shirts. Otherwise, he did not shake the prosecution case. The trial court was satisfied that the appellant was guilty of the charged offences. Consequently, he was convicted on all five counts. After considering the aggravating factors and mitigation, the trial court observed that the appellant was not remorseful for the offences he committed, hence it sentenced him to imprisonment for seven years in respect of first three counts of forgeries, two years imprisonment for the offence of uttering false document and two years' imprisonment for the offence of Personation of Public Officer forming an aggregate of 25 years imprisonment all sentences to run concurrently. The appellant being dissatisfied with the conviction and sentence, unsuccessfully appealed to the High Court. Hence, this appeal armed with three grounds which may conveniently be condensed in two main complaints namely:

- (1) That, the case was not proved beyond reasonable doubt; and
- (2) That, a maximum sentence was awarded to the first-time offender for a non-scheduled offence and without considering his mitigation. At the hearing of this appeal, the appellant entered appearance in person and the respondent Republic was advocated by Messrs. Job John Mrema and Daisy Makakala, learned senior State Attorneys together with Tumain Maingu Mafuru, learned State Attorney. When the appellant was invited to amplify his grounds of appeal, he relied on his written submission which he lodged on 2nd July, 2024. The appellant briefly, argued the first ground that the prosecution failed to discharge their duty of proving the offences against him beyond reasonable doubt as required by sections 3 (2) (a), 110 and 112 of the Evidence Act. Therefore, he urged the Court to find him not guilty to the charged offences which were not proved. Submitting on the second ground on excessiveness of sentence of passed by the trial court and upheld by the first appellate court, he argued that the seven years imprisonment was the maximum on the offence of forgery set out in section 337 of the Penal Code. He buttressed his submission with a decision of the Court in Rajabu Dausi vs. Republic, Criminal Appeal No. 106 of 2012 and Masanja Charles vs.

Republic, Criminal Appeal No. 219 of 2011(both unreported). Further, the appellant challenged his sentence by referring to section 170 (1) of the Criminal Procedure Act, that the trial magistrate had no jurisdiction to pass sentence of more than five years imprisonment. Moreover, he argued that upon being convicted, he raised three mitigating factors based on his ill health that he was suffering from diabetes and blood pressure and also that he had orphans to take care of them, but the trial court did not consider them. Hence, he rested his appeal by urging the Court to find him not guilty to the charged offence. The respondent Republic vehemently opposed the appellant's argument and supported the conviction and sentence meted by the trial court because the offences were all established and proved to the standard required by law. Mr. Mrema submitted that the elements of forgery were established and proved, together with false documents and personation that he was a Doctor of Philosophy (PhD) working at Open University, while he never held such title and never worked with the Open University. Moreover, Mr. Mrema, argued that, ail exhibits tendered by the prosecution witnesses were admitted in court unopposed. To bolster his argument, he cited the case of Halfan Rajabu Mohamed vs. Republic (Criminal Appeal 281 of 2020) [2023] TZCA 178 TANZLII (6 April 2023). In addition, Mr. Mrema, resorted to the Sentencing Manual for Judicial Officers of 2020 as upgraded from time to time and argued that the trial magistrate considered not only the nature of the offences the appellant committed but also the gravity of those offences to the complainants. Above all, he argued that the trial court took cognizance of the appellant's demeanour after giving his mitigation that he was not remorseful. Mr. Mrema rested his case by urging the Court to dismiss the appeal forthwith. In determining the two grounds of appeal, we find logical to begin with the first ground on proof of the offences against the appellant. Thereafter we will consider the appellant's complaint on excessiveness of the sentence. It is a common ground that the appellant seeks to fault the concurrent findings of the trial and the first appellate courts. The rule concerning concurrent findings of facts is well established that a second appellate court like this one, wili not readily interfere with the concurrent findings of the lower courts except when it is found that the lower courts' decisions had misapprehension, non-direction or misdirection on the evidence or by applying a wrong principle of law and arrived into an erroneous decision which occasioned miscarriage of justice. See: Director of Public Prosecutions vs. Jaffari Mfaume Kawawa [1981] T.L.R 149 and Mussa Mwaikunda vs. Republic [2006] T.L.R 387 and Kadili Ally vs. Republic (Criminal Appeal No. 99 of 2020) [2022] TZCA 62 TANZLII (24 February 2022). As alluded above, the appellant was faced with five counts at trial, out of them, three counts were on forgery contrary to section 333 of the Penal Code. The allegations of forgery had three cumulative elements which are: proof that the document is false; that it is the accused who made such a false document; and that the accused made such document with intent to defraud or deceive. See: Raymond Adolf Louis & 2 Others vs. Republic, (Criminal Appeal No. 120 of 2019) [2022] TZCA 3 TANZLII (27 January 2022). Intent to defraud is defined under section 336 of the Penal Code as follows: "An intent to defraud is presumed to exist if it appears that at the time when the false document 8 was made there was in existence a specific person ascertained or unascertained capable o f being defrauded thereby, and this

presumption is not rebutted by proof that the offender took or intended to take measures to prevent that person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document." In this appeal, the three documents alleged to have been forged were; first; A Staff Identity Card in the name of Dr. D. A. Kayombo, bearing No. 248 purporting to show that it was genuinely issued by the Open University; second, is an introduction letter with Ref. No. OUT/PF 248 dated September 2014 showing that it was issued by the Open University; and third is a Loan Application Letter with Ref. No. OUT/PF248 of the same date purporting to show that it was genuinely issued by the Open University. Those documents comprised the first three counts of forgery to which the appellant was charged to have committed at unknown dates within the region of Dar es Salaam, having the intent to defraud and that in respect of all the three documents, the appellant knew the facts to be false. 9 It was observed by the first appellate court that PW1 was credible and his evidence was reliable which evidence was not faulted by the appellant. Exhibit P10 at page 200 of the record of appeal indicates that, the appellant clearly admitted to have forged the Staff Identity Card and an introduction letter from the Open University for the purpose of securing a loan of TZS. 25,000,000.00 from the NMB Bank. The appellant devised a fictitious name of Dr. Dickson Adrian Kayombo for that purpose, instead of his real name of Patrick Antony Kingalu. The appellant confessed the same before PW7 who recorded his cautioned statement which was admitted in evidence as exhibit P10. Another pieces of evidence relevant to this ground is of PW1 and PW4, experts of handwriting and fingerprints. Their evidence indicated clearly that the documents which the appellant presented before the NMB bank for loan application were signed by him as the applicant and those documents which he purported to have secured from the Open University were not genuinely issued by the University, but forged as per exhibit P1 and P2. Undoubtedly, the evidence of PW3, a Monitoring Officer of NMB bank and PW5 established that the appellant went to the bank several times, opened a bank account No. 22310009507 by the name of Dickson Adrian Kayombo and applied for a loan by presenting the forged 10 documents. The appellant apart from confessing in his cautioned statement, also in his defence he did not dispute the fact that he opened a bank account and that he went there to collect his ATM Card where he was arrested. We therefore, having no doubt that the three documents in the first three counts were established and proved by the prosecution witnesses to the standard required by law. In respect of the fourth count on uttering false document, the law provides that a person commits the offence who knowingly and fraudulently utters a false document. To prove such offence, three elements must be established and proved, that is; one, uttering a false document; two, knowledge of the falsity of the document; and three, fraudulence in such utterance. All those elements were established and proved by the prosecution witnesses and even the appellant did not dispute that fact. Likewise, the offence of Personating Public Officer under section 100 (b) of the Penal Code is easy to grasp. It is complete when a person falsely presents himself to be a person employed in a public service and assumes *inter alia*, to do any act by virtue of such employment. In this appeal and in accordance to the evidence of PW2 and PW6, it is evident that the appellant was neither an employee of the Open 11 University nor was he a public officer as he presented himself to be

a doctor of philosophy (PhD) from the Open University, a fact which was false. Even in his defence, the appellant admitted to have attempted to secure a loan from NMB by presenting false documents. Based on the above discussion, the first ground of appeal must fail because the prosecution managed to establish and prove those offences to the required standard that is; beyond reasonable doubt. We therefore, dismiss the second ground forthwith. Having concluded on the first ground, we are now tasked to consider the complaint on excessiveness of the sentence passed by the trial court and upheld by the first appellate court. To begin with, we wish to pay homage to our previous decision in *Katinda Simbila @ Ng'waninana vs. Republic* (Criminal Appeal 15 of 2008) [2010] TZCA 7 TANZLII (14 June 2010) where we held that: "Admittedly, the sentencing process is one of the most intractable and delicate tasks in the administration of justice, especially where the law has not fixed a minimum sentence. This is where ingenuity and wisdom work together in order to lead us to substantive justice as no two cases are identical in all circumstances. This is all because there is no common yardstick or denominator for measuring the sentence which will match every case." The universal purposes of proper sentencing the accused are: deterrence, retribution, rehabilitation, compensation and reparation. In the case of *Tabu Fikwa vs. Republic* [1988] T.L.R. 45 Judge Samatta (as he then was) took pains to discuss in details the purpose of sentencing the accused. He stated that the rationale is to ensure the offender is adequately punished within the confines of the law for the offence; to prevent crime by deterring the offender and other persons from committing similar crimes; to protect the community from the offender; to promote rehabilitation of the offender; to denounce the conduct of the offender; to recognize the harm to the victim and the community; and to protect the security of the society over those of the offenders. Due to the difficulties of passing appropriate sentence to the convict, we think, Mr. Mrema was right that the Judiciary in its own wisdom in year 2020 came up with "Tanzania Sentencing Manual for Judicial Officers" whereby the mode of sentencing an accused person is provided. Notwithstanding the availability of sentencing manual, yet it is well known that sentencing is in the trial court's discretion on which an appellate court will sparingly interfere in exceptional circumstances including where the trial magistrate or judge acted upon some wrong principles or over-looked some material facts and has imposed a sentence which is either patently inadequate or manifestly excessive. See: *The Republic vs. Mohamed Ali Jamal* [1948] 15 E.A.C.A. 126; *Bernadeta d/o Paul vs. Republic*

[1992] T.L.R 97; and *James Yoram vs. Republic* [1951] 18 E.A.C.A. 147. In this appeal, the appellant tried to challenge both courts below that the trial court had no jurisdiction to sentence him to seven years imprisonment contrary to section 170 of the Criminal Procedure Act. The learned senior State Attorney contented that the section was not applicable because the presiding trial magistrate was at the rank of a Principal Resident Magistrate. On our part we think this issue should not detain us much because the law is clear as follows: 170 (1) "A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences -

- (a) Imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment;
- (b) A fine not exceeding twenty million shillings;
- (c) Subject to the provisions of the Corporal Punishment Act, corporal punishment. It is clear that the above provision limits the sentencing power of a subordinate court to five years except for offences with minimum sentence. However, such limitation does not apply to Senior and Principal Resident Magistrates. The most relevant part of the above provision is the proviso to subsection 2 quoted as follows: "Provided that, this section shall not apply in respect of any sentence passed by a senior Resident Magistrate of any grade or rank." Since the presiding trial magistrate was at the rank of a Principal Resident Magistrate, it is obvious that he had jurisdiction to pass a sentence as he did. However, we still find the need to deliberate on the appellant's complaint on excessive sentence. Dispassionately, the appellant continued to challenge the trial and the first appellate courts on the severity of sentence of seven years imprisonment in relation to failure of the trial magistrate to consider his 15 mitigation whereas he raised three facts that he is diabetic; he suffers from high blood pressure; and he had orphans to take care of. However, the trial magistrate did not consider them, thus he punished him to the maximum sentence of seven years imprisonment. Mr. Mrema quickly responded that the appellant's mitigation was considered. He added that, despite the fact that the offence was not among the scheduled offences under the Minimum Sentences Act, yet the gravity of the offence he committed and the magistrate's observation that the appellant's attitude towards his offence was not remorseful. Therefore, the maximum sentence of seven years was justified. On our part, we are aware of the very basic legal position that a first-time offender as a matter of general rule deserves a lenient punishment, subject to other factors. It is on record that the appellant was a first offender and during sentencing, the learned Principal Resident Magistrate recorded the mitigation and aggravating factors as submitted by the appellant and learned State Attorney respectively. However, although he recorded that he had considered that the appellant was a first offender and that he is diabetic, having high blood pressure and is taking care of orphans, he proceeded to award the maximum sentence. That was with respect, patently wrong as it is against the sentencing principles alluded to above. In this regard, we cannot have better words than what we stated in the case of *Nemes Myombe Ntalanda vs. Republic* (Criminal Appeal 1 of 2019) [2021] TZCA 513 TANZLII (24 September 2021) that: "It is trite law, in sentencing, the trial court has to balance between aggravating factors which tend towards increasing the sentence awardable and mitigating factors which tend towards exercising leniency. See: *Bemad Kapojosye vs. Republic*, Criminal Appeal No. 411 of 2013 (unreported)" In this appeal, the award of maximum sentence by the trial court indicates that, it did not consider the appellant's mitigation and the fact that he was a first offender. Although, the learned senior State Attorney submitted that the trial court considered the demeanour of the appellant and he found that he was not remorseful, that being the line of

reasoning in sentencing, it shows that the trial court did not exercise it judiciously. We may add here that although remorsefulness may account for lenient sentence, lack of remorsefulness does not justify excessive sentence. It is therefore improper in sentencing, to take into account the fact that the accused did not show remorsefulness. See *Silfano @ Ochanda s/o Okech vs. R* [1972] H.C.D 223. It is also the rule that maximum sentences are reserved for serious circumstances such as recidivist offenders. It is discouraged for a first offender, like in this case, to pass maximum sentence. What was held in *Mavuta vs. Republic* [1973] 1 EA 89 is relevant here where it was stressed that the maximum sentence should not normally be imposed upon a first offender. We think this is a suitable case in which the Court can interfere with the awarded sentence, specifically on the first three counts related to forgeries which attract the maximum sentence of seven years imprisonment. See: *Tofiki Juma vs. Republic* (Criminal Appeal 418 of

2015) [2015] TZCA 135 TANZLII (24 November 2015); *Shagi Mang'oma vs. Republic* (Criminal Appeal No.356 of 2020) [2023] TZCA 17396 TANZLII (12 July 2023); and *Maganga Lushinge vs. Republic* (Criminal Appeal No. 150 of 2020) [2023] TZCA 17427 TANZLII (20 July 2023). Based on the above discussion we quash and set aside the sentence of seven (7) years' imprisonment on the first, second and third counts and substitute it with the sentence of five (5) years' imprisonment. The substituted sentence, in our view, is appropriate in the case at hand. However, we uphold the sentence of the trial court of two years 18 imprisonment on the fourth and fifth counts respectively and also, we uphold the order that all sentences should run concurrently. The substituted sentence should run from the date of the appellant's conviction. DATED at DAR ES SALAAM this 17th day of July, 2024. G. A. M. NDIKA JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL P. J. NGWEMBE JUSTICE OF APPEAL The Judgment delivered this 18th day of July, 2024 in the presence of Appellant in person - linked via video conference from Ukonga Prison and Ms. Gladness Senya, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. 19

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