

TANZANIA / JUDGMENT

robert kennedy mabula versus republic 2023 tzhc 22956 16 november 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF SHINYANGA AT SHINYANGA CRIMINAL APPEAL 58 OF 2023 (Originating Criminal Case 47/2022 of Shinyanga District Court) ROBERT KENNEDY MABULA APPELLANT VERSUS REPUBLIC RESPONDENT

JUDGMENT

Date of last order: 1st November, 2023 Date of Ruling: 16th November, 2023 MIRINDO J.: Robert Kennedy Mabula, the appellant, was an employee of Savannah Plains High School at Ibadakuli in Shinyanga District until 28th February 2022. On 5th August 2021, he asked for medical leave to attend medical treatment at Tumbi Regional Referral Hospital. He was granted leave from 9th August 2021 to 22nd August 2021. He did not report to work on 23rd August 2021. Instead on 9th September 2021, he wrote a letter accompanied by a medical report from Dr Leonard Amiri Myovela. His employer, Savannah Plains High School decided to verify the report by writing to Tumbi Regional Referral Hospital but the Hospital disclaimed the report and its author, Dr Myovela. 1 Robert was summoned but did not attend, before the School's disciplinary committee but sent a sick sheet from Shinyanga Regional Referral Hospital of 2nd November 2022. The disciplinary committee concluded he had a case to answer and the School referred the incident to Police. Robert was charged before Shinyanga District Court with four counts: In the first and third counts, he was charged with uttering false documents: a medical report from Tumbi Regional Referral Hospital and a sick sheet from Shinyanga Regional Referral Hospital, respectively, contrary to section 342 of the Penal Code [Cap 16 RE 2022]. In the second and fourth counts, he was charged with forgery of the sick sheet from Shinyanga Regional Referral Hospital and the medical report from Tumbi Regional Referral Hospital contrary to sections 333, 335(d) and 339 of the Penal Code [Cap 16 RE 2022]. In his defence, Robert stated that he received treatment for peptic ulcers at Tumbi Regional Referral Hospital where on 16th August 2021 he was issued with registration card at the reception. He was forwarded to Dr Myovela who attended him and instructed him to return on 3rd August 2021. While on treatment, he sent to Savannah Plains High School his medical report prepared by Dr Myovela. After treatment at Tumbi, Dr Myovela directed him to attend clinic at the nearest hospital in Shinyanga and he attended Shinyanga Referral Hospital. Robert also wrote a letter dated 6th 2 October 2021 informing his employer his

intention to report back to work after treatment at Tumbi. Although he received no response from his employer, he continued to report to work until the expiry of his contract on 28th February

2022. On 28th January 2022, his employer had already given him a one- month' notice that his contract will not be renewed. Dr. Myovela, testifying for the defence, informed the trial court that he worked at Tumbi Regional Referral Hospital from 2013 to 2021 and attended Robert on 16th August 2021 at the Hospital. In cross-examination by prosecution, Dr Myovela fumbled. At first he stated that he ceased to work with the Hospital in October 2021 and treated Robert at the Hospital. After the prosecution counsel successfully verified Dr. Myovela's registration from the register of Tanganyika Medical Council, it transpired that he had no medical practicing certificate. Dr Myovela testified that he had been transferred to Lulenzi Hospital since 23rd December 2020. At the conclusion of the trial, the learned trial Senior Resident Magistrate acquitted and discharged Robert of the third count of uttering a false document, namely, the sick sheet from Shinyanga Regional Referral Hospital and fourth count of forgery of the medical report from Tumbi Regional Referral Hospital. The trial court convicted him of the first count of uttering a false medical report from Tumbi Regional Referral Hospital and 3 second count of forgery of the sick sheet from Shinyanga Regional Referral Hospital. It sentenced Robert to pay fine of 2,000,000/= in each count or to serve the jail sentence of two years in case he failed to pay the fine. Robert was also ordered to refund his employer, 16, 200,000/= Tzs paid to him as salary for six months on which he was out of duty. Robert has appealed to this Court against his conviction and sentence. He was represented at the hearing of the appeal by Mr. Mashaka Tuguta, learned counsel and the respondent was represented by Mr. Leonard Kiwango, learned State Attorney. Mr. Tuguta argued that the charge was not proved beyond reasonable doubt. In this regard, Mr. Tuguta drew attention of this Court to the particulars of the offence in the first count. He argued that particulars on the first count were defective for not disclosing an offence known to law which Robert could legally defend himself. As mentioned earlier, in the first count, Robert was charged with uttering a false document by presenting the false medical report. I take the liberty to reproduce those particulars in appreciating Mr. Tuguta's concern: ROBERTS/O KENNEDYMABULA on 22'd day of September, 2021 at Savana Plains High School knowingly and fraudulent uttering false documents to wit: he presented forged Medical Report to Savana Plains High School purporting to have been given by Tumbi Regional Referral Hospita~ a fact knowing to be false as a result he obtained TZS 4 16,200.,000/= (Sixteen million two hundred thousand only as salary for six months from Savanna Plains High School. Mr. Tuguta argued that it is abundantly clear that the medical report was prepared by Dr Myovela. It was Mr Tuguta's argument that a person cannot be convicted of forging a document unless it is proved that such person either authored or signed it with intent to defraud. The particulars of the offence are clear that Robert neither authored nor signed the medical report from Tumbi Regional Referral Hospital. Given that this fact was overlooked in the particulars of the offence, Robert was convicted for unknown offence. In further support of this view, Mr.

Tuguta observed that in the present appeal the situation is worse because the statement of the offence referred to a charge of uttering false document under section 342 while the particulars make reference to forgery of a medical report. Without reference to the provisions of section 333 and 335 of the Penal Code in the statement of the offence, the particulars could not support the charge of forgery. The learned counsel concluded that Robert did not know the charge he was facing under the first count and this Court should resolve these doubts in Robert's favour. Mr. Kiwango briefly responded that the offence of uttering false document was proved beyond reasonable doubt and Robert knew the charge he was facing and properly defended himself. 5 In dealing with Mr Tuguta's submission, one should have a clear understanding of what constitutes the offence of uttering false document under section 342 of the Penal Code [Cap 16 RE 2022]. The offence of uttering false documents, traces its origin from the English Forgery Act 1913 (3 and 4 Geo 5, c 27), and the meaning of the expression "uttering a false document" has been established over the years. In James, JS, STROUD'S JUDICIAL DICTIONARY OF WORDS AND PHRASES! Vol 5, S-Z, 4th edn, London: Sweet and Maxwell, 1974 the expression is described as follows: To "utter" a false document 15 to part WItH it, or tender it, or use It in some way, to get money or other benefit by money; and It is Immaterial who is to get the money or get the benefit. (R v Shukard Russ & Ry 200; R v Radford 1 Den 59; R v Ion 21 UMC 166). A similar description is found in Greenberg, D, JOWITT'S DICTIONARY OF ENGLISH LAW, 3rd edn, Vol 2, J-Z, London: Sweet and Maxwell, 2010: In Criminal law, to utter a forged document. die or seat. etc. or counterfeit coin. is to pass or attempt to pass it off as genuine when it is known to be This expression denotes different usage of a forged document by the accused. In Bakari Mwalimu Jembe v Republic (Criminal Appeal 278 of 2017)

[2019] TZCA 4 (27 February 2019), the Court of Appeal recapitulated the ingredients of uttering false document as stated in the Kenya's case of Joseph Mukuha Kimani v. Republic [1984] EKLK: 6 (a). the document was false in the sense that it was forged; (b). the accused knew that it was forged; and (c). the utteror intended to defraud. In light of what I have endeavoured to show, I reject Mr Tuguta's contention that the particulars of the offence of uttering false document were defective by using the term "forgery" in connection with the charge of uttering false document. I now turn to consider whether the first count of uttering a false medical report from Tumbi Regional Referral Hospital was proved beyond reasonable doubt. Was the medical report false? There is sufficient evidence to show that the medical report prepared by Dr. Myovela was not from Tumbi Regional Referral Hospital. He was not an employee of the Hospital at the time he purported to prepare the medical report. The second issue to be proved by the respondent was whether Robert knew that the medical report was forged. It was Mr. Tuguta's argument that one cannot be convicted of forging a document unless it is proved that one either authored or signed it with intent to defraud. In counsel's view, the particulars of the offence were clear that Robert neither authored nor signed the medical report from Tumbi Regional Referral Hospital. Given that this fact was overlooked in the particulars of the offence, Robert was convicted for 7 unknown offence. The learned counsel invited this Court to declare that

the charge was defective as was held by the Court of Appeal in DPP v Shida Manyama alias Seleman Mabuba (Criminal Appeal 285 of 2012) [2013] TZCA 168 (25 September 2013) that: But to constitute an indictable offence under s. 335 (d) (i), the particulars ought to have specifically stated that the respondent did sign the disputed letter in the name of Hamis Msuka purporting to show that he had been paid compensation. With due respect to the learned counsel, in Shida Manyama, as opposed to the present appeal, there was no proof of authorship of the forged document. The above holding does not apply to the facts of this appeal. In Shija Luyeko v R [2004] TLR 254, the accused who did not actually kill the deceased but procured another person to kill was held to be the killer under section 22 (d) of the Penal Code. In the present appeal, Robert procured Dr Myovela to prepare for him a false medical report. The details of the medical report were for Robert's benefit and so he was a party to its authorship. In Mwalimu Bakari alias Jembe v Republic (Criminal Appeal 86 of 2017) [2019] TZCA 321 (24 September 2019), an employee of Korogwe District Council presented a cheque list to the National Microfinance Bank (NMB), Korogwe Branch, for the payment of its creditors. Three days later, Mwalimu Bakari presented two 8 cheques to a bank teller and was instructed to present a payment voucher something which Bakari did in a short while. Upon close examination, a bank official suspected the genuineness of cheques and the payment vouchers issued by Korogwe District Council for the payment of one its suppliers. After inquiring from Korogwe District Council, it was discovered that those documents were not authorized by the Council. Although Mwalimu Bakari admitted presenting the cheques and vouchers, it was his defence that he had no knowledge that they were forged. He clarified that his friends requested him to channel their payments through his bank account and they promised him a commission. He accepted the offer and certain officials of Korogwe District Council gave him fund transfer forms which he presented to the Bank along with the cheques and payment vouchers. He was convicted and appealed to the Court of Appeal where he maintained that he was not involved in the preparation of the forged documents and he simply allowed his friends and officials of the District Council to use his account to affect the payment for some consideration. Dismissing Bakari's contention and upholding his conviction for uttering false documents, the Court of Appeal inferred Bakari's knowledge of the forged cheques and vouchers from the following set of facts: (i) Bakari's accepting his account to be used for payment knowing that he had no authority to do so, (ii) Bakari not revealing to the Police the address of persons who gave him cheques and payment vouchers. The Court of Appeal added that: ...the appellant's act of presenting the cheques and vouchers depicting that he supplied goods to the District Council while he did not do so/ shows that he knew that he intended to reap what he did not sow. He wanted to steal from the District Council. In Director of Public Prosecutions v Justice Lumima Katiti and Others (Criminal Appeal 15 of 2018) [2022] TZCA 505 (12 August 2022), the Court of Appeal reaffirmed that there is a presumption that one who utters a forged document is either a forger or utterer who connived with forger, that is, the document was forged with one's knowledge and approval. It is clear that in this appeal the forged medical report was solicited by Robert and Robert knew that the report was forged to his own advantage. Having held that the

medical report was a forged document and Robert knew that it was forged, it is clear that the intention of Robert was retain his employment. The intention of Robert was defraud his employer to continue paying him salary when he was fraudulently absent from duty. In relation to the second count regarding forgery of the sick sheet from Shinyanga Regional Referral Hospital, Mr. Tuguta argued that the statement of the offence made confusing references to the provisions of Penal Code and as a result Robert did not know the offence he was facing. This charge was 10 defective because it was brought under section 333 which merely defines forgery; section 339 which is about forgery of judicial or official documents; and section 335(d) which states the elements of forgery. The learned counsel argued that there was no information that the sick sheet from Shinyanga Regional Referral Hospital was either judicial or official document. This was a charge for forgery of an official document from public institutions under section 339. The elements of that offence are stated in the definition of forgery under section 333 and the type of forgery is by signing false document under section 335(d). I disagree that the charge was defective. Mr Tuguta argued that no witness was produced by the respondent to prove forgery of the sick sheet. The sick sheet was produced in court by the first prosecution witness to whom it was sent by Robert. Despite the respondent's assertion that the sick sheet was not genuine because it was not signed by a medical officer who prepared it, it was duty bound to produce evidence from Shinyanga Regional Referral Hospital regarding the authenticity of the sick sheet. For this reason, the second count was not proved beyond reasonable doubt. In DPP v Morgan Maliki and Another, Criminal Appeal 133 of 2013, the Court of Appeal held that save for the punishment, forgery and uttering 11 false documents are distinct offences and are not intended to be alternatives to each other. It will be recalled that the trial court acquitted Robert of the fourth count of forgery of the medical report from Tumbi Regional Referral Hospital. Having held that the medical report was forged, I proceed under section 366(1) (a) (ii) of the Criminal Procedure Act [Cap 20 RE 2022] to set aside the order of acquittal and substitute for it with conviction for forgery. The respondent's case at the trial was that Robert presented the forged medical report to his employer, the Savannah Plains High School, and fraudulently obtained 16,200,000= Tzs as a salary for six months of which he did not work. Robert was absent from work for two months that he claimed to be on medical treatment and for four months when Robert signed the attendance and left on the pretext that he was still sick. The trial court ordered this amount to be refunded to Savannah Plains High School. Mr Tuguta challenged the order directing the refund. He argued that there is evidence to show Robert's return to work until 28th January 202, when his employer issued a one-month' notice informing him that the contract will not be renewed. The learned counsel concluded the order of refund was not properly made and should be set aside. There is no dispute that Robert unlawfully absented himself from work for 61 days on the basis of false information that he was going for further medical check-up and forged medical report. In his defence at the trial Robert 12 argued that he reported to work on 6th October 2021 in light of the letter he wrote to his employer. It was Robert's evidence that he continued to work until the end of his contract on 28th February 2022. The respondent's case was that despite Robert's reporting to work,

he always issued excuse from duty letters of absence for six months until the expiry of his contract. There was no proof before the trial court regarding excuse from duty letters. In any case, for the purposes of refunding his employer, it is only 61 days of absence that should be taken into account as they relate to the charges against Robert. Given that the employee's salary is paid on the basis of 28 days, Robert unlawfully absence consists of two months' salaries and the salary of five days which translates to 5,882,142 Tzs/=. Mr Tuguta argued that even if Robert were to refund his employer, this Court should take into consideration the sale agreement between Robert and the Director of the Savannah Plains High School that enabled Robert to purchase a motor vehicle. Mr Kiwango argued that there should no deduction on the basis of the sale agreement because the deduction was for Robert's benefit. The significance of this agreement is that a large amount was deducted from Robert's salary to service the loan and so the amount deducted should be excluded from the amount that Robert should refund his employer. It is a 13 public policy rule that one should not be allowed to benefit from one's criminality: *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1QB 147 at 156; *Oldfield v Transamerica Life Insurance Co of Canada*

[2002] 1 SCR742. This rule was restated by Lord Atkin in *Beresford v Royal Insurance Co* [1938] 2 All ER602 at 607 in the following terms: I think that the principle is that a man is not to be allowed to have recourse to a Court of Justice to claim a benefit from his crime whether under a contract or a gift No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime or remove a restraint to a crime. and that its effect is to act as a deterrent to crime. But apart from these considerations the absolute rule is that the Courts will not recognize a benefit accruing to a criminal from his crime It is against public policy to allow Robert to benefit from the salary of 61 days that enabled him to complete the loan for the purchase of a Toyota Land Cruiser Prado. For this reason, I reject Mr Tuguta's submission. I uphold the conviction for the first count imposed by the trial court. I quash the conviction on the second count. I also quash the order of acquittal for the fourth count and on its stead convict Robert of forgery contrary to sections 333, 335(d) and 339 of the Penal Code [Cap 16 RE 2022]. I maintain the sentence of fine imposed by the trial court on the first count but impose the fine of 2,000,000/= Tzs for the fourth count. Since these amounts of fine 14 court's original sentence for the second count which I have quashed and the first count, I make no further order as to the payment of fine. In view of what I have stated above, I vary the amount to be refunded and order that Robert shall refund Savannah Plains High School 5,882,142 Tzs/= only. Order accordingly. i=- F.M. MIRINDO JUDGE 16/11/2023 Court: Delivered in Chambers this 16th day of November 2023 in the presence of Mr Mashaka Tuguta for the Appellant and Mr Leonard Kiwango for the Respondent. B/C Ms Sumaiya Hussein- (RMA) present. Right of appeal explained i=- F.M. MIRINDO JUDGE 16/11/2023 15

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