IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 388 OF 2016

DAVID S/O RICHARD KIPUTA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

13/11/2017&30/04/2018

J U D G M E N T

MWANDAMBO, J:-

The District Court of Morogoro convicted David Richard Kiputa, the Appellant of two counts of stealing by Agent contrary to sections 273 and 258(1) and forgery contrary to sections 333, 335 (a) (d) (i) (IV) and 337 all of the Penal Code, Cap 16 [R.E 2002] as charged. Upon conviction, the Appellant the trial court passed a sentence of five years imprisonment in the first count and three years jail term in respect of the second count, both sentences were to run concurrently. In addition, the trial court ordered the appellant to pay compensation of TShs 90,000,000/= immediately he finishes his custodial sentence. Aggrieved, the Appellant has appealed against conviction and sentences meted out to him.

The facts which triggered the appellant's arraignment before the trial court and ultimately conviction are as follows. The appellant was employed as a driver of a company called Exceptional Ltd sometime in September 2014. That

company had a contract with another company called Dalbit International for transportation of fuel from Dar es Salaam to Ndola and Lusaka in the Republic of Zambia and Lubumbashi in the Democratic Republic of Congo (DRC). It is common ground that the fuel was transported to the countries of destination using specialized trucks fitted with fuel tanks of specific capacities. It was also not disputed at the trial that the appellant was entrusted with 40,000 litres of petrol by his employer to transport from Dar es Salaam and off load the same at TAZAMA depot in Zambia through a truck with Registration No. T 772 ARK/T 780 ARK. According to the testimony at the trial, the transportation of fuel to the destination points was organized and supervised by three people as well as tracking and monitoring through a Global Positioning System known by its acronym as GPS which simply means a Satellite navigation system. It was the prosecution's case at the trial that the appellant did not deliver the petrol entrusted to him to the point of destination. Instead, he converted the fuel and sold to third parties out of which he managed to pocket Tshs. 11,000,000/=. That sum found its way into a bank account at Tanzania Postal Bank, Mbeya Branch on 06th November, 2014 which he opened on the same day immediately after his return from Lusaka Zambia. To prove non delivery of the fuel, the prosecution led evidence which the trial court found to be satisfactory that the appellant submitted documents to his employer by way of delivery notes and petroleum inspection reports which were later on found to be forged as they lacked relevant stamps with several cancellations and particulars of delivery by a vehicle used in previous transactions.

The prosecution's evidence was through six witnesses including the director of Exceptional Co. Ltd (Appellant's employer) (PW1), officers from DALBIT Ltd in Tanzania and Lusaka Zambia as well as Police investigators. In addition, the prosecution tendered several documents amongst others;

Appellant's cautioned statement (exh. PE1), certificate of seizure (exh. PE2), cash deposit form from Tanzania Postal Bank for the deposit of Tshs. 11,000,000/= (exh. PE3) and copies of delivery notes (exh. PE4) .At the end of the trial, the learned presiding Resident Magistrate became satisfied that the prosecution had proved its case beyond reasonable doubt on both counts and hence the conviction and sentences now challenged in this appeal.

The appellant's petition of appeal consists of seven grounds which are a mix of complaints and arguments with supporting legal provisions and decided cases. Upon a careful examination of the petition of appeal the appellant's main areas of complaint boil down to the following areas of complaint:

1. *wrongful conviction on the basis of receipts alleged to be forged in the absence of satisfactory evidence to prove forgery.*
2. *founding conviction on the basis of a repudiated confession.*
3. *erroneous admission of the evidence of PW4 which had no connection with the crime the subject of the charge against the Appellant.*
4. *denial of right of hearing.*

At the hearing of the appeal the Respondent Republic which was represented by Ms. Dhamiri Masinde, learned State Attorney resisted the appeal and made her submissions in support of the trial court's decision and urged the Court to dismiss the appeal. The appellant who had no legal representation fended for himself and made his arguments in support of the appeal after the submissions by the learned State Attorney.

Opposing the appeal, the learned State Attorney combined arguments on ground one and two as one so 6 and 7 were grounds she made separate

argments on 3,4 and 5 as appear in the petition of appeal. For easy appreciation and to the extent possible, I will follow the same sequence in this judgment

Essentially, ground one and two criticise the trial court for admitting receipts and accepting the prosecution's evidence that the same were forged in the absence of satisfactory evidence to that effect. The learned State Attorney's argument was that the trial court cannot be faulted for upholding the prosecution's evidence of forgery because the appellant confessed to have committed the offence through a cautioned statement admitted in evidence as exhibit PE1. Furthermore, it was the learned State Attorney's submissions that there was sufficient evidence from PW1 which proved receipts submitted by the Appellant differed with the genuine receipts. However, the genuine receipts were not tendered in evidence.

As to non-delivery of the fuel to the destination, the learned State Attorney submitted that there was sufficient proof from the GPS that the Appellant directed the fuel and as a result it was not delivered to the intended destination. The appellant's argument in reply was that contrary to the trial court's findings, the receipts he submitted to the office of his employer were genuine but PW3 tendered in evidence photocopies which were at variance with the originals. Again, the GPS evidence was merely from PW1's. There is no other evidence to that effect.

The trial court's reasoning in support of a finding of forgery relied on the evidence of PW4 and PW6 who are recorded to have pointed several features in exhibit PE4 including lack of stamps of the office where the appellant offloaded the fuel, variance in the year of delivery between the actual year (2014) and 2008 indicated in exhibit PE4, address of the transporter shown as White

Star/Exceptional Company instead of Exceptional Co. Ltd only. Later in his judgment the learned trial Resident Magistrate stated:

> *"It is clear that, he (the Appellant) decided to forge the document in order to deceive his employer so that he can make him believe that, he offloaded the fuel, the fact he knew is not true at all. There is no doubt all that (sic!.), the accused person (DW1) knew those documents are* ***false but still he signed and other person*** *whom he knows himself signed it. "(emphasis added at page 17).*

Later on, the learned trial Resident Magistrate reasoned:

> *"As a matter of fact, the accused person (DW1) did made (sic!) a false document, and delivered to his company knowingly all are false. If you see exhibit PE4 there a (sic!) signature of the person who received the fuel Inspectors and his signatures and their names with no any stamp..." (at pp. 17 and 18).*

Before delving into a discussion on the merits of the appeal I find it apposite to deal with the count on forgery which forms the basis of the first two grounds of appeal. The second count was preferred under sections 333,335(a), (d) (i), (iv) 337 of the Penal Code alleging that:

> *"**DAVID RICHARD KIPUTA**, on the date or dates unknown between 29t^h^ October 2014 and 12^th^ November 2014 at the place or places unknown within Dar es salaam, Coast region, Morogoro, Iringa and Mbeya Regions* ***with intent to deceive or defraud from DALBIT PETROLEUM, forged delivery notes and Petroleum Inspection Report*** *purporting to*

show that he had delivered at TAZAMA Depot, Lusaka Zambia all 40,000 litres of petrol valued at Tshs 90,000,000/= say, ninety Million Tanzania Shillings only the property of ***DALBIT PETROLEUM,*** *one in reference to Plot No. 410 Block "L" PASIANSI, the he knew to be false." (emphasis added).*

The validity of a change on the offence of forgery was disassed by the C/A the **D.P.P V Shida Manyama@Seleman Mabuba**, CAT Mwanza Criminal Appeal No. 285 of 2012 (unreported) in which the prosecution preferred a charge of forgery against the accused/respondent in the following manner:

"SHIDA s/o MANYAMA @ SELEMANI MABUBA on the 10th day of May, 2004 at PASIANSI, Area in ILEMELA District in the City and Region of Mwanza with intent to defraud or deceive the Land Officer of Mwanza City Council did forge a letter dated 10th May, 2004 purporting to show that he had compensated one HAMIS s/o MSUKA in reference to Plot No. 410 Block "L" PASIANSI, while in fact it was not true."

The Court of Appeal found that charge to be defective because no particulars were specifically stated that respondent did sign the disputed letter in the name of Hamis Msuka purporting to show that he had been paid compensation. On that account, the said Court held that the charge disclosed no known offence in law under s. 335 (d) (i) of the Penal Code and also lumped two offences under (a) and (d) (i) together.

As seen above, the second count in the instant appeal does not specify who the appellant intended to deceive or defraud. It only says in order to deceive from Dalbit Petroleum which I think is incongruent with the requirement for pleading forgery under the charging sections. Besides, the charge does not specify that the appellant did sign the delivery notes and petroleum inspection report in the name if the recipient of the petroleum or inspectors. Consistent with the decision of the Court of Appeal in the cited case the charge was patently defective and it should have been dismissed.

Be what it may, it was held in the above case that to prove the charge of forgery satisfactorily, the prosecution had a duty to prove that:-

(i) the disputed letter was authored by the respondent;

(ii) the disputed letter was a false document, and

(iii) the respondent had forged the disputed letter with intent to defraud or deceive.

The question falling for the Court's consideration in the instant appeal is whether the prosecution discharged its duty to prove the charge of forgery satisfactorily warranting a finding of guilt and conviction as charged. My starting point in the determination of that question is none other than exhibit PE4 on the basis of which the trial court found the appellant guilty of forgery. That exhibit comprises a number of documents which PW1 claimed to have been brought to him by the appellant. Except for the photocopies of documents connected with the consignment of 40,000 litres of fuel to Zambia through a truck T 772/T 780 ARK driven by the Appellant, the rest have no connection with the charge laid at the appellant's doors before the trial court.

It will be recalled that during the preliminary hearing, the prosecution listed delivery note and petroleum inspection report as some of the exhibits to be

tendered during the trial. In my view, reference to delivery note and petroleum inspection report must have a bearing on the fuel entrusted to the appellant to deliver to the country of destination. These are the documents which ought to have been admitted excluding anything else not connected with the offence. If the prosecution felt necessary to produce more documents than those listed during the preliminary hearing, it should have sought leave to do so. There is nothing in the trial court's record to establish that the documents other than those listed at the preliminary hearing were admitted with the trial court's leave. In the absence of such proof, the said documents must be and are hereby expunged from the record. Having expunged them there will be no other evidence from which to compare the genuineness of Exhibit PE4.

On the other hand, according to PW1, it is the appellant who submitted to his office documents said to prove delivery of the fuel to the destination point only to be told later by Minju Kamulo (PW5) who was the operation Manager of Dalbit in Dar es salaam that the fuel had not been delivered and that the documents submitted by the appellants were forged. The record shows that the copies of the said documents were retained by PW1. In other words, PW1's office kept custody of the delivery note and other related documents in connection with the fuel in question. It has not been shown at what stage did custody of the delivery note change to PW3 neither did PW3, offer any explanation how he came into possession of the said documents. Although the said documents were admitted without any objection, consent to admission was subject to compliance with the relevant rules of admission more so when the appellant contends in this appeal that the documents tendered are at variance with those he submitted to his employer's office. That means the prosecution must have sufficiently explained an unbroken chain of custody of the delivery note from the office of the appellant's employer to the police and later to the court at the stage of giving

evidence. That was regrettably not the case and therefore, the credibility of the delivery notes cannot be assumed to be intact.

The effect of tendering an exhibits without evidence of broken chain of custody has been discussed by the Court of Appeal in various cases notably; **Paulo Maduka V. R,** CAT Cr. Appeal No. 2007 (unreported) and **Zainabu d/o Nassoro @ Zena V. R,** CAT Cr. Appeal No. 348 of 2015 (unreported) to mention but a few. The rule deduced from the above cases is that without an assurance of an unbroken chain of custody of an exhibit, the court will give a benefit of doubt in favour of the accused. It follows thus that since the integrity of the delivery note (exh. PE4) has not been assured by the prosecution through a credible evidence that the said exhibit is the same as that the appellant presented to his employer upon his return from Zambia and the same remained intact free from any tampering from the moment it was submitted to the stage it found its way into PW3's custody and later in the trial court.

The position in this appeal is that the integrity of exhibit PE4 has not been guaranteed to render it free from any doubt. There was doubt on the integrity of said exhibit which should have been resolved in favour of the accused person (the appellant) which the trial learned Resident Magistrate should have resolved that doubt in the appellant's favour resulting into a finding of not guilty on the charge of forgery. It is to be noted that the cautioned statement (exh. PE1) tendered by PW3 does not say anything in relation to confession on the forgery of the delivery note (exh. PE4) and therefore it could not have added any value to the prosecution's evidence and prove the charge of forgery. At any rate, apart from the testimonies from PW1, PW3 and PW6 about forgery of delivery notes, there was no other evidence to prove that it is the appellant who forged the documents proving delivery of the fuel to the intended destination.

In the absence of such independent evidence from a handwriting expert, the trial court assumed too much from the prosecution's witnesses that the appellant was guilty of forgery. At best, going by the PW1's evidence that his office received the documents from the appellant which were later found to be forgeries, the appellant would have been guilty of uttering false documents under section 342 of the Penal Code whose punishment is the same as forgery. However, the prosecution did not prefer that charge and so the trial court could not have convicted and sentenced the appellant with that offence.

On the whole, the contrary to the learned State Attorney's submissions, I am satisfied that the prosecution's evidence on the count for forgery was proved to the required standard and the trial court overlooked very important aspects in relation to the integrity of exhibit PE4 on which it relied in convicting the appellant of the offence of forgery. In the event ground one and two of the grounds of appeal are hereby sustained.

The third ground criticises the trial Court for acting on a cautioned statement (exhibit PE1) which was obtained through inducement and torture contrary to sections 19 and 27 (1) and 27 (3) of the Evidence Act, Cap 6 [RE 2002]. The learned State Attorney submitted and rightly so in my view that the ground is baseless and not borne out by any evidence from the trial court's record of proceedings. Whilst it is the law that confession made involuntarily is inadmissible in evidence pursuant to section 28 of the Act, there is no evidence in this appeal to prove that exhibit PE1 was made involuntarily. It will be noted that the Appellant was represented by an Advocate who had no objection to its admission. Had the Advocate objected to its admission, the trial court was bound to conduct an inquiry to determine its voluntariness. As no such objection was taken before the trial Court, it is too late in the day and indeed an afterthought

to raise it at this stage. I would thus find no merit in ground three which is dismissed accordingly.

I have had difficulties in understanding the Appellant's complaint in ground five but upon further examination, I understood the appellant complaining that the trial Court erred in disbelieving his evidence of delivery of fuel to the intended destination. Luckily, the learned state Attorney made her submissions on the basis of that understanding. The learned State Attorney submitted that the evidence of PW5 proved beyond reasonable doubt about non delivery of the fuel to the intended destination and the appellant's evidence did not succeed shaking the said evidence. The appellant's submission was that despite his objection against the admission of the cautioned statement the trial Court admitted it nonetheless. I have already disposed of the complaint in relation to the alleged irregular admission of exh. PE1 and so the appellant's argument cannot hold any water.

There is no dispute that the Appellant was entrusted with 40,000 litres of fuel to deliver to TAZAMA pipeline in Zambia. The recipient of the fuel denied delivery of the fuel at the intended destination. The trial court found the evidence of PW1 and PW6 credible and corroborated by the cautioned statement (exhibit PE1) and had proved the offence of stealing by agent on the required standard. Likewise, the trial court found the prosecution to have established circumstances proving stealing by reference to a bank pay in slip dated 6th November 2014 (exh. PE3) which showed that the appellant deposited Tshs. 11,000,000/= into his bank Account with Tanzania Postal Bank, Mbeya branch. According to exh. PE3 the credit into the Appellant's Account opened on that very day was part of the sale proceeds of the fuel sold to third parties in Zambia other than intended destination. The trial court did not believe the appellant's version of evidence regarding the source of that credit into the appellant's newly

opened account. With respect I am inclined to agree with the trial court's findings in relation to non delivery of the fuel to the intended destination. The evidence of PW5 and PW6 who were directly responsible for the receipt of the fuel proved the charge of stealing beyond reasonable doubt. That evidence was duly corroborated by exhibit PE1 in which the appellant is recorded to have admitted selling fuel from one of the chambers of the tank to third parties in collaboration with two persons in Zambia. It is from that sale the appellant found himself with cash of Tshs. 11,000,000/= which he hurriedly deposited into his account in Mbeya opened immediately upon his return from Zambia.

In my view, the circumstances of the opening of an account in a place outside the appellant's usual place of residence immediately after the return from a journey where he was instructed to deliver fuel is so connected to stealing that his contrary version cannot shake that evidence. Accordingly, I find no merit in this ground of appeal and I dismiss it.

The appellant's complaint in ground four is that the trial court wrongly admitted PW4's evidence which had no connection with the charges against him. The learned State Attorney had a different view and submitted that even without that evidence, the prosecution's evidence from other witnesses as well documentary exhibits was sufficient to sustain the charges and so the trial court cannot be faulted for convicting the appellant as charged. With respect I agree with the learned state Attorney's submission. Firstly, the fact that PW4 was a co-worker with the appellant who had a similar assignment to the same destination at the same time made that evidence directly relevant to the prosecution's case. Whether that evidence was credible is a different matter altogether and the trial court was entitled to evaluate that evidence along with other evidence from the rest of the witnesses. Secondly, as rightly submitted by the learned state Attorney, PW4's evidence was not the sole basis of the appellant's conviction and

so even without that evidence, the rest of the evidence was sufficient to sustain the count of stealing by agent. Without further ado, ground 4 is found to be devoid of merit and is accordingly dismissed.

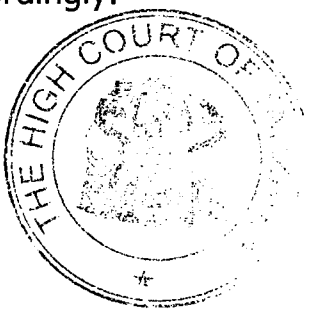
Lastly on grounds six and seven which criticize the trial court for denying the appellant his right to be heard in violation of Article 13 (6) (a) of the Constitution. The learned State Attorney invited me to dismiss the two grounds for lack of merit because the Appellant was afforded right to be heard and duly represented by an advocate of his choice. On the other hand it was the learned State Attorney's further submission that the Respondent had no obligation to bring documentary evidence which it did not require to prove its case.

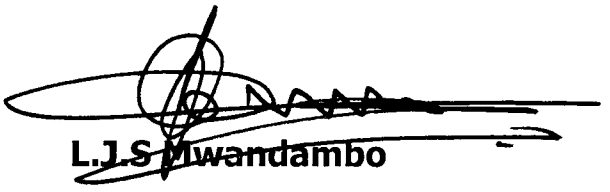
There is no gainsaying that the right to a fair hearing is so fundamental that denial of it renders a decision reached a nullity. It is equally trite from **Mussa Mwaikunda V. Republic** [2006] TLR 387 that an accused is entitled to a fair hearing which entails giving him adequate opportunity to put up his defence. The record of proceedings shows that after the ruling on a case to answer following the closure of the prosecution's case, the appellant was addressed of his right to give his evidence and call witnesses in terms of section 231 of the Criminal Procedure Act, Cap 20 [R.E 2002]. The appellant is recorded to have indicated to give evidence on oath without any other witness and exhibit (see page 42 of the proceedings).

True to the above, on 9th May 2016 the appellant gave his evidence on oath led by his advocate and after re- examination, the Advocate prayed to close the case for the defence and that marked the end of the trial. There is nothing in the trial court's record suggesting that the appellant and/or his advocate made any request to be allowed to call witnesses other than himself or tender any documentary exhibit departing from what he had indicated immediately after a

ruling on a case to answer and the trial court denied him that request. In the absence of such proof there is no basis upon which the trial court can be faulted for denying the appellant his fair hearing and bringing into play Article 13 (6) (a) of the Constitution. In consequence, grounds six and seven lack merit and are hereby dismissed.

In the event and for the foregoing reasons the appeal succeeds in part in ground one and two with the result that the finding of guilt on the count of forgery is hereby quashed so is the conviction and sentence thereon. The same is substituted with an order acquitting the appellant on that count. The appeal is dismissed on the rest of the grounds and trial court's finding, conviction and custodial sentence on the charge of stealing by servant is hereby upheld. Order accordingly.





L.J.S Mwandambo

JUDGE

30/04/2018