IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: KISANGA, J.A., LUBUVA, J.A. And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 140 OF 1994

BETWEEN

JOHN RWEMIGIRA .....APPELLANT

AND

THE REPUBLIC .....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mwanza)

(Masanche, J.)

dated the 15th March, 1993

in

Criminal Appeal NO. 276 of 1992

JUDGMENT OF THE COURT

LUBUVA, J.A.:

In the District Court of Sengerema, the appellant, John Rwemigira, together with one Lwegashara s/o Benedicto who has not appealed was charged with and convicted of making false document contrary to section 335 (a) of the Penal Code in the first count and

forgery contrary to sections 333, 335 (c) and 337 of the Penal Code. He was sentenced to one year term of imprisonment of the first count and three years on the second count. The sentences were ordered to run concurrently. On appeal to the High Court, the appeal was dismissed. The appellant is now appealing to this court against the conviction and sentence.

In this appeal, the appellant appeared in person and the respondent Republic was represented by Mr. Feleshi, learned State Attorney. In the memorandum of appeal, three grounds of appeal are raised. The first ground pertains to the second count of forgery. The complaint was that the learned judge erred in holding that the certificate of occupancy, the subject of the charge, was a forged document when infact the offence of forgery as defined under the penal code had not been established. With regard to this count, Mr. Feleshi did not support the conviction. He said the essential elements of the offence of forgery had not been established. He regretted the fact that due to communication break down, the office of the Attorney General on behalf of the respondent Republic was not represented in the High Court when the appeal was heard. He said if

he had appeared, he would have drawn the attention of the court to the deficiency pertaining to the court of forgery. In the first place, he said the document, the subject of forgery in this count was apparently not tendered in court. We could not trace it in the record in order to satisfy ourselves on its falsity. Secondly, from the submission by the appellant, it is apparent that there was no other document that was falsely made. Rather, it was the only document which was issued straight away in the name of the appellant. In that case, we agree with Mr. Feleshi that the offence of forgery, that is the making of a false document with intent to defraud or deceive was not disclosed. As seen from page 37 of the record, the trial magistrate in a commendable manner correctly addressed on the requisite elements of forgery. Unfortunately, he did not relate the elements of the offence to the document in question in this case. Consequently, he came to the conclusion that the offence of forgery had been established. On appeal the learned judge it appears did not, with respect, address on the issue. Had he done so, we think he would have come to the same conclusion that no offence on the second count had been disclosed on the evidence available against the appellant.

Briefly his submission on this count was as follows: The appellant in his letter of 28/4/1988 (Exh. P.B) had represented that Dickson s/o Arcard (PW1) and Vedasto s/o Arcard (PW2) the children of the late Arcard Bahesi had agreed to sell the house on Plot No. 92 Block T. The representation was made to the Land Office. On the basis of this representation, the appellant intended to have a Certificate of Right of Occupancy issued in his name. As a result of such representation, Land Certificate No. LD/SENG/2794/1/PBR Plot No. 92 Block T (Exh.PA) was issued in the name of the appellant. PW1 and PW2 denied any knowledge about the agreement in Exh. PB. They (PW1, PW2) said that there was no agreement on the sale of the house but admitted that the appellant had agreed to loan them 150,000/= payable in due course. Other witnesses, PW3, PW4 and PW5 also supported PW1 and PW2 that there was no agreement on the sale of the house to the appellant. On this evidence, the appellant had made a false document in that it purported to have been made by PW1 and PW2 when infact it was not true. The document was signed by Josephat Rechungura (DW2) the son of the appellant. With this false representation Mr. Feleshi contended, the

learned judge on first appeal was justified in upholding the conviction on the first count of making false document. Prompted by the court on the propriety of the charge on this count, Mr. Feleshi did not seem to be sure of the position. At some stage he seemed to maintain that it was proper but at another, he said even if the charge was defective, it was curable.

The appellant, naturally as a layman did not have much to say apart from pleading that he did not intend to deprive the children of the late Arcard Bahesi, once his best friend of the house. He had helped the late Arcard Bahesi`s family so much that he now regrets to find himself in this situation. He asked for the assistance of the court.

Before dealing with the merits of the appeal on this count, we wish to deal first with the property of the charge as laid. On the first count, the charge indicated the offence of making false document contrary to section 335 (a) of the Penal Code. The particulars of offence are to the effect that:

> John Rwemigira charged on 28th day of April, 1988 at unknown
> time at Ibisabageni Village within the Sengerema District in Mwanza
> Region, did make a letter to show ... ... (emphasis supplied).

From this, it is to be observed at once that there is a serious omission in the particulars of the offence. That is, the intent to defraud or to deceive in writing the letter is the prerequisite element for the offence under the Penal Code. Instead, the particulars only over that "the appellant did make a letter to show that Dickson Arcard and his young brothers there (sic) sold to him a house on Plot No. 92 Safu T a document which has reason to believe is untrue." We think the correct position is that the particulars should have shown that the appellant, with intent to defraud or deceive did write a letter etc. It is common knowledge that the intention of writing this letter was to deceive the Land Officer that the house had been sold to him so that the certificate would be issued I his name. The omission in the particulars was so fundamental that it could not be curred under

section 388 of the Criminal Procedure Act, 1985 as Mr. Feleshi seemed to suggest. It is to be observe that these provisions as cited by Feleshi are not applicable to the Court. The basic essentials of the offence must be brought out in clear terms in the particulars of the offence so that the accused knows exactly what is alleged against him. This was not the case here, the omission was therefore fatal.

In the upshot, for these reasons, we allow the appeal, quash the convictions and set aside the sentences. As the appellant has completed serving the sentence, we make no order as to his release.

DATED at MWANZA this 1st day of DECEMBER, 2000.

R. H. KISANGA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

K. S. K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

N. M. Mwaikugile
SENIOR DEPUTY REGISTRAR