IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MKUYE, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 95 OF 2021

LUSAJO JAMSON MWASAMBUNGU ..... 1ST APPELLANT

NSUBI JAMSON MWASAMBUNGU ..... 2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Siyani, J.)

dated the 16th day of November 2020

in

Consolidated Appeals No. 36, 55 and 98 of 2020

JUDGMENT OF THE COURT

02nd December & 30th January, 2023

KOROSSO, J.A.:

Nsubi Jamson Mwasambungu, Lusajo Jamson Mwasambungu (the 2nd and 1st appellants) together with Maneno Peter Mlewa (then the 3rd accused person and not subject of this appeal) were arraigned before the District Court of Dodoma at Dodoma in Criminal Case No. 14 of 2018 charged with four counts as follows: The first count that of conspiracy to commit an offence contrary to section 384 of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code) was for the 1st, 2nd appellants and the 3rd accused person. It was alleged that on unknown dates and place within Municipality of Dodoma in Dodoma Region, the 1st and 2nd

appellants together with Maneno Peter Mlewa did conspire to commit an offence termed uttering false documents to obtain money by false pretence. In the second count, which was for the 2nd appellant alone, she was charged with the offence of personation, contrary to section 369(1) and (2) of the Penal Code. The particulars were that the 2nd appellant on 5/6/2017 within the Municipality of Dodoma in Dodoma Region, with intent to defraud did falsely represent herself to be Edina Hyera so as to obtain a credit of Tshs. 3,000,000/- from Happy Alex Mshana. The third count for the 2nd appellant alone was that of uttering a false document contrary to section 342 of the Penal Code. The allegations being that on 5/6/2017 within the Municipality and Region of Dodoma the 2nd appellant knowingly and fraudulently did utter to Happy Alex Mshana a false transfer of offer of the Ground lease on Plot 75 Block "A" Ndachi "B" Center purporting it to be from Edina Hyera, the owner of the said plot.

The fourth count was obtaining money by false pretence contrary to section 302 of Penal Code for the 1st and 2nd appellants with the 3rd accused person. Allegedly that the 1st and 2nd appellants together with the 3rd accused person on 5/6/2017 within the Municipality and Region of Dodoma did obtain Tshs. 3,000,000/- the property of Happy Alex Mshana

pretending to sell Plot No. 75 Block "A" Ndachi "B" Centre while knowing the said plot does not belong to the 2nd appellant (then the 1st accused).

The three accused persons denied the charges leveled against them. In the trial that ensued thereafter, the prosecution case rested on the evidence of eight witnesses. According to Happy Mshana (PW1) on 6/6/2017 she purchased Plot No. 75 Block "A" Ndachi (the disputed land) from a person, allegedly the 2nd appellant who was introduced as Edna Hyera and the owner of the plot for sale. PW1 visited the said plot, and upon being satisfied, negotiated the purchase price and subsequently, the sale of the plot was effected having allegedly transacted with the 2nd appellant. The sale transaction was witnessed by PW1's advocate, the late Mr. Shukuru Mlwafu who also drafted the requisite documents to finalize the sale. The sale agreement was drawn, signed by PW1 and allegedly the 2nd appellant and admitted as evidence in court as exhibit P3. PW1 alleged that she paid the 2nd appellant Tshs. 3,000,000/= for the purchase of the plot as the first installment and was thus given the allocation letter (exhibit P1). Thereafter, it was the action by PW1 of initiating processes to develop the purchased plot, by buying building materials and storing them at the plot which brought forward Deogratius Andrea Kibanda

(PW2). PW2 claimed to own the Plot which PW1 had purchased, having bought it from one Edna Hyera.

Being confronted by PW2 about the ownership of the plot, led PW1 who was in apprehension to report the incident to the police. PW2 testified that he purchased the disputed plot from Edna Hyera on 6/8/2014 for Tshs. 1,600,000/- and that the sale was witnessed by Mr. Machibya learned advocate. He drafted most of the documents required effecting the said sale transaction. Mr. Machibya also processed the transfer of the plot to PW2, who had been provided with all requisite documents on the plot by Edna Hyera. The relevant documents included the letter of allocation (exhibit P4), transfer of ownership (exhibit P5) and disposition of landed property (exhibit P6). He also alluded to the fact that he has paid all the relevant fees for the disputed plot and was awaiting to receive the title deed for the same. He testified that upon being informed that someone had put building materials in the disputed plot he thus took the initiative to trace the culprit (PW1). PW2 asserted his ownership of the disputed plot having all the relevant documents for the disputed plot.

Edna Hyera (PW3) introduced herself as the one who had owned the disputed property having been allocated by Capital Development Authority (CDA), and that she had, however, later sold it to PW2. She

denied having had any interaction with PW1 or the 1st and 2nd appellants about the disputed land or any other business. A land officer from Dodoma City Council, Ruta Rwechungura (PW4)'s evidence was to the effect that the land records show that the disputed property was owned by PW3, Edna Hyera and then transferred to PW2. He also opined that exhibit P1 was not the proper document for sale or transfer of title to land. A/Insp Habibu Rungwe (PW5) who investigated the complaint made to the police narrated the process of their investigations into the matter and the arrest of the alleged culprits, those who were then charged and tried with the offences as expounded in the charge sheet.

The 2nd appellant (DW1) denied the charge and stated that she had been led to sign documents believing it related to purchasing a plot of land as promised by her sister, the 1st appellant. She denied having been paid Tshs. 3,000,000/= and conceded to have only signed documents which she was unaware of their contents believing it was for sale of land for her to get a plot of land. For the 1st appellant she denied taking part in the offence charged and stated she called the 2nd appellant so that she can fill an application form to be allocated with a plot of land.

Upon considering the adduced evidence, the trial court, being satisfied with the prosecution case, convicted the 1st, 2nd appellant and

the 3rd accused person and sentenced each to seven years imprisonment for the first count. Two years imprisonment to 2nd appellant for the second count and two years' imprisonment for the third count. Furthermore, a sentence of six years imprisonment was meted on the 1st, 2nd and 3rd accused for the fourth count. Dissatisfied with the decision of the trial court, the appellants and the 3rd accused then appealed to the High Court. The High Court upheld the conviction and sentence of the 1st and 2nd appellants and acquitted the 3rd accused.

Although both the 1st and 2nd appellants on 15/12/2020 filed a joint notice of appeal against the decision of the High Court as shown at page 190 of the record of appeal, it is only the 2nd appellant who filed a memorandum of appeal predicated on nine grounds that paraphrased and compressed state as follows: **one**, failure of the lower courts to consider the defence evidence. **Two**, impropriety in admitting the statement of the deceased advocate. **Three**, faults appellant's conviction on the offence of conspiracy in absence of requisite evidence. **Four**, faults appellant's conviction on the unproved charge of uttering a false document. **Five,** faults conviction of the 2nd appellant for being based on the evidence of co- accuseds (the 1st appellant (then the 2nd accused) and the 3rd accused person then). **Six**, conviction on obtaining money by false pretence was

not supported by adduced evidence. **Seven**, failure by the subordinate courts to be guided by the principle that conviction should be based on the strength of the prosecution evidence and not the weakness of the defence. **Eight**, the impropriety of admitting the cautioned statement of the 2nd appellant, and **nine**, that the charge was not proved beyond reasonable doubt.

When the appeal came for hearing, the 1st appellant was present in person and unrepresented. The 2nd appellant was present in person and represented by Mr. Fred Peter Kalonga, learned advocate. Ms. Chivanenda Luwongo, learned Senior State Attorney represented the respondent Republic assisted by Ms. Bertha Kulwa and Ms. Mariatereza Kamugisha, learned State Attorneys.

Before hearing commenced, the 1st appellant sought leave to withdraw her appeal, having no further interest to pursue it. Ms. Luwongo on the other hand submitted that since the 1st appellant having duly filed the notice of appeal failed to file the memorandum of appeal within the specified time and thus contravening Rule 72(5) of the Tanzania Court of Appeal Rules, 2009 (the Rules), and the appropriate remedy for such irregularity is to dismiss the appeal for failure to file the memorandum of appeal. The 1st appellant had no rejoinder leaving it to the Court to give

proper directions. Being satisfied that although the 1st appellant had filed the notice of appeal but failed to file the memorandum of appeal within the prescribed period, we proceeded to dismiss the appeal with respect to Lusajo Jamson Mwasambungu (the 1st appellant) under Rule 72(5) of the Rules and thus what remained for determination was the appeal of the 2nd appellant only.

Before according the counsel for the appellant and the respondent Republic the opportunity to address us on the grounds of appeal filed by the remaining appellant, we invited the counsel for the contending parties to address us on the propriety of the charge against the appellant found on pages 4-6 of the record of appeal.

Mr. Kalonga argued that the charge was improper because it contained charges against the appellant on the offence of conspiracy to commit an offence in the first count and then substantive offences of uttering false documents and obtaining money by false pretence in counts number three and four. He argued that the charge of conspiracy to commit an offence can stand on its own and relied on the decision of this Court in the case of **Hassan Iddi Shindo and Another v. Republic**, Criminal Appeal No. 324 of 2018 (unreported).

The learned counsel argued further that in the instant case, since the first count in the charge is that of conspiracy which can stand on its own, further charging the appellant with other counts of uttering false documents and obtaining money by false pretence in the same charge rendered the charge to be incurably defective being prejudicial to the rights of the appellant. He thus invited the Court to nullify the proceedings, quash the conviction and set aside the sentence.

On the part of the learned Senior State Attorney who took lead in submitting for the respondent Republic, she conceded to the anomaly in the charge and advanced two reasons for her stance, alluding to; **First**, the impropriety of the particulars of the offence on the first count as they addressed two offences in one count, that is, conspiring to commit the offence of uttering a false document and obtaining money by false pretence. **Second**, the impropriety of charging the appellant in the same charge sheet with the offence of conspiracy to commit an offence in the first count and substantive offences, that of uttering false documents and obtaining money by false pretences in the third and fourth counts as discerned from pages 4 and 5 of the record of appeal.

To augment her stance, she also relied on the case of **Hassan Iddi Shindo** (supra). She, however, argued that the anomaly was not

prejudicial to the rights of the appellant since she was aware of what offences she was charged with entailed and thus curable under section 388 (1) of the Criminal Procedure Act [Cap 20 R.E. 2019, now, R.E 2022] (the CPA). She prayed the Court to so find and in consequence strike out the first count only and proceed with the remaining counts.

Having scrutinized the charge against the appellant, we agree with both counsel for the appellant and the respondent Republic that it has the following defects: **one**, in the first count the particulars expound that the three accused persons conspired to commit two offences, that is; uttering false documents in order to obtain money by false pretence. Thus essentially, the particulars of the first count of the charge allude to two offences in one count of conspiracy to commit an offence, namely; conspiracy to commit an offence of uttering a false document and to commit an offence of obtaining money by false pretence. **Two**, the fact that having charged the appellant and her co-accuseds with conspiracy to commit the offence in the first count, in the fourth count, they are also charged with the offence of obtaining money by false pretence and in the third count, the appellant was charged with the offence of uttering false documents. The charge failed to consider the fact that a charge of conspiracy can stand on its own.

The charge is the foundation of criminal proceedings upon which a criminal case evolves as expounded in various decisions of this Court including **Hebron Kasigala v. Republic**, Criminal Appeal No. 3 of 2020; **Rajab Khamis @ Namtweta v. Republic**, Criminal Appeal No. 578 of 2019; **Samwel Lazaro v. Republic,** Criminal Appeal No. 68 of 2017 and **Maweda Mashauri Majenga @ Simon v. Republic**, Criminal Appeal No. 255 of 2017 (all unreported).

Essentially, where a charge is said to contain two separate offences in one count it is said to be engrained in duplicity. We agree with the learned Senior State Attorney that this anomaly is also found in the instant case in the first count of the charge against the appellant. Certainly, the first count alluded to conspiracy to commit two separate offences, since it alleges there was a conspiracy to commit the offence of uttering a false document and obtaining money by false pretence which are two distinct offences. As conceded by the learned Senior State Attorney the said anomaly renders the charge to be defective, and we agree.

On the second anomaly, the Court had an opportunity to address a similar concern in **Steven Salvatory v. Republic**, Criminal Appeal No. 275 of 2018, the Court held that the offence of conspiracy cannot stand where the actual offence has been committed. In the case of **Hassan**

Iddi Shindo and Another (supra), the Court in addressing an akin issue relied on its previous decision in the case of **John Paulo Shida v. Republic**, Criminal Appeal No. 335 of 2009 (unreported) where it was observed:

> *"It was not correct in law to indict or charge the appellants with conspiracy and armed robbery in the same charge because, as already stated, in a fit case, conspiracy is an offence which is capable of standing on its own".*

See also, **John Paulo @Shida and Another v. Republic**, Criminal Appeal No. 335 of 2009, **Magobo Njige and Another v. Republic**, Criminal Appeal No. 442 of 2017 and **Emmanuel Magembe and 3 Others v. Republic**, Criminal Appeal No. 35 of 2018 (all unreported).

In light of the above-stated stance on the matter, it was not proper for the prosecution to charge and convict the appellant on charges of conspiracy; uttering a false document; and obtaining money by false pretence in the same charge. The defect as argued by the learned counsel for the appellant is not curable going to the foundation of the case. Therefore, under the circumstances, the first appellate court thus had no legal justification to uphold the conviction for conspiracy and that of

uttering false documents and obtaining money by false pretence as they did.

On the way forward, the learned counsel for the appellant urged us to nullify the proceedings and quash the conviction and that although normally, in similar circumstances the Court can order a retrial, he implored us to find that route not appropriate in the circumstances of the present case. He contended that the prosecution case had a lot of gaps and essentially the case against the appellant was not proved to the standard required thus, an order for retrial will provide the prosecution with an opportunity to fill in the holes in their case and occasion injustice to the appellant.

The learned counsel for the appellant then proceeded to highlight the alleged gaps in the prosecution case and irregularities in proceedings which he believed detract from the argument for a retrial. He submitted that while expounding on the gaps he will also be amplifying on the grounds of appeal. He contended that the gaps in the prosecution case are as follows: **one**, irregularity in sentencing of the appellant, arguing that the trial court, upon sentencing the appellant did not define how the sentences were to run and the first appellate court failed to address the anomaly. That the decision not to order how the sentences were to run

prejudiced the rights of the appellant. **Two**, failure by the prosecution side to prove how a charge of conspiracy of three persons can be proved by two persons only, after the acquittal of the 3rd accused person by the High Court. **Three**, the trial and first appellate courts reliance on the cautioned statement of the appellant (exhibit P8) as supporting the claims expounded in the charge, while exhibit P8 is not a confession since the appellant exculpates herself from any involvement in the offence charged stating therein that she was set up by the then 2nd and 3rd accused persons. **Four**, the fact that the evidence of PW5, a prosecution witness exculpated the appellant adducing that investigation conducted implicated the 2nd and 3rd accused persons as the mastermind of the offence occasioned. **Five**, failure of the trial and the first appellate courts to consider the appellant's defence. **Six**, that there is no direct evidence on whom PW1 handed the alleged advance payment of Tshs. 3,000,000/- thus no evidence of the appellant having obtained the money. **Seven**, there is evidence that the negotiations were conducted by the 2nd accused as shown in exhibit P2 and thus there being no link between exhibit P2 and the appellant.

Mr. Kalonga thus implored the Court to find that the prosecution did not prove the case to the standard required and refrain from ordering a

retrial since it is not what justice demands. He concluded praying that the appeal be allowed and the appellant set at liberty.

Ms. Luwongo expounded that the appeal was resisted, being in support of the conviction of the appellant in the second, third and fourth counts. She, however, did not support the conviction of the appellant in the first count. In addition, whilst she was in support of the sentence imposed on the appellant in the second and third counts but did not support the sentence imposed on the appellant in the fourth count arguing that it contravened the sentencing guidelines as outlined in section 170 of the CPA.

On whether the prosecution failed to prove the case against the appellant, the learned Senior State Attorney contended that the prosecution case proved their case against the appellant in the second, third and fourth counts. With regard to the 2nd count of personation, she contended that this was proved to the hilt for the following reasons. **One**, the fact that the prosecution managed to produce Edna Hyera (PW3) the owner of the disputed land, and thus clearly showed the act of the appellant identifying herself to PW1 as Edna Hyera while she was not was personation. **Two**, the prosecution through PW2 tendered exhibits admitted as P2 and P3. Exhibit P2 includes a photograph of the appellant

identifying herself as Edna Hyera and the owner of the disputed property while knowing she was not. **Three,** the fact that PW2 stated that the appellant was not Edna Hyera in court. PW2 being the owner of the disputed property having bought the land from Edna Hyera. Edna Hyera (PW3) and PW4 testified that the disputed property was now in the hands of PW2.

The learned Senior State Attorney challenged the appellant's defence that she was unaware of the sale of the disputed plot between PW2 and the appellant stating that there is nowhere where the appellant denied being Edna Hyera or cross-examined PW1 or her co-accuseds on this. She thus urged us in such circumstances, to draw adverse inference on the appellant for such failure since it meant she did not dispute PW1's assertion of her having represented herself as Edna Hyera. The learned Senior State Attorney relied on the case of **Daniel Magoko and 2 others v. Republic,** Criminal Appeal No. 494 of 2020 (unreported) to bolster her argument. Ms. Luwongo argued further that the evidence presented by the prosecution left no stone unturned that the appellant personated Edna Hyera (PW3) before PW1. She urged us to find that the offence in count two was proved to the standard required against the appellant.

On the offence of uttering false documents found in the third count, the learned Senior State Attorney asserted that there was sufficient evidence to establish that the appellant uttered to PW1 a letter purporting to be an allocation letter (exhibit P2). That it is PW1 who testified that the appellant gave her the allocation letter (exhibit P1) while knowing it to contain false information and knowing she was not the real owner of the disputed land not being Edna Hyera. The learned Senior State Attorney thus urged the Court to find that the offence of uttering false documents was proved against the appellant.

Regarding the offence in the fourth count against the appellant of obtaining money by false pretence, Ms. Luwongo contended that this was proved by the evidence of PW1 that she paid Tshs. 3,000,000/= as advance payment for the purchase of the disputed plot when she and the appellant were before the late advocate whose statement was admitted as exhibit P10. She maintained that the appellant's defence of not being given the money cannot detract from PW1's evidence and exhibit P3 on the matter. She asserted that the offence charged was proved against the appellant who received the advance payment for the purchase of the disputed plot knowing that she was not the owner and had no power to sell the same to PW1. The learned Senior State Attorney thus concluded

that the offence charged in the second, third, and fourth counts were proved beyond reasonable doubt as against the appellant.

On the ground faulting the trial and first appellate court for not considering the defence, the learned Senior State Attorney alluded that the complaint is not supported by the record since perusal of the record of appeal shows that on pages 130-141 the defence was amply considered by the High Court since the complaint was also an issue for determination in the High Court. She argued that the High Court on page 172 of the record acknowledged the fact that the trial court failed to consider the defence and went on to address the identified anomaly on pages 173-181 and then decided to step into the shoes of the trial court as guided by various decisions of the Court including **Daniel Magoko and Others** (supra) and reanalyze the defence afresh. That the High Court upon considering the defence found the appellant was properly convicted on the strength of the prosecution case and not otherwise.

With regard to lack of notice before consideration and admitting exhibit P10, a complaint found in the second ground of appeal, the learned Senior State Attorney argued that the record of appeal shows that the notice was duly given and served as found on page 118, and thus the complaint is misconceived. That all the essential requirements were met

in the process of admissibility of the exhibit. She thus implored the Court to find that the prosecution proved its case against the appellant as expounded. She urged us to dismiss the appeal except for the first count, which should be struck out, and uphold the convictions and sentences imposed for the 2nd and 3rd counts. Furthermore, she urged us to uphold the conviction for the fourth count however, set aside the sentence for the fourth count and substitute it with another appropriate sentence since the meted sentence was improper being above the sentence authorized to be imposed by a Resident Magistrate of the stature of the trial magistrate in terms of section 170(1)(a) of the CPA.

In rejoinder, Mr. Kalonga reiterated his submission in chief and challenged the learned Senior State Attorney's assertion that the appellant's photograph appeared in exhibit P2, the allocation letter which purported to show that the appellant was Edna Hyera, stating that the said photograph was unrecognizable as that of the appellant and thus denied that the offence of personation was proved. He also challenged the assertion that there were discrepancies in exhibit P2 regarding the date the transaction was effected since three dates are referred namely, 1/6/2017, 5/6/2017, and 6/6/2017. He reiterated his argument that there was no evidence to ascertain that the appellant received the purchase

price from PW1. On the anomaly in the sentencing of the appellant in the fourth count, the learned counsel was in support of the submission by the learned Senior State Attorney praying the Court to hold that there was an irregularity in sentencing the appellant in the fourth count.

Mr. Kalonga concluded by beseeching the Court to find that the proceedings were faulty for the reason of a defective charge and refrain from ordering a retrial. He argued that a retrial will not accord justice to the appellant and for the Court to also consider that the prosecution failed to prove the case beyond reasonable doubt.

In light of our determination hereinabove that the charge against the appellant was defective for duplicity and including offences of conspiracy to commit an offence and including the substantive offences of uttering false pretence and obtaining money by false pretence in the same charge, we now delve into addressing the way forward with a backdrop of the submissions and cited authorities by the counsel for both sides and the record of appeal.

Whilst the learned counsel for the appellant contends that the appellant was prejudiced, the learned Senior State Attorney stated otherwise, arguing that the appellant knew and understood the contents of the charge and thus was not prejudiced. Where the charge is duplex

as in the instant appeal, this Court has in various cases expounded the consequences thereto. In the case of **Issa Juma Idrisa and Another v. Republic**, Criminal Appeal No. 218 of 2017 (unreported), the Court discussed the effect of a charge being duplex after considering prevailing conditions from various decisions of the former Court of Appeal for Eastern Africa including that of **Republic v. Mongela Ngui** [1934] EACA 152 (CAK) cited in the case of **Horace Kiti Makupe v. Republic** [1989] eKLR, and stated thus:

> *"In our jurisdiction, as alluded to above, an omnibus charge offends the principle of fair hearing and the usual consequence has been to quash the proceedings and judgments of the lower courts .... the Court in unambiguous words held that the anomaly renders the charge fatally defective....the reason given was that an accused person must know the specific charge (offence) he is facing so that he can prepare his focused defence which, in the event of a duplex charge, cannot be accomplished. We think such a position is in fine with the decision of the former Court of Appeal for Eastern Africa in* ***R. vs. Mongela Ngui*** *(supra) that in determining whether the defect is fatal and incurable, we should find out whether the charge under consideration embarrassed or prejudiced the accused such that he could not*

arrange for a focused and proper defence. That is the yardstick we set in the case of ***Jumanne Shaban Mrondo vs. Republic****, Criminal Appeal No. 282 of 2010 (unreported) where we stated that the fatality of any irregularity is dependent upon whether or not it occasioned a miscarriage of injustice."*

See also the **Director of Public Prosecutions v. Morgan Maliki and Another**, Criminal Appeal No. 133 of 2013 and **Adam Angelius Mpondi v. Republic**, Criminal Appeal No. 180 of 2018 (both unreported)).

Therefore, in both instances, the issue to determine where there is such a defect is whether the appellant was prejudiced. Having considered all the circumstances obtained in the instant appeal, we entertain no doubt that being found guilty and convicted on a defective charge, the appellant was not fairly tried by the trial court, and the decision of the High Court confirming her conviction and sentences was without any legal justification. The double entendre in the particulars of the first count certainly denied the opportunity to fully understand the substance of the charge she faced and thus give a focused defence.

The overriding issue is whether the discerned anomalies in the charge against the appellant justify an order for retrial. According to the

case of **Fatehali Manji v. Republic** (1966) EA 343, in considering whether to order a retrial, the essential question should be the sufficiency or otherwise of the prosecution evidence against the appellant and whether the interest of justice justifies an order of a retrial.

We have gone through the evidence presented by the prosecution and find that the evidence presented to prove the charge of personation and obtaining money by false pretence is engrained in a lot of gaps to sustain the conviction of the appellant as expounded by the learned counsel for the appellant. The fact that PW1 communicated with the 3rd accused and the appellant only came in at the last minute in the transaction as also adduced by PW5 gives strength to the appellant's testimony that she was not aware of the transaction, having co-opted by her sister who was the 2nd accused. The prosecution relied on the evidence of PW1 alone which is on some parts contradicts itself. The cautioned statement of the appellant is not a confession, she alleges that she signed the documents believing they involved transactions for herself to purchase land before the 3rd accused who was PW1's husband. In the case of **Edward Mbawala v. Republic**, Criminal Appeal No. 38 of 2009 (unreported), we stated that to prove the offence of personation, the prosecution must prove that the accused with intent to defraud, falsely

represented oneself as some other person. We are of the view that in the instant case there was no such proof of intention to defraud on the part of the appellant and thus it cannot be said that the said offence was proved as contended by the learned Senior State Attorney.

On the conviction on the second count, that of uttering a false document, the allocation letter – exhibit P1 which is alleged to have been uttered to PW1 by the appellant before an advocate has nothing substantive to link the appellant with the allegations. According to PW1 she met one Nelly (who PW1 recognized in court as the 2nd accused person) who told her that her she has a young sister who is selling a plot of land. That she later met the owner of the plot, whom she was informed was Edna Hyera and negotiated the purchase price. However, the letter of allocation has no photographs. When cross-examined PW1 stated: "*I was shown the plot by the 2nd accused person. She introduced to me as an agent and the plot she told me belongs to her little sister.*"

Clearly, this has also been alluded by PW5 and shows that the appellant was not the main seller. Even before the advocate, PW1 stated that they went to the advocate with appellant, 2nd accused and a white woman. Thus the evidence leaves doubts on the role of the appellant in the sale of the plot and augments her defence that she was not the main

culprit. There is also no proof that it is the appellant who handed exhibit P1 to PW1 or even if she did whether she knew that the contents were false to prove the offence of uttering a false document charged.

Regarding the charge of obtaining money by false pretence, the appellant denied having been given any money by PW1. Although PW1 adduced that she handed the money before the Advocate, the statement of the Advocate does not reveal there was an exchange of money stating that even the advocate had questioned why there was no exchange of money upon signing the contract, but the 3rd accused had stated that she will be handed the money outside as the money was in his vehicle. When cross-examined by the 2nd accused on whom she paid the money to, PW1 stated that she paid the money after the owner handed her the documents, though she does not reveal the date nor the person she gave the money to although she stated the 3rd accused was not present when she handed the money. This leaves a lot of doubts on whether the said Tshs. 3,000,000/= was handed to the appellant. Doubts which should benefit the appellant. We thus find this offence was not proved either.

In the final analysis, we are of the firm view that the prosecution case to prove the charges as against the appellant is weak and at any rate cannot attract an order for a retrial. We thus find having determined that

the charge was defective and that the prosecution failed to prove the charges against the appellant, we are satisfied that the above findings are sufficient to determine the appeal and find no further need to consider the other grounds of appeal.

In the circumstances, we allow the appeal, quash the convictions and set aside the sentences imposed upon the appellant. We order the appellant's immediate release from prison unless she is otherwise lawfully held.

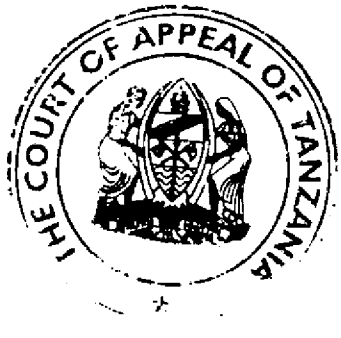
DATED at **DAR ES SALAAM** this 24th day of January, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The judgment delivered this 30th day of January, 2023 in the presence of 2nd appellant in person and Ms. Mwajuma Mkonyi, learned State Attorney for the respondent/Republic via video facility is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL