IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CIVIL APPEAL NO. 125 OF 2020

TRYPHONE ELIAS @ RYPHONE ELIAS .....1ST APPELLANT

PRISCA ELIAS ..... 2ND APPELLANT

VERSUS

MAJALIWA DAUDI MAYAYA ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania (Commercial Division) at Mwanza)

(Mruma, J.)

dated the 8th day of June, 2018

in

Commercial Case No. 7 of 2013

.....

JUDGMENT OF THE COURT

14th August & 21st December, 2023

MKUYE, J.A.:

This is an appeal in which the appellants, Tryphone Elias @ Ryphone Elias and Prisca Elias (the 1st and 2nd appellants) are appealing against the judgment and decree of the High Court dated 8/7/2018 by Hon. Mruma, J. in Commercial Case No. 7 of 2013.

Before embarking on the merits of the appeal, we find it appropriate to narrate the brief facts leading to the matter at hand. They go thus.

The appellant Tryphone Elias @ Ryphone Elias and Prisca Elias (the appellants) and the respondent, Majaliwa Daudi Mayaya were contractors based at Shinyanga. It would appear that on 19/1/2013 the respondent advanced the 1st appellant a repayable loan to the tune of TZS. 200,000,000.00. This arrangement was allegedly reduced into writing (simple agreement) which was signed by the 1st appellant, and as a lien for the loan, he handed over to the respondent the Certificates of Title to Plot No. 105 A, Block "N" Nyahanga Area and Plot No. 22, Block "A" LD Nyihogo (Service Industry) Kahama, both located within Kahama District.

According to the respondent, the 1st appellant also issued postdated cheques of different amounts on three occasions to be cleared on different dates but upon presentation to the respective bank, were returned with a caption "refer to drawer". Thus, the loan remained unpaid.

The respondent, anxious to recover his money instituted a suit under summary procedure against the appellants claiming for payment of TZS. 200,000,000.00, general damages to be assessed by the court, interest on the sum claimed and damages to be assessed at

a commercial bank rate from the date of accrual of cause of action until the delivery of judgment, interest on decretal amount from the date of judgment to full satisfaction and costs.

On their part, in the first place, the appellants applied and were granted leave to defend themselves. They filed their joint written statement of defence and witnesses' statements whereby they claimed that no such loan amount was ever advanced to them by the respondent contending that any such claim was found on of forgery. They, however, admitted that way back in 2011, they had been advanced by the respondent a sum of TZS. 64,000,000.00 and as a security, they deposited the Certificates of Title to Plot No. 105 A, Block "N" Nyahanga Area and Plot No. 22, Block "A" LD Nyihogo (Service Industry) Kahama, both located within Kahama District and that, out of the total amount of the loan, they repaid a sum of TZS. 50,000,000.00 and remained with unpaid balance of TZS. 14,000,000.00.

For the determination of the matter, three issues were framed as follows:

1. *Whether or not the plaintiff did advance to the defendants any money in terms of a loan to the tune of*

Tanzanian shillings two hundred million [200,000,000.00 Tshs].

2. *If the first issue is answered in the affirmative, what were the terms and conditions for the advancement and repayment of the said loan.*
3. *What reliefs are the parties entitled.*

Upon hearing both sides, the trial court found in favour of the respondent having observed that the alleged forgery had not been particularized in the pleadings and strictly proved at a standard higher than the balance of probability as required or expected. That, in the absence of particularisation and there being no evidence to prove dishonest amounting to fraud or forgery attributed to the plaintiff, left the plaintiff's evidence unchallenged. It found that Exh. P1 was the evidence which proved that the 1st appellant had borrowed the amount of money from the respondent and Exh. P2 collectively, was proof that the sums of money remained unpaid.

Dissatisfied with the decision of the High Court, the appellants have now appealed to this Court. It is noteworthy that they lodged a joint notice of appeal although the 2nd appellant was discharged from any liability related to the respondent's claim. They have also lodged a memorandum of appeal containing three grounds as follows:

"1. That, there was no sufficient evidence on the basis of which the learned trial judge could safely and conclusively hold that the 1st appellant was the author of exhibits P1 and P2 as to hold him liable thereon.

2. That, the learned trial judge grossly erred in shifting the burden of proof on the 1st appellant.

3. That, the judgment sought to be impugned is against the evidence on record".

When the appeal was called on for hearing, Mr. Anthony Nasimire, learned counsel appeared representing the appellants whereas the respondent had the services of Mr. Deocles Rutahindurwa, also learned counsel.

When called upon to argue the appeal, Mr. Nasimire adopted the written submission they had filed earlier on without more. He urged the Court to allow the appeal.

In relation to the 1st ground that there was no sufficient evidence to show that the 1st appellant authored Exhibits Pl and P2, it was argued in the written submission that, there was no sufficient evidence to support the respondent's claim that he advanced a loan of

TZS. 200,000,000.00. to the 1st appellant. It was argued further that, the basis upon which the High Court relied upon to hold that the 1st appellant was indebted, that is, Exh. P1 and the three postdated cheques (Exh P2 collectively), in that they were authored by 1st appellant, was denied by him claiming that they were forged. It was pointed out that, although the trial judge at the instance of the respondent's advocate had ordered that the CRDB Branch manager should be summoned with samples of specimen signatures for 1st and 2nd defendants (appellants herein), the respondent did not call such crucial witness who could have cleared the dust by showing the authenticity of the cheques (Exh. P2). It was argued that, failure to do so entitled the Court to draw adverse inference against the respondent that, had such witness been called, he would have given evidence which is prejudicial to the respondent's interests.

Alternatively, it was argued that, the respondent could have called the handwriting expert in order to ascertain the actual author of Exh. P2. But that he did not do so.

It is further argued that, Exh. P1 is forged as consistently maintained by the 1st appellant. The 1st appellant denied to have signed Exh. P1 and that he did not know Ryphone Elias. In this

regard, it is the appellants' argument that failure by the respondent to invoke the provisions of sections 47 and 49 (1) of the Evidence Act, Cap 6 R.E 2019 (the Evidence Act) to ascertain the authenticity of Exh. P1 and P2 denied the opportunity to adequately and safely connect the 1st appellant with the claim.

In addition, the appellants claimed that **one,** Exh. P1 was not properly admitted for want of appropriate stamp duty because it is not known how much was paid as the exhibit do not show it. It was argued that, as Exh. P1 does not bear the stamp duty it cannot be accepted in evidence as per section 46 (1) of the Stamp Duty Act.

However, much as Exh P1 shows that it was affixed with a Stamp Duty Stamp without showing the amount paid for it, we think, failure to do so does not invalidate the proceedings as we stated in the case of **Elibariki Mboya v. Amina Abeid,** Civil Appeal No. 54 of 1996 (unreported). But again, in the case of **Twazihirwa Abrahan Mgema v. James Christian Basil,** Civil Appeal No. 229 of 2018 (unreported), we declined to reverse the High Court's decision on account of failure to pay the stamp duty for a lease agreement which was admitted in evidence without having paid the stamp duty. We took a stance that, even if it was not paid at the appeal stage, we

could have allowed the appellant to pay it before proceeding with the hearing of the appeal.

The appellants argued further that, **two,** though Exh. P2 is said to have been drawn by among others, Mr. Ryphone Elias, it was not proved by the respondent if Ryphone Elias is one and the same as Tryphone Elias, the appellant herein. **Three,** the appellant admitted to be indebted TZS. 14,000,000.00 out of loan previously advanced by the respondent to him on a collateral of the latter's house situated at Plot No. 22 Bock "A" LD Nyihogo (Service Industry) Kahama. **Four,** since it was the respondents' claim that Exh P1 and P2 were genuine, which the appellants consistently claimed to have been forged as they were not his, the respondent bore the onus of proof as per sections 47 and 49 together with section 110 (1) of the Evidence Act and not the appellant.

Mr. Nasimire submitted further that, much as the particulars of forgery ought to have been pleaded and particularized, the appellants made allegations of forgery in para 5, 6 and 7 of the joint written statement of defence (page 37) and para 4, 9 and 19 of 1st appellant's witness statement (pages 65-67) and para 5 and 10 of the 2nd appellant's witness statement (pages 75 - 76) which was adequately

done. He, thus concluded that, the respondent failed to establish his case on the balance of probabilities and urged the Court to allow the appeal, quash the judgment and set aside the decree with costs.

In response, Mr. Rutahindurwa, in the first place, adopted the written submission in reply lodged on 10/8/2020. With regard to the onus of proof of the alleged forged documents (Exh P2), the respondent agreed that in terms of section 110 (2) of the Evidence Act, whoever alleges must prove as to the existence of a fact. He pointed out that the respondent discharged such duty by pleading and testifying with documentary evidence connecting the appellants directly (page 221 of judgment). It was argued that, it was the appellants who failed to prove the allegations of fraud and forgery in Exh. P1 and P2. The respondent also challenged the appellants for having failed to particularize the allegation of fraud in the pleadings as per Order VI rule 4 of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC) - See also **Mulla: The Code of Civil Procedure** 16th Ed Vol. 2 at pages 1781 – 1783. On top of that, the respondent submitted that the standard of proving fraud or forgery is not as required in civil cases but slightly higher degree of probability than that which is required in ordinary civil cases. In which case, it was argued that, it

was not enough for the appellants to particularise the alleged fraud or forgery in relation to Exh. P1 and P2 but also ought to lead evidence to that effect which they did not do. Therefore, he maintained that it was proper for the trial judge to reject it.

The respondent argued further that, the argument that there was no evidence connecting appellants with Exh. P1 and P2 is not true since, even when he was informed that Exh. P2 was dishonoured, he did not report to the investigative organs for investigation but remained mute. He added that, if the appellants believed that the document (Exh. P1) was forged, they would have reported the matter to the police especially after being served with the notice of the cheques having been dishonoved. It was argued further that the 1st appellant cannot disown the cheques (Exh. P2) when looking at the banker's name, number of cheques issued and the dates anticipated for payment which are similar with the banker's name, numbers of the cheques and payment dates reflected under the "Deed of Acknowledgment" (Exh. P1) which are his or belong to him.

As regards the admissibility of Exh. P1 as well as the proper name of the 1st appellant having failed to lead evidence to prove if Tryphone Elias and Ryphone Elias is the same person, it was the

respondent's reply that Exh. P1 was properly admitted. As to which was the proper name of the appellant, the respondent contended that such claim is an afterthought since the appellant never raised it from when the suit was filed, when granted leave to defend himself by filing written statement of defence and during the whole trial.

In this regard, Mr. Rutahindurwa implored us to find that the appeal is bankrupt of merit and dismiss it with costs.

In rejoinder, Mr. Nasimire insisted that the appellants had consistently denied to know Exhs. P1 and P2 and that they had nothing to do with the rejected cheques.

Having examined the grounds of appeal, record of appeal and written submissions in support and against the appeal, we find that the main issue for our consideration is whether the respondent had advanced a loan to the 1st appellant. Before we tackle it we need to resolve the issue whether the 1st appellant was the author of Exh. P1 and P2.

Our take off would be to restate the issue of onus of proof and the standard of proof in civil matters. According to section 110 (1) of the Evidence Act, whoever alleges must prove. Also, section 110 (2) of the same Act places the onus of proof on a person who alleges the

existence of a certain fact. In this case, it would appear that it was the respondent who carried the burden of proof for his claims and assertions going by the above provisions and more so when taking into account he was the one who sued the appellants. He, therefore, ought to prove that the said Exhs. P1 and P2 were authored by the 1st appellant.

The complaint in ground no. 1 is based on the fact that it was not proved that Exh. P1 and P2 were authored by the 1st appellant so as to conclude that he was liable to the suit.

We note that regarding the contention by respondent that he lended the sum of TZS 200,000,000.00 to the 1st appellant was seriously contested by the appellants asserting that even the loan agreement (Exh. P1) and the bounced cheques (Exh. P2 collectively), were forged by the respondent to facilitate his ill motive. The trial court, in determining this issue based on the fact that, although appellants raised the issue of forgery, he did not lead any evidence of such fraud or forgery in court as required by section 110 of the Evidence Act, putting the burden of proof on the one who alleges must prove although it is notable that there was no issue framed in

that respect which could have led the parties to prove or disapprove it.

On the other hand, the trial court found that the respondent had proved to have advanced a loan of TZS 200,000,000.00 to the 1st appellant basing on Exh. P1 which was viewed as a written acknowledgment by him that he obtained such a loan and his commitment to repay it within a period of three months as scheduled. On top of that, the trial court relied on the evidence relating to the bounced cheques (Exh. P2) drawn by 1st appellant in the respondent's favour.

The trial court was of the view that, the fact that 1st appellant alleged forgery or fraud, he was required to particularize in the pleadings and prove it strictly at the standard higher than on the balance of probability. And, for the reasons of failure to particularize and bring evidence to prove forgery it made the alleged forged documents unchallenged and therefore, its finding that the respondent had advanced TZS 200,000,000.00 to the appellant.

It is without question that in this case there are allegations of forgery, particularly, on the cheques which were dishonoured (Exh P2 collectively) as was rightly submitted by the parties. It is important to

observe that, it is a cardinal principle of law that where an allegation of fraud or forgery crop up or is put forward in civil proceedings, particularization must be made. This is specifically provided for under Order VI rule 4 of the CPC which states

> *"In all cases in which the party pleading relies on any misrepresentation fraud, breach of trust, wilful default, or undue influence and in all other cases in which particulars may be necessary to substantiate any allegation, such particulars (with dates and items if necessary) shall be stated in the pleading".*

The provisions of Order VI rule 4 of the CPC were clearly expounded by Mulla in **Code of Civil Procedure**, 16th Ed. Vol. 2 in which it was stated:

> *"Where fraud is charged... it is an acknowledged rule of the pleadings that ... must set the particulars of the fraud which he alleges. It is not enough to use such general words "fraud" deceit or machination, general allegations, however, strongly worded are insufficient events amount to an averment of fraud of which any court ought to take notice. The object of the rule is that in order to have a fair trial it is imperative that the party should*

state the essential material facts so that the other party may not be taken by surprise".

There is unbroken chain of decided cases which have reiterated such stance among them being the Ugandan case of **Musoke v. Mayanja,** [1995 – 1998) 2 EA 205 in which the Supreme Court cited the case of **Okello v. Uneb**, Civil Appeal No. 12 of 1987 (unreported) and stated as follows:

"It is well established that where the party relies on fraud, that fraud must be stated on the face of the proceedings".

And, as to the standard of proof required in such situations is that which may not be so heavy as beyond reasonable doubt, but something more than a mere balance of probabilities is required - See **Ratilal Gordhanbhai Patel v. Lalji Mkanji** (1957) EA 314; **City Coffee Ltd v. The Registered Trustees of Ilolo Coffee Group,** Civil Appeal No. 94 of 2018 (unreported).

Indeed, in this case the issue of forgery was brought about by appellants and not the respondent. According to the record of appeal, the appellants brought it on board through paragraph 6 of the witness' statement that Exh. P1 was forged (see page 66). Also, the former 2nd defendant (the 2nd appellant) alleged it in paragraph 10 of

her witness statement (see page 76). Yet in their joint written statement of defence they pleaded forgery in respect of the three cheques in paragraph 5 at page 37 of the record of appeal. It is true that in all cases, the appellants did not particularize them in their defence as required by the law. We may add that even in their testimony the witnesses did not seriously prove the alleged forgery although, we think, the problem might have been caused by the fact that no issue on that aspect was framed, much as the trial court relied on it in determining the matter before it as alluded to hereinabove.

Much as we do not have qualms as to what is required when a party in a civil matter wishes to rely on fraud, we are of a view that each case must be considered in accordance with the prevailing circumstances. Regarding the issue of fraud or forgery, it was the respondent's testimony that the appellant drew postdated cheques for payment of the said loan in three instalments in his favour. The appellant denied it challenging even the purported name of the appellant contending that the name of Ryphone Elias appearing on the said cheques is not his as his name has been all through Tryphone Elias. We note that during the trial, as shown at page 135 to 136 of the record of appeal, the respondent's advocate prayed to call the

CRDB Bank Branch Manager so as to ascertain the names of the defendants and also other matters pertaining to the cheques and to have electronic signatures, cards of the bank etc. brought to courts. And, on a no objection from the counsel for the appellant, the trial court, made an order that the Branch Manager CRDB Bank, Kahama Branch be summoned with documents containing specimen signature by the 1st and 2nd defendants, their electronic cards, if any, or other image showing pictures of the defendants electronically or in an analog form, cheques issuing register and bank statements of the 1st and 2nd defendants from 2011 February 2013. Therefore, it was the duty of the respondent to prove that Exh. P1 and P2 were authored by the appellants.

However, the move proved futile due to failure by the party to bring him in accordance with the High Court (Commercial Court) Rules, 2012 requiring him to file a witness statement before testifying. So, the issue remained unresolved if the purported Ryphone Elias who was alleged to draw the postdated cheques (which bounced) was the same person as Tryphone Elias, the appellant herein, so as to find out that it was him who drew them, although the trial judge merely discounted the allegation of fraud and forgery for failure to

particularize and prove it and found that the claim was proved as the Exh P1 and P2 remained unchallenged. It is our considered view that, in the absence of evidence proving otherwise, the respondent failed to establish in the balance of probabilities that it was the appellants who authored Exh. P1 and P2. Thus, Mr. Rutahindurwa's invitation that an adverse inference be drawn against the appellants for failure to call material witnesses cannot stand under the circumstances, We, therefore, find merit in this ground and allow it.

That notwithstanding, we still think that each case must be determined in accordance with its prevailing circumstances from another angle. On this, we are guided by the case of **Tanzania Leaf Tobbaco Company Limited (TLTC) v. Godfrey Joseph Gobbo and Another,** Civil Appeal No. 235 of 2022 (unreported). We take this stance because, this case is mainly based on documentary evidence which must speak for itself. The loan agreement which was heavily relied upon by the trial court purportedly written by the 1st appellant (hand written) stated as follows:

> *"Leo hii tarehe 19.1.2013 mimi Tryphone Elias, Mkurugenzi wa Kampuni ya Pet Cooperation Ltd, S.L.P. 627, Kahama, nimepokea (nimeazima) fedha taslimu za Kitanzania Tshs.*

200,000,000/= milioni mia mbili ambazo nitalipa kama ifuatavyo:

1. *Milioni (20) ishirini 20,000,000/= italipwa tarehe 26.1.2013 kwa hundi namba 140144 CRDB.*
2. *Milioni tisini 90,000,000/= italipwa tarehe 26.2.2013 kwa hundi namba 140143 CRDB.*
3. *Milioni tisini 90,000,000/= italipwa tarehe 15.3.2013 CRDB ambayo ni hundi namba 140142.*

Fedha hizi nimezipokea kutoka kwa Majaliwa Daudi Mayaya ambaye ndiye mlipwaji wa hundi hizo zilizotajwa hapo juu.

Nimemkabidhi hati yangu ya kiwanja changu cha Nyihogo na Nyahanga ili kuwa dhamana.

Ni mimi mkopaji Tryphone Elias.

Signed

19.1.2013".

According to the above excerpt, several features are observed. **One,** it depicts acknowledgment by the 1st appellant to have received a loan of TZS. 200,000,000.00 from the respondent. **Two,** it depicts commitment by the 1st appellant to repay the loan in three instalments through postdated cheques indicated therein. **Three**, it is

one sided as it recites the events done or undertaken to be done by the 1st appellant without showing the role or obligation by the respondent. **Four**, it is purported to have been signed by the 1st appellant alone as the respondent did not sign. **Five,** the purported title deeds for the plots offered as a collateral do not show their Title numbers considering that they are registered Plots. In our view, what we ask ourselves is whether it was proper, even if it is taken as a simple agreement, to be that much simple.

Apart from that, the said agreement, if any, involved a colossal amount of money to the tune of TZS. 200,000,000.00. Both 1st appellant and respondent are at one that there was a loan of TZS. 64.000.000.00 previously advanced by the respondent to the 1st appellant dated 9.6.2011 in which the 1st appellant offered as a collateral his Right of Occupancy in respect of Plot No. 22 Block "A" LD Nyihogo (Service Industry) Kahama Township and an Offer of Granted Right of Occupancy for Plot No. 105 "A" Block "N" Nyahanga Area within Kahama District which was still in the respondent's possession since the 1st appellant had paid part of the loan while remaining with a balance of TZS. 14,000,000.00.

We have had an opportunity to lay a hand of the said agreement at page 49 of the record of appeal (though not part of this matter but mentioned by respondent in para 3,4, and 5 of the witness statement of the respondent) and acknowledged by the 1st appellant in his witness statement (para 12,13,14 and 16) and the 2nd appellant's witness statement (para 7,8 and 9) and we found that it is plain that the same was executed before the Resident Magistrate In-charge for Kahama District Court. It contains all essential ingredients of the contract showing the borrower and lender, the amount to be borrowed, the collateral and how it will be repaid. More importantly, it is signed by both the lender and the borrower unlike the agreement at hand in which a substantial amount of TZS. 200,000,000.00 is involved whereby only the borrower signed. It is our view that, since this arrangement involved a colossal amount of money unlike the first amount, more prudence was needed in dealing with it. In other words, if the amount of money of TZS 64,000,000.00 advanced to the appellant previously had to undergo such rigorous process of executing a loan agreement before the magistrate, what prohibited the second agreement to undergo a similar process. We say so because, though respondent claims that he advanced such amount to the appellant, the appellants had consistently denied it in which case

we do not think he bore a duty to invite investigative organs to clear the dust. It was a word of mouth from one person against the other in which the respondent was not able to prove that he advanced such a colossal amount of money to the appellants on the balance of probabilities.

With regard to the 2nd issue that it was wrong for the trial court to shift the burden of proof on the appellants, we think, it should not detain us much. It is quite clear under section 110 of the Evidence Act, that the burden of proof lies on a person who alleges that there is a fact. In this case, it was the respondent who instituted a suit claiming to be paid TZS 200,000,000.00 allegedly advanced to the appellants on the basis of Exh. P1 and P2 which were denied by the appellant contending that they were forged. In its decision, the trial court, as shown at page 221 of the record of appeal, stated among others:

> *"Regarding TZS. 200,000,000.00 which the plaintiff is claiming in this suit, that the defendant denied to have had borrowed it. He said that the loan agreement (Exh. P1 and the bounced cheques (Exh. P2) was forged by the plaintiff to facilitate his frivolous and vexations claim. The defendants did not lead any*

evidence of fraud or forgery. Section 110 (1) of Evidence Act [Cap. 6 R.E. 2002] puts the burden of proof on he who alleges...".

In this case, as already hinted earlier on, the respondent was the one who was required to prove what he alleged before the court. Also, this is concretized by the fact that the respondent prayed and was granted leave to bring the CRDB Bank Branch Manager to prove crucial documents which were the basis of the alleged loan agreement. We therefore agree with appellants that it was wrong for the trial court to shift the burden of proof on the first appellant. Thus, the 2nd ground of appeal is merited and we allow it.

The third ground of appeal seems to challenge the evidence in the impugned judgment and, we think, in view of what we have endeavoured to explain hereinabove, we are in agreement with the appellants that the judgment was against the evidence that was adduced before the trial court. The respondent was required to prove that he advanced a loan of TZS. 200,000,000.00 to the appellants. However, the trial judge decided on the issue of improper allegation of fraud and forgery that it was unchallenged and, on that basis, found that the respondent proved the case. We think that was not

proper in view of what we have discussed that even the contract was one sided. Put it differently, we are satisfied that the respondent was not able to prove the case on the balance of probabilities as per the law.

With the foregoing, we are satisfied that the appeal is merited. We, therefore, allow the appeal, quash the judgment and set aside the decree herein with costs.

Order accordingly.

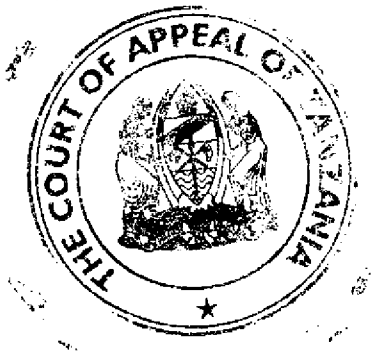
DATED at **DAR ES SALAAM** this 19th day of December, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered on this 21st day of December, 2023 in the presence of Mr. Majura Jackson Kiboge, hold brief for Mr. Anthony Nasimire, learned advocate for the appellant also hold brief of Mr. Deocles Rutahindurwa, counsel for the respondent, via video link from High Court Mwanza is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL