

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KIMARO, J.A., MMILLA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO.2 OF 2016

THE REPUBLIC.....APPELLANT

VERSUS

- 1. MEDIAN BOASTICE MWALE**
- 2. DON BOSCO OOGA GICHANA**
- 3. BONIFACE TOMAS MWIMBWA**
- 4. ELIAS PANCRAS NDEJEMBI**

.....**RESPONDENTS**

**(Appeal from the ruling of the High Court of Tanzania
at Arusha)**

(Mjemmas, J.)

dated the 18th December, 2015

in

Criminal Sessions Case No.61 of 2015

.....
JUDGEMENT OF THE COURT

24th May & 15th September 2016

KIMARO, J.A.:

On 11th December 2015 when the trial of the respondents (accused in High Court Sessions Case No. 60 of 2015) was still in process, the prosecution led by Mr. Tibabyekomya, Principal State Attorney, assisted by Mr. Awamu Mbagga, Mr. Shedrack Kimaro, Mr. Pius Hilla and Mr. Paulo

Kadushi, all Senior State Attorneys, sought to tender documentary evidence as exhibits through Mr. Suleiman Nyakulinga, who was then testifying as the second prosecution witness (PW2). The documents which were sought to be tendered were seven affidavits, two death certificates, thirteen tax returns forms, judgment and proceedings of a case of Mona Moseti and transcript of testimonials in the case. The documents were sought to be tendered under the Mutual Assistance in Criminal Matters Act, [Cap.254 R.E.2002]. They were obtained from the United States of America.

The first and second respondents were represented in the trial by Mr. Omary Iddi Omary, assisted by Mr. Innocent Mwanga, both learned Advocates. Mr. Alberto Msando learned advocate, assisted by Ms. Julieth Tarimo both learned advocates represented the third respondent while the fourth respondent was represented by Mr. Mahuna, assisted by Mr. Uheri Ngoseck, both learned advocates.

Mr. Innocent Mwanga, learned advocate raised an objection in respect of admission of two letters from the Department of State of USA written on 27th February, 2013 by Ann R. Murchison and certified by Mr.

John F. Kerry the Secretary of State. The reason for the objection was that the letters did not comply with sections 38(2) (a) and (b) and (3) of the Act. On her part Ms. Julieth Tarimo added that section 88(1)(b) and (c) of the Evidence Act, [Cap 6 R.E. 2002] requires such document to be certified by a Public Officer in the United Republic of Tanzania. Another objection raised was in respect of the proceedings and the judgment in a case of Lorna Mosei Criminal Case No. 3, 11-CR-00017-M(01) in the United States of District Court of the Northern District of Texas, Dallas, Dallas Division **United States of America V Lorna Mosei**. She said the proceedings did not comply with the requirements in section 38(1) and (2) hence they were inadmissible in evidence under section 95 of the Evidence Act, [CAP 6 R.E. 2002] for lacking a certification by the a Foreign Service Officer of a Commonwealth Representative.

Mr. Omary, learned advocate raised an objection in respect of the affidavits. The affidavits were that of John H. Adams, Edgar Louis Johnson, Keneth Earl Holloway, Delvin Alfred Fields, Jasson Hess, Denice Canon and Clarence Sample. He said all the affidavits were not in compliance with section 38(1), (2) (a) and (b) and 38(3) of the Mutual

Assistance Act for not being signed by a judge or magistrate or Officer of a foreign country. They were not even authenticated by oath of a witness or an Officer of a government of a foreign country or sealed with an official public seal of a foreign country or Minister. He added that in criminal matters cases are not proved by affidavits but evidence must be "viva voce". He cited the case of **Raphael V Republic** Criminal Appeal No. 55 of 1973 reported in [1973] E.A 473. He said the affidavits were in violation of the provisions of the Notaries Public and Commissioner for Oaths Act for failure to show the date of the attestation of the affidavit. He cited the cases of **Director of Public Prosecution V Dodoli Kapufi and Patson Tsalile** Criminal Application No. 11 of 2008 (unreported), **Zuberi Mussa V Shinyanga Town Council** Civil Application No. 100 of 2004 (unreported) and **D.P. Shapriya Co. Ltd V Bish International B.V.** (2002) E A.

The learned advocate also raised an objection in respect of two death certificates and the tax return forms on the same reason that they did not comply with section 38(1) (2)(a) and (2) (b) of the Mutual Assistance on Criminal Matters read together with section 88 of the Evidence Act.

The defence prayed to the trial court to refuse admission of the documents.

The prosecution insisted that the documents complied with the requirements of the law and the objection by the defence should be dismissed and the documents admitted.

In his ruling the learned trial judge dismissed the objection raised by the defence in respect of the two letters that were written by Ann R. Murchison. He said they complied with section 38 (2) (a) and (b) of the Mutual Assistance on Criminal Matters. As for the rest of the documents the learned trial judge sustained the objection raised by the defence. These were the proceedings in respect of the case of **United States of America V Lorna Mosseti**, the two death certificates, 13 Tax Returns and the seven affidavits.

The Republic was aggrieved by the decision of the trial judge. They filed three grounds of appeal challenging the refusal by the learned trial judge to admit the rest of the documents. The grounds are;

1. That the learned trial judge grossly erred in law by holding that all the conditions set out under section 38(2) (a) and (b) of the Mutual Assistance in Criminal Matters Act [Cap 254 R.E. 2002 have to be met before a document is admitted.
2. That the trial judge erred in law and facts by holding that the affidavits sought to be produced in evidence by the prosecution were inadmissible.
3. That the trial judge erred in law by rejecting to admit the prosecution documents into evidence despite the fact that the said documents met the conditions stipulated under section 38(2) (a) and (b) of the Mutual Assistance in Criminal Matters Act, [Cap. 254 R.E.2002].

When the appeal was heard on 24th May 2016 at Arusha, the appellant had a strong representation of Mr. Edwin Kakolaki, Mr. Oswald Tibabekomya and Mr. Timothy Vitalis all learned Principal State Attorneys and Mr. Paul Kadushi learned Senior State Attorney. Mr. Omary Iddi Omary learned advocate represented the first and second respondents. He was assisted by Mr. Innocent Mwanga, learned advocate. For the third

respondent legal services were rendered by Mr. Alberto Msando, learned advocate while the fourth respondent was represented by Mr. Moses Mahuna learned advocate.

In support of the first ground of appeal, Mr. Tibabyekomya, Principal State Attorney, leading his colleagues challenging the decision of the trial court, submitted in support of the first ground of appeal that the learned judge wrongly construed the provisions of section 38(2)(a) and 38(2)(b) of the Mutual Assistance on Criminal Matters Act by holding that all conditions in the section have to be complied with. He said a correct interpretation of the section is that in subsection (a) of subsection 38 (2) a document sought to be admitted in evidence from a foreign country must either be signed and certified by a judge, magistrate or officer from the foreign country and in addition under subsection (b) of section 38(2) must be authenticated by oath of a witness or an officer of the Government of the foreign country or sealed by an official public seal of the foreign country or Minister. He said fulfillment of one condition in subsection (a) and one condition in subsection (b) suffices to make the document admissible because the conditions are in the alternative. To expound on

the point, the learned State Attorney cited sections 42 and 63(2) of the Mutual Assistance in Criminal Matters Act of Singapore, and New Zealand respectively, which he said apply in alternative like the Tanzanian Act. He said the Tanzania Act is framed on the language used on the Zimbabwe's Act, that is the Scheme Relating to Mutual Assistance in Criminal Matters (the Harare Scheme). He said the intention is to provide flexibility of admission of documents authenticated in a foreign country. He prayed that the documents be allowed for admission in evidence.

As regards ground three, involving the two death certificates, thirteen tax returns, indictment of a case of **Lorna Moseti**, transcripts of testimonies and the judgment thereof, the learned State Attorney said the learned trial judge wrongly refused admission of the documents because they complied with the requirement of section 38(2)(a) and (b) of the Mutual Assistance in Criminal Matters Act , Cap 254. He said the death certificates were signed and certified by the Deputy State Registrar of New Mexico and Indiana and were sealed by the public seals of the State of New Mexico and Indiana. The indictment, transcripts of testimonies and the judgment in the case of Moseti were signed by Official Reporter in the

Northern District of Texas, Dallas Division. They also had a certificate of authentication of P. Sue Engeldow; Official Court Reporter. The learned State Attorney said the documents satisfied the requirement in section 38(2) (a) and (b). Regarding the tax returns, the learned Principal State Attorney said they were all signed by a Disclosure Specialist and have a seal of the State of Indiana. The learned State Attorney was of the view that the learned trial judge subjected the documents to strict conditions than required under the law concerned. That he combined the four conditions sections 38(2) (a) and (b) into two and that removed the option which would have assisted the prosecution. He prayed that the two grounds of appeal be allowed.

Submissions in support of the second ground of appeal were made by Mr. Vitalis, learned Principal State Attorney. Ground two of appeal is concerned with the rejection of admission of the seven affidavits. He said the rejection was wrong because the affidavits met the required conditions for admissibility. Instead of relying on the relevant law that allows admissibility of the affidavits in the circumstances of the case, said the learned State Attorney, the learned trial judge resorted to using section

196 of the Criminal Procedure Act [Cap 20 R.E.2002] and the case of **Raphael Versus Republic** supra to deny the appellants admissibility of the affidavits. He prayed that the appeal be allowed and the affidavits be admitted in evidence because that is evidence obtained from a foreign country.

Reply by the respondents for grounds one and three was made by Mr. Msando, learned advocate. He said both grounds have no merit and should be dismissed. The reason he gave is that the prosecution has totally failed to appreciate the elementary definition of the meaning of authentication of documents. He said authentication is a process of verifying or attesting the genuineness of what the document purports to be. Citing section 38(2) (a) and (b), the learned advocate said, it sets out the conditions that makes the process complete. He said since the word used is **and** that makes the intention of the legislature clear. While section 38(2) (a) gives a category of persons who must sign or certify the document intended to be relied upon, section 38(2) (b) on the other hand explains how the authentication should be done. It is the combination of the persons signing and the how the authentication is done which

determines whether the document can be admitted in evidence under the said provision. He said the examination of all the documents complained of reveals that they are not signed by a judge, or magistrate or officer of a foreign state and are not authenticated by an oath of a witness or an officer of a foreign of the United States of America, because they lack the country's official public seal of the United States of America or a Minister of the United States of America. In as far as the case against the respondent is concerned, the learned advocate said, a foreign country in this aspect is the United States of America. Instead of the prosecution requesting the documents to be signed and authenticated by the United States of America they accepted documents signed by the individual States of America while they are not a country. He referred to the death certificate of Raymond. He said it has a seal of the State of New Mexico which for the purpose of the case, is not a foreign country. When he compared the death certificate with the documents that were written by Ann R. Murchison, which the learned trial judge admitted in evidence, the learned advocate said they were rightly admitted in evidence because they met the conditions required in section 38(2) (a) and (b). Ann R. Murchison certified the document as the Chief Records Officer Service Division, Office of Technical Operations,

Passport Services Directorate, United States Department of State of America and John F. Kerry authenticated the same as Secretary of the United States of America and sealed it by the stamp of the United States of America. Moreover, the documents itself has the title United States of America. The learned advocate requested the court to reject the appeal by the appellant because the rest of the documents the prosecution are seeking to be admitted in evidence have not met the requisite conditions for admission under section 38(2) (a) and (b) of the Mutual Assistance in Criminal Matters. These are tax returns, the proceedings and the judgment of the case of **Lorna Mossati**. He said a correct interpretation of section 38(2) (a) and (b) is that section 38 (2) (a) must be read cumulatively with section 38(2) (b) because the word used is a and not in the alternative as the learned State Attorney submitted. He prayed that the grounds of appeal be dismissed.

Mr. Omary, learned advocate, made a reply on the complaint of rejection of the affidavits. He said they were properly rejected because in criminal cases affidavit evidence is not allowed in lieu of oral evidence. He said the learned trial judge rightly rejected the admission of the affidavits

because section 196 of the Criminal Procedure Act, [CAP 20 R.E. 2002] says that all evidence taken under the Act must be taken in the presence of the accused person. In this respect, said the learned advocate, the case of **Raphael** supra, was correctly interpreted and it remains a good authority. So the learned trial judge cannot be faulted. He said the seven affidavits which the learned trial judge refused to admit in evidence have not satisfied the requirement in section 38(2)(a) and (b).

First, they have neither been signed by a judge or magistrate or officer of a foreign county nor authenticated by a witness, or officer of a foreign country, have no government seal of a foreign country, or that of a Minister of Foreign country. He said the prosecution has not even given special circumstances that would justify the trial court to depart from the case of **Raphael** (supra). He said section 42(2) (a) and (b) (i) and (ii) of the Mutual Assistance Act of Singapore which has been referred to by the prosecution is not in "pari materia" with section 38(2)(a) and (b) of the Mutual Assistance Act of Tanzania. While the word used in the Singapore Act is **or** and not **and**, said the learned advocate, the word used in our statute is **and** which means that a condition in section 38(2)(a) must go

together with a condition in section 38(2)(b). The learned advocate said the same position applies to the News land Act which gives an option of use of 63(2)(i) or (ii). The learned advocate's opinion is that the learned trial judge correctly interpreted section 38 (2) (a) and (b) of the Mutual Criminal Assistance Act and correctly rejected the admission of the affidavits. He prayed that this ground of appeal be rejected and the appeal be dismissed.

In brief rejoinder, Mr. Tibabyekomya said a seal of any State of the United States of America is sufficient to prove the authenticity of the document. He said the provision must be interpreted broadly and not narrowly. In his opinion section 38(2) (a) and (b) of the Mutual Assistance Act in Criminal Matters provides for different modes of authentication.

Mr. Vitalis added that section 10 of the Mutual Assistance Act in Criminal matters is an exception to the general rule of admissibility of affidavits in criminal matters. The logic behind is that a witness in a foreign county is competent but cannot be compelled by the courts in Tanzania to come and give evidence. He thought that if the trial judge had

considered section 10 he would have admitted the documents. He prayed that the documents be admitted.

We have gone through the record of appeal, the grounds of appeal and the submission made by the respective parties in the appeal. Our considered opinion is that the point of contest between the parties is minor. First we appreciate the efforts made by the learned Principal State Attorneys and the learned advocates. In as far as our role is concerned, in this appeal the contest is our minded opinion is on the correct interpretation of section 38 (2) (a) and (b) of the Mutual Assistance in Criminal Matters Act [CAP 254 R.E.2002]. The section reads:

Section 38(1) *"In proceedings under this Act, or under the proceedings of Crime Act, **arising directly or indirectly from a request made under this Act, any document that is dully authenticated in terms of subsection (2) shall be admissible in evidence.**"*[Emphasis added].

Section 38(2) “A document shall be regarded as ***duly authenticated for the purpose of subsection (1) if it purports to be –***

- (a) ***signed or certified by a judge, magistrate or officer in or a foreign country; and***
- (b) ***authenticated by oath of a witness or an officer of the Government of a foreign country or sealed with an official seal of public seal of the foreign country or of a minister.”***[Emphasis added]

Reading closely the provisions of section 38(2) (a) and (b), we are of a considered view that a document which is sought to be admitted in evidence in proceedings falling under the Act must be:

- (i) Signed or certified by a judge of a foreign country **and** authenticated by oath of a witness from a foreign country.
- (ii) Signed or certified by a judge of a foreign country **and** authenticated by an officer of a foreign country.

- (iii) Signed or certified a judge of a foreign county **and** sealed by an official public seal of a foreign country.
- (iv) Signed or certified a judge of foreign country **and** sealed by official public seal of a Minister of foreign country.
- (v) Signed or certified by a magistrate of a foreign country **and** authenticated by an oath of a witness of a foreign country.
- (vi) signed or certified by a magistrate of a foreign country and authenticated by an Officer of a Government of a foreign country.
- (vii) signed or certified by magistrate of a foreign country and sealed by a public seal of a foreign country.
- (viii) signed or certified by a magistrate of a foreign country **and** sealed by official public seal of a Minister of a foreign country.
- (ix) signed and certified by an Officer of a foreign county and authenticated by oath of a witness from a foreign county.
- (x) signed or certified by Officer of a foreign country and authenticated by an Officer of a foreign country.

(xi) signed or certified by an Officer of a foreign county and sealed by the official public seal of the county.

(xii) signed or certified by an Officer of a foreign country and sealed by public seal of Minister of a foreign country.

A document from a foreign country which is sought to be admitted in evidence under the Mutual Assistance in Criminal Matters Act must satisfy one of the listed twelve categories above. As correctly stated by the learned Principal State Attorney, the law has provided for a wide option in which countries can assist each other in curbing the rate of crime. We also agree with the learned State Attorneys that a competent and compellable witness in a foreign country cannot be compelled by our country to come and give evidence in relation to matters which though related to the case in Tanzania took place in a foreign country.

That said, we will start with the two death certificates of Raymond and James. That of Raymond is certified by Deputy State Registrar of New Mexico and sealed by public seal of the State of New Mexico. That of James is certified by State Registrar of the State of Indiana and sealed by official public seal of State of Indiana. None of the conditions in section

38(2) (a) or 38(2) (b) was satisfied the reason being that the State of New Mexico or Indiana is not a country. We will expound on this later. The same trend is found in the thirteen tax returns which were refused admission in the trial court. All are certified by Disclosure Specialist of Internal Revenue Service of State of Atlanta. The State of Atlanta, just like the State of New Mexico or Indiana are not foreign countries. As regards indictment and proceedings in the case of **United State of America V Lorna Moseti**, they also fall out of the listed twelve categories under which an authenticated document from a foreign country can be admitted in evidence under the Mutual Assistance in Criminal Matters act. The indictment is signed and certified by Clerk US District Court Northern District of Texas but the seal is that of the District Court of Northern District of Texas. Even the transcripts fall short of satisfaction of the conditions in section 38(2)(a) and (b) as listed. All transcripts are signed and certified by P. Sue Engledow; Official Court Reporter and sealed by the seal of the Northern District of Texas Dallas Division. Texas is a State in the United States of America but it is not a country.

Since none of the complained of documents met the mandatory conditions for admission under section 38(2) (a) and (b) we see no reason for the appellant to complain that the learned trial judge refused to admit the documents. What the prosecution fails to appreciate is the fact that the United State of America as a country is made up of fifty states (50). In terms of section 38(2) (a) and (b) of the Mutual Assistance in Criminal Matters Act the word country means the United State of America as made up of the fifty states. Any of the fifty states taken singly is not a country for the purposes of section 38(2) (a) and (b) of the Mutual Assistance in Criminal Matters Act. This means that because none of the documents satisfied both conditions, the learned trial judge correctly refused to have them admitted. The learned Advocate said the two sections must be read cumulatively. He is quite right. Satisfaction of one condition in section 38(2) (a) must go hand in hand with satisfaction of one condition in section 38(2)(b). Short of that, the document will not be legible for admission in evidence.

We agree that the observation made by the learned trial judge when he said that:

“Upon careful reading of section 38(1), (2) (a) and (b) and (3) of the Mutual Assistance in Criminal Matters Act, I find that the language used by the legislature is clear and plain as correctly submitted by Mr. Omary, learned counsel. I entirely agree with him and the other defence counsel that all conditions set out under subsection (2)(a) and (b) have to be met before a document is admitted under section (1). The argument by Mr. Oswald learned State Attorney that the word “and” appearing after paragraph (a) should be given a different meaning from its ordinary meaning is not acceptable. If the legislature had intended those sub-paragraph to be independent of each other or in the alternative it could have said so expressly.”

Is, with respect to the learned trial judge, wrong. The learned State Attorney was right when he said that the document has to satisfy one condition in section 38(2) (a) and one condition in section 38(2)(b) for it to

be admitted in evidence. The document need not satisfy all the conditions to make it admissible. As we have shown above, a satisfaction of any one of the conditions in the twelve conditions we have listed, justifies the admission of the document in evidence. As we have brought out clearly the conditions which make a document from the foreign country admissible in evidence we need not dwell on the other statutes of foreign jurisdictions.

Lastly is the ground of appeal on affidavits. On this aspect we agree with the learned defence counsel that they were rightly rejected. All affidavits did not comply with the requisite conditions given in sections 38(2) (a) and (b) of the Mutual Assistance In Criminal Matters Act. They are neither signed and certified by a judge, magistrate or officer of a foreign country, nor authenticated by an oath of a witness or officer from a foreign country or sealed with the official public seal of that foreign country or a official public seal of the Minister of a foreign country. Those were the most important conditions that had to be complied with. But as the learned advocates argued, the right to hearing is one of the important factors to be observed in criminal trials. Section 196 of the Criminal Procedure Act puts it clearly that evidence must be taken in the presence of the accused. The

rationale is clear. It must be done so to enable the accused person the get the right for cross examination of the witness. This right is fundamental. The Constitution of the United Republic of Tanzania, 1977 article 13(6) (a) puts it clearly that:

"kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba : wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinahusika, basi mtu huyo atakuwa na haki ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo kingine kinachohusika."

The case of **Raphael** supra puts it plainly clear that reception of affidavit evidence in criminal cases is not a welcomed procedure except in very rare cases. The case against the respondents does not fall within the envisaged exception.

Except for the first ground of appeal which we allow, the rest of the grounds of appeal have no merit. We dismiss the appeal.

DATED at DAR ES SALAAM this 22nd Day of August, 2016.

N.P.KIMARO
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

R.E. MZIRAY
JUSTICE OF APPEAL

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

A.K.RUMISHA
DEPUTY REGISTRAR
COURT OF APPEAL

15/09/2016

