**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE REGISTRY OF DAR ES SALAAM)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 222 OF 2021**

***(Appeal from the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu in Economic Case No. 13 of 2016 by Hon. Mtega J.H; RM, dated 20th of August, 2021)***

**RAMADHANI SEIF MLINGA.....1st APPELLANT**

**BERTHA HUMPHREY SOKA.....2nd APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

15th February 2023 & 05th May, 2023

**POMO, J.**

Before the Resident Magistrate Court of Dar es Salaam at Kisutu in Economic Case No. 13 of 2016, six counts were predicated against the appellants together with the person namely, David Emmanuel Mattaka who was the then Managing Director and Chief Executive Officer (CEO) of Air Tanzania Company Ltd (ATCL). On the fateful dates, the first appellant was the Chief Executive Officer (CEO) of the Public Procurement Regulatory Authority (herein PPRA) and the second Appellant was the head of Legal Unit of PPRA.

In essence, the charges arose from Aircraft, A 320-214 Airbus, lease Agreement between Wallis Trading Inc of Liberia and Air Tanzania Company Ltd (ATCL). The appellants were alleged to have forged minutes of the meeting dated 19th March, 2008 purported to show that on the said date, the PPRA held a meeting to discuss application for retrospective approval of the Air Tanzania Company Ltd Aircraft Lease Agreement. As witnessed from the record, there were 6 counts predicated in the charge sheet, however it was only the 6th count which was against the appellants herein. The 6th Count was of forgery contrary to section 333, 335 (a) and 337 of the Penal Code [Cap 16 R.E: 2002].

The rest 5 counts were against the CEO of Air Tanzania Company Ltd. These counts included; 1st Count, abuse of position contrary to section 31 of the Prevention and Combating of Corruption Act, No. 11 of 2007; the 2nd Count was abuse of office contrary to section 96 (1) and 35 of the Penal Code, Cap 16 R.E 2002, 3rd Count was Occasioning loss to the specified authority contrary to paragraph 10 (1) and (4) and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2002, 4th Count was occasioning loss to a specified authority contrary to paragraph 10 (1) and (4) and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [Cap 200 R.E: 2002] and

5th count was occasioning loss to a specified authority contrary to paragraph 10 (1) and (4) and section 57 (1) and 60 (2) of the Economic Organized Crime Control Act, Cap 200 R.E 2002.

Before embarking on considering the merits or demerits of the appeal, I think it apposite to give a brief account of the facts leading to the decision which is the subject of the instant appeal as discerned from the records. It went thus, on the fateful dates, the appellants were the officers of the Public Procurement Regulatory Authority (PPRA) of which as alluded, the first appellant was the Chief Executive Officer (CEO) and the second appellant was the head of the Legal Unit whom had legal duties to advice on the general issues and procurement laws to the office of the CEO. Besides, the 2nd appellant was responsible to coordinate all meetings of the boards and their committee and recording the meeting minutes.

It was alleged that, on 13th March, 2007, a Chinese Company namely, China Sanangol International Holding Limited (CSIHL) was introduced to ATCL Management as a new inspiring investor who wanted to invest in ATCL. CSIHL was introduced by the then Permanent Secretary of the ministry of infrastructure, Mr. Enon Bukuku and the former ambassador Mr. Charles Sanga. The two parties executed the Heads of agreement and signed on the same date. According to clause 3.3.3 of the Heads of

Agreement, CSIHL promised ATCL, that they would finance ATCL to procure three A 319/A.320 airbuses, two A330-200 airbuses and three turbo-prop aircraft or any other type of aircraft within the range of new generation aircraft, however it was alleged that the board of directors of ATCL was not involved in this agreement.

Moreover, it was the prosecution version that the CEO of ATCL together with his team were advised by CSIHL to hire airbus from Wallis Trading Inc (WTI) while waiting for the new airbuses which their delivery would have taken over four years. ATCL agreed and Wallis Trading Inc accepted to lease airbus A 320-214 to ATCL, however it was alleged that the board of ATCL again was not involved.

It was alleged that, ATCL did due diligence to know the air worthiness of the plane and it was discovered that, the airbus A320-214 with serial number 630 was owned by a Dutch Bank and at the material time ATCL wanted to hire it, it was leased to Air Jamaica. The plane was under maintenance and Air Jamaica (lessee) wanted to restore it to the Dutch Bank. The Dutch Bank sold the airbus to Wallis Trading Inc before it was leased to ATCL.

That, while ATCL due diligence was underway, Wallis Trading Inc presented their draft lease agreement which was submitted to PSRC who

forwarded it to the Attorney General (AG) for vetting. The AG gave the opinion that before it is signed, the same has to be rectified and stake holders meeting had to be held to discuss clause 5 of the Agreement which delt with payment of various fees, purposely to avoid financial burdens to ATCL. It was alleged that, neither PSRC nor ATCL convened the stakeholders meeting as recommended by AG but the contract was then signed on 9th October 2007. Therefore, the lease agreement was signed before the completion of due diligence.

It was the prosecution factual version further that, ATCL was required after signing the agreement to provide lessor with the Government Guarantee within three business days after signing the agreement and the penalty for delay was USD 60,000 monthly from the date of signing the agreement up to the date the guarantee is provided. Inattentively, it was alleged that, it took ATCL five months to submit the guarantee to the lessor. Besides, for all that time, the lessor did not deliver the aircraft to ATCL for the reason that she was waiting for the government guarantee.

It appears that, before ATCL had received the aircraft, it engaged a company namely AIRCLAIM LTD to inspect the plane and the report was to the effect that, the aircraft had average air worthiness. ATCL again, sent a team of three officers (experts) to San Salvador to re-inspect the

plane and the team did advice the CEO of ATCL not to sign the acceptance certificate because the plane was still under maintenance and it could have taken over two months to complete the maintenance.

It was alleged that, the CEO of ATCL ignored the advice and proceeded to sign the plane acceptance certificate and since 27th October 2007 when the said certificate was signed, the plane was under control of ATCL and thus ATCL had to assume the duty to pay maintenance fees. As a result, ATCL signed airplane maintenance agreement with AEROMAN and LENTAL TEXTILE INC to continue with maintenance of the plane. It was alleged that the two companies were paid a total of USD 808, 386.90 as maintenance fees.

It was further alleged that, a week after ATCL had signed the lease agreement, it wrote a letter to the Treasury Registrar requesting for government guarantee in vain. The reasons for denial were alleged to be one, because the lease agreement was signed before the guarantee was sought as required by the Government Loans, guarantees and Grants Act. Two, because ATCL did not follow the procurement procedure in securing the lease. Three, ATCL Board of Directors was not involved in the lease process and four, ATCL did not conduct feasibility study and it had no business plan in place in respect of the leased aircraft.

It is worth much to be noted here that, on 27th February 2008 the by then Paymaster General, Mr. Gray Mgonja, wrote a letter to the first appellant, the by then CEO of PPRA seeking his opinion if ATCL followed the procurement Rules and his reply was to the effect that ATCL did not follow the procedures.

It was alleged that, on 12th March 2008 the first appellant wrote a letter to the CEO of ATCL advising him to make application to the Paymaster General for retrospective approval of the ATCL irregular lease of airplane in order for ATCL to get government guarantee. On 19th March, 2008 the CEO of ATCL sought the retrospective approval as advised and on the very same date the paymaster general sought advice from the first appellant.

On the very same date, it is alleged that, the 1st appellant and the 2nd appellant forged the minutes of meetings of stock verification department and Technical Audit Unit with a view of showing that the directors had discussed the ATCL application for retrospective approval. Moreover, on the same date, the 1st appellant advised the Paymaster General to approve the ATCL irregular lease agreement and eventually, the Paymaster General approved the lease agreement retrospectively basing on the advice by the 1st appellant.

Thereafter, on 27th March 2008 the Paymaster General wrote a loose minute to the Minister of finance advising him to grant government guarantee to ATCL and on 28th March 2008, the Minister approved the guarantee and on 2nd April 2008, the guarantee was signed by the Paymaster General.

It appears that, after the issuance of government guarantee, the aircraft was released to the ATCL. It left San Salvador to Tanzania on 28th April 2008 and landed in Tanzania on 1st May 2008. It operated between 30th May 2008 and 10th December 2008. During that period, it only generated an income of TZS. 17,813,265,109.00.

During this period of operation of airbus A320-214, ATCL signed a maintenance agreement with Air Mauritius for maintenance of the airbus. ATCL paid maintenance fee at a tune of Euro 130,885.17.

On 5th March 2009, the airplane was flown to Mauritius for maintenance. It was withheld there for months because ATCL could not foot it's maintenance bill. On 5th July 2009, the plane was flown from Mauritius to France for 12 years + "C" Check required by plane maintenance schedule. The total cost of maintenance in France was Euro 1,244,443.94 and ATCL was only able to pay Euro 1,986.38. At the time

ATCL had to engage and pay SGI Technical services company a sum of Euro 14,000 for supervising 12 years + "C" Check.

The aircraft was withheld in France for months for ATCL failure to pay the outstanding maintenance bill. On 27th October, 2011, the lessor terminated its lease contract with ATCL. It paid all the French maintenance costs and took away the plane. It then presented to the ATCL a bill of USD 45,103,838.80 and after the bill was negotiated by the government negotiated team, it was reduced to USD 42,459,316.12.

Due to these allegations, the appellants together with the CEO of ATCL were charged and prosecuted. The trial Court was convinced by the prosecution beyond reasonable doubt with satisfaction of the 17 paraded witnessed whom tendered a total of 20 documentary exhibits, that the counts predicated were proved, save for the 3rd count where no conviction was met.

To be more specific, in respect of the count of forgery of the alleged minutes, the trial Court had relied to the testimony of PW1, Ezra Musa Msanya, a director of Stock Verification who denied to have been present in Tanzania when the so purported meeting was convened on 19th March, 2008 whilst the minutes (Exhibit P18) shows his presence. PW1 had contended that, he left Tanzania on 16th March, 2008 and arrived in

London on 17th March, 2008 and thereafter, he came back to Tanzania on 8th April, 2008. In support to his testimony, PW1 tendered his travel passport (Exhibit P1). Again, the trial Court also relied to the evidence by PW2, Amin Nathanael, a Director of Technical Audit Unit whom testified to the effect that, on 19th March, 2008 when the so meeting was alleged to have been convened, he was in Manyara region and thus, he did not participate in the meeting of PPRA Advisory Committee relating to retrospective approval. To support, he had tendered the minute for trip (Exhibit P2) and payment voucher (Exhibit P3).

The fact that, no attendance register was presented to show that, the two were present, the Court reached to the verdict that, the minutes were forged purposely for deceiving the Permanent Secretary Ministry of Finance to grant the government guarantee retrospectively as he did in Exhibit D.6. and convicted the two for forgery.

Upon being convicted with the offence of forgery, the appellants herein were sentenced to either pay Two Million or to serve an imprisonment of one year in default.

Disgruntled with the decision, the appellants have come to this Court premising their grievances on five (5) grounds that were lodged on the 11th November, 2021 and two (2) additional grounds which were filed

as supplementary grounds of appeal on 6th June 2022 making a total of seven (7) grounds which read *verbatim* that: -

1. *The Hon. Trial Magistrate erred in law and fact for convicting the appellants for the offence of forgery without establishment of the mental element of the offence.*
2. *The Hon. Trial Magistrate erred in law and in fact for failure to properly analyze the defence evidence.*
3. *That, the Hon. Trial Magistrate erred in law and in fact for failure to consider the effects of the prosecution failure to call material witnesses as against the appellants.*
4. *That, the Hon. Trial Magistrate erred in law and in fact for relying on uncorroborated testimony of PW1 and PW2 to convict the appellants.*
5. *The Hon. Trial Magistrate erred in law and fact for convicting the appellants without proof of the case against them beyond reasonable doubt.*
6. *The Hon. Trial Magistrate erred in law in not acquitting the appellants who were respectively the 2nd and 3rd accused persons after having held that "it is likely to the 2nd and 3rd accused persons are convicted too for the offence charged, that is the 6th count of forgery…"*
7. *The Hon. Trial Magistrate erred in punishing/sentencing the appellants who were respectively the 2nd and 3rd accused persons after having held that "it is likely to the 2nd and 3rd accused persons*

*are convicted too for the offence charged, that is the 6th count of forgery…"*

To prosecute the appeal, the appellants had the services of two learned advocates namely, Messrs Mpaya Kamara and Hussein Kitta Mlinga, learned advocates. The respondent was represented by Mr. Imani J. Nitume, learned Senior State Attorney.

The matter was scheduled to be argued by way of written submissions and the parties had complied aptly with the order. I do commend the learned counsel for their punctuality.

The appellants' counsel prayed for the Court to also consider the contents of the appellants' closing submission (Defence Final Submission) they made before the trial court. Submitting in support of the first ground of appeal, the appellants' complaint is that, the prosecution had failed to establish the *mens rea* of the offence of forgery which is an intention to defraud or to deceive. It was the appellant's submission that, no evidence was given by prosecution to establish the intention to deceive or defraud.

It was further contention by the appellants' counsel that, the person alleged to have been deceived was the Paymaster General, Mr. Gay Mgonja however, he was not called to testify. That, the only witnesses

who testified against the appellants were PW1, PW2 and PW17, Julieth Godfrey Matechi a PCCB investigator.

It was the appellant's' submission that, from the testimonial version by the appellants, that there was no intention to deceive or to defraud but the retrospective approval which had been sought by ATCL which was urgent and that the appellants were to act swiftly to avert the Government from incurring more loss. Therefore, it was the appellant's argument that, the trial Court had erred to declare that the appellants had intention to deceive.

The appellants' advocates also submitted that, the appellants' defence on the purpose of the so meeting which according to them was to avert the government from incurring more losses was ignored. And therefore, failure to consider the defence is fatal. To buttress their argument, they invited the Court to make reference to the decision of this Court in **DPP vs. Justina Mungai**, Criminal Appeal 356 of 2016, High Court of Tanzania, Dar es Salaam District Registry (Unreported).

On the second ground of appeal, the appellants' advocates submitted that, the trial magistrate did not properly analyze the evidence since there is number of key pieces of evidence which could exonerate the appellants from conviction. According to them, it included; *one*, the

invitation letter & dispatch (Exhibit D21 and D22) of which showed that PW1 and PW2 were invited by the letter and delivered by dispatch. According to them, the letters were dispatched by DW6, Salum Khatibu Mngazija. *Two,* the absence of PW1 and PW2 at the meeting; here it was their complaint that the travel passport (Exhibit P1) was not genuine since it had no signature, despite the presence of the stamp of immigration. And the trial magistrate position that, the stamp impressions appearing on page 6 & 8 of Exh. P1 makes the same genuine as there was no dispute that the stamp belongs to immigration office, according to the appellants was unfound as it was contested.

*Three*, the exact date which PW1 returned to Tanzania from London was not clear. According to the appellants advocates, at page 6 of the Trial Court's judgement, PW1 had testified that, he returned to Tanzania from London on 17th March 2019. On contrary at page 96 of the judgement, the Trial Magistrate stated that, PW1 returned on 8th April 2008.

*Four,* as to the PW2's absence at the meeting, it was their contention that, the trial Court had relied to Exhibits P2 and P3 which were the minutes sheet containing a purported approval to travel and payment voucher. There was a hot contestation but the trial Court did not address and continued to decide that PW2 was not present. *Five,* the appellants

could not deceive the Paymaster General to grant government guarantee as held by the trial Court since the issue of government guarantee was not in mandate of PPRA. Again, the charge had nothing to do with appellant's advice on government guarantee and exhibit P18 shows that the advice was for retrospective approval of the lease agreement for ATCL's aircraft.

*Six,* the Trial Court held at page 99 and 102 of the judgement that, the minutes (Exhibit P18) were contrary to section 61 (7) of the Public Procurement Act No. 7 of 2004, however the said law was repealed and replaced by Act No. 7 of 2011. Again, neither of the two laws contains the provision of section 61(7), therefore according to the appellants advocates the appellants conviction was based on non-existent provision of law. *Seventh,* the appellants did not advise the Paymaster General to issue Government Guarantee but rather they informed him that the procurement process was faulty and cautioned him on the precaution to be taken before granting the requested guarantee. (Referred to Exhibit D13 ana D19).

And *eight,* page 94 paragraph 2 of the trial Court's judgment, suggests that the appellants received Exhibit D20 which was the letter from Chief Secretary while directed the appellants to advise on the request

for retrospective approval by ATCL While in reality, Exhibit D20 was a letter from ATCL to the Permanent Secretary Ministry of Finance @PMG which was minuted by the letter to the 1st appellant.

As to the Third ground, it is the appellant grievance that, the prosecution had failed to call a material witness who was a Paymaster General to corroborate the testimony of PW1 and PW2. It was their general submission from the appellants' counsels that, the trial Court ought to have drawn a negative inference against the prosecution.

As to the fourth ground, the appellants complain that, the trial magistrate erred to rely on uncorroborated testimonies of PW1 and PW2 when it convicted the appellants. In their contention, for the burden to have been discharged, the Trial Court ought to have received another piece of evidence in support of their testimony but not to rely solely to their testimony. They prayed the Court to make reference to paragraph 3.1.3 (c) of the closing submission of which the appellants had insisted that PW17 who was the PCCB investigator was also supposed to demand some other documents from PW1 and PW2 to complete the investigation.

On ground six and seven of appeal, the appellants' advocates articulated on them together that, the language used to convict the appellants manifests lack of both certainty and certitude. That the

conviction clause at page 103 of the judgment, the Trial Magistrate stated that; *"It is likely to the 2nd and 3rd accused persons are convicted too for the offence charged that is the 6th count of forgery…"'* According to the appellants' advocates, the appellants were not properly convicted and that being the case, even the sentence becomes faulty as the word "likely" suggests probability. They gave the meaning of the word "likely" in accordance to the www.collinsdictionary.com, the Concise Oxford Dictionary and the Blacks Law Dictionary which all definitions the word "likely is interpreted to mean 'probable".

Therefore, it was their submission that, the trial magistrate was still doubting the appellants culpability and such suspicious ought to have been interpreted in favour of the appellants as much as suspicious, even of the highest degree is unworthy to warranty conviction. In support, they invited the court to refer the decision in **DPP vs. Justina** (Supra) at page 39-40.

On the fifth ground of appeal, the appellants' advocates submitted in generality that, basing on their submissions in respect of the other grounds, it is their humble submission that the case was not proved beyond reasonable doubt, Thus, the appeal should be allowed by

quashing and setting aside conviction(s) and sentences(s) and further accordingly acquit the appellants.

In his rebuttal submission, Mr. Nitume for the Republic submitted in respect of ground one that, the guilty mind (*mens rea)* was proved as the evidence on record shows that the appellants were supposed to comply with the Public Procurement Act before convening the meeting which resulted to a forged minutes dated 19th March, 2008 (Exhibit P18). He further accentuated that, the other evidence which proved *mens rea* is their testimony which shows that PW2 has attended the meeting held at PPRA office which was not true as the evidence in record shows that, PW1 and PW2 have not attended the said meeting. According to Mr. Ntume, the fact that, the meeting was convened in respect of retrospective approval in absence of PW1 and PW2 who were responsible for stock verification department and technical audit Unit in the Ministry of Finance, and forged the minute thereafter, this proved the appellants' *mens rea.*

In respect of ground 2, the learned senior State attorney explicated that, the trial Magistrate did consider the defence evidence to wit page 27 to page 99 of the judgment but he ended up rejecting it having been satisfied that it raised no reasonable doubt to displace the case for the

prosecution. According to him, the Trial Magistrate evaluated the evidence both for prosecution and defence. It was his further submission that, the evidence of DW6 who has been contended to be the one who dispatched the said letters; do not remember the receiver of the two letters and that is why the magistrate did not give the weight to the DW6 evidence.

On the issue of stamp impression of which the appellants complain that the trial magistrate wrongly held that, there was no dispute over stamp impression, the learned state attorney insisted that, it could have been proper to raise the issue of genuine and impression of the stamp before the admission of Exhibit P1. It was respondent's further submission that, the trial magistrate did evaluate evidence over the issue as evidenced at page 96 of the Judgment.

On the contradiction on the exact date of which PW1 returned to Tanzania from London, Mr. Nitume resisted it stiffly. He submitted that, page 13 of the Proceedings, shows the testimony of PW1 who testified to the effect that, on 19th March, 2008 he was in London having left Tanzania on 16th March 2008 and arrived in London on 17th March 2008. Then he left London on 07th April, 2008 and arrived in Tanzania on 8th April 2008. Thus, the testimony by PW1 can solve the purported contradiction.

It was Mr. Nitume's submission that, the fact that the trial magistrate was not convinced with the defence case does not necessarily mean that she did not consider the same. To cement on this point, he invited the Court to make reference to it's decision in **Rose Khalid Salim vs. Republic**, Criminal Appeal No. 71 of 2022, High Court of Tanzania at Dar es Salaam (Unreported).

As to the third ground of appeal, Mr. Nitume replied that, he does not agree with the submission by the appellants' advocates that Paymaster General was the material witness to be called by the prosecution side to testify. His point of view was that, it was alleged that the appellants forged the minutes dated 19th March, 2008 by showing that PW1 and PW2 attended the meeting. Therefore, the testimonies of PW1 and PW2 in collaboration with other testimonies from prosecution witnesses were enough to prove that, the appellants had forged the minutes.

It was his conclusion over the issue that, in reference to page 48 of proceedings, what could have been testified by the Paymaster General was testified by PW10 William Frank Chitanda and PW12 Peter Mihalale and therefore the prosecution had discretion to call or not to call the Paymaster General. To cement over the position, he cited the case **of Ally**

**Shabani Nzige vs. D.P.P,** Criminal Appeal No. 18 of 2020, High Court of Tanzania at Arusha (Unreported).

As to the Fourth ground of appeal, it was Mr. Nitume's submission that, the testimonies of PW1 and PW2 were to the effect that the two did not attend the meeting convened by the appellants on 19th March, 2008 and the minutes dated 19th March 2008 were forged as they did not attend that meeting. PW1 was in London and PW2 was at Manyara. It was his further submission that, paragraph 3.13 of their closing submission just list things which they think an investigator (PW17) was supposed to do, but it could have not changed the fact that, PW1 and PW2 never attended the meeting held on 19th March, 2008.

In respect of ground 6 and 7 of appeal, Mr. Nitume argued that, he does not see the important issue in the two grounds since the word "it is likely" does not affect the evidence produced before the Court which was used by the trial magistrate to convict the appellants. The learned State Attorney further submitted that, the word "it is likely" in the judgment is a normal discrepancy which do not corrode the credibility or trial magistrate findings.

Ad to the ground 5, it was the respondent's submission that, the evaluated evidence from page 95 to 102 of the judgment and available

evidence in record especially the testimonies of PW1 and PW2 including the material evidence found in exhibit P1, P2, P3 and P18 prove that prosecution side managed to prove its case beyond reasonable doubt that the appellants forged the minutes of the meeting held on 19th March, 2008.

According to Mr. Nitume, the prosecution presented a strong case against the appellants and left only a remote responsibility on their favour which can easily be dismissed as it was in the case of **Magendo Paul vs. Republic**, [1993] T.L.R 23. He therefore prayed for the dismissal of the appeal.

In their rejoinder, the appellants' advocates in respect of ground one, they insisted that, the forged minutes constitute *actus reus.* The trial magistrate was bound to make a finding on whether the *mens rea* had been established.

It was also the appellant's submission that, the testimony by DW2, DW3 and DW6 were to the effect that PW1 and PW2 were duly invited to the meeting by invitation letter (Exhibit 21) and the invitation was served as exhibited in the dispatch book (Exhibit P22). It was also their submission that the letter sent by the 1st appellant to the Paymaster General comprising the advice in respect of retrospective approval (Exhibit

D23) was copied to PW1 and PW2. The fact that, they did not questioned during trial, their denial is a mere after thought.

The learned advocates for the appellants further submitted that, the argument by the respondent that the appellants were supposed to comply with the Public Procurement Act, is misplaced as there was no standard procedure for convening meetings relating to handling of applications for retrospective approvals.

On the second ground, the appellants' advocate in generality, they rejoined that, the Trial Court did not properly evaluated the evidence but rather it narrated the testimonies by the witnesses. Furthermore, their complain was that, DW6 was the one who dispatched the letters, but at page 53 of the judgment, the trial magistrate notion was that the person who dispatched the letters was not called to testify.

As to dispute on stamp impression on Exhibit P1, the appellants' advocates prayed for the Court to be guided by the Judiciary of Tanzania: Exhibits Management Guidelines of September 2020 specifically Guideline 2.4.8 which directs that, the objection to authenticity of exhibits such as forgery if raised during tendering, the Court may record but reserve the decision thereon to the final determination of the case as authenticity touches the contents of the documents.

As to the issue of the inexistence provision of the law of which the appellants had violated, the appellant's advocate rejoined that, the respondents had not replied in either way. Similarly, as to Exhibit D20 not been correspondence between Chief Secretary and the appellants was not replied. As well, on appellants' mandate to advise the Paymaster General to issue a government guarantee was not addressed.

On the third ground, in generality, they insisted that the Paymaster General was the material witness and he was supposed to be called but he was not called for undisclosed reasons, the consequence is that the prosecution case suffered significant gap.

On the fourth ground respectively, it was the appellants' rejoinder submission that, the evidence of PW2 which itself required corroboration it could not corroborate the evidence of PW1.

On the sixth and seventh ground of appeal, the appellants' advocate rejoined that, the word "it is likely" in a convectional statement suggests does not speak in certainty that the appellants were guilty but only saying that there is a possibility they could have committed the offence.

On the fifth ground, the appellants reiterated their submission in chief and prayed that the appeal be allowed.

After a careful consideration of the record and the rivalry submissions from both sides, I am aware of a salutary principle of law that a first appeal is in the form of a re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record and subjecting the same to a critical scrutiny and if warranted arrive at its own conclusions of facts. See **D. R. Pandya vs. Republic** (1957) E.A 336 and **Vuyo Jack vs. D.P.P,** Criminal Appeal No. 334 of 2016, CAT at Mbeya (unreported).

Guided by the above, I will therefore dispose the appeal in seriatim beginning by addressing the 1st to the 7th grounds of appeal but prior to that, for easily disposal of the matter at hand, I wish to outline the key ingredients of the offence which is the subject of this appeal. The Court of Appeal of Tanzania in the decision of **D.P.P vs. Shida Manyama @ Selemani Mabuba,** Criminal Appeal No. 285 of 2012, CAT at Mwanza (Unreported) at page 22 to 23 pin pointed the ingredients of which the prosecution side is duty bound to prove as follows: -

(i) the document was authored by the accused;

(ii) the document was a false document, and

(iii) the accused had forged the document with intent to defraud or deceive.

Embarking to the matter at hand, the first ground suggests that no mental element was proved by prosecution. The appellants advocates insisted that, the intention to deceive element was not expounded by the trial magistrate. On their part, the intention of the said meeting was to act swiftly to avert the government from incurring more loss. On the other hand, the learned state attorney argued that the *mens rea* was proved as the evidence of PW1 and PW2 were to the effect that the appellants did convene the meeting on their absence and forged the minutes indicating that the two were present while Exhibit P2 and P3 indicated that PW1 was in London and PW2 was at Manyara on the due date of 19th March, 2008.

Having gone through the judgement of the trial Court and the evidence in record, I wish to highlight the following; *one,* PW1 was the director in the office of stock verification and PW2 was the director of Technical Audit Unit. The two were important members to be involved in the meeting to discuss the retrospective approval which had been sought by ATCL. *Two,* the Trial Magistrate at page 101 of the judgment upon scrutiny, he had made it clear that, the evidence of PW1 and PW2 showed that, the two did not attend the meeting convened by the appellants and thus the minutes (Exhibit P18) which indicated their presence were proved to be a false document by the evidence of PW1 and PW2 which were supported with other documents (Exhibit P1 and P2) proving that they

were not in Dar es salaam on the material date. *Three,* by indicating the presence of PW1 and PW2 it is obvious that, whoever got involved thereafter with the process would have been assured that what was resolved was the position of the PPRA Advisory Committee relating to retrospective approval while in essence, all members were not present. From this point, vide the so minutes, it is where the appellants would have fastened to rescue the loss to the government as contended. I believe, the so speedup in the process was preceded with the ill intent of deceiving just to fasten the process by assuring that the meeting was convened on 19th March 2008 in presence of all members including PW1 and PW2. Thus, I find no merit on the first ground of appeal.

On the second ground of appeal, there was a complain that, the trial magistrate did not consider the evidence of the defence and in parallel to that she had failed to analyze properly the evidence in record. I took trouble to take a keen perusal from the Trial Court judgement to see how she came to convict the appellants on the 6th Count; at page 93-94 the judgement, it had this analysis: -

> *"The 5th issue is whether the 2nd and 3rd accused persons made a false document".*
>
> *The evidence of PW1 Ezra Musa Msanya A director of Stock Verification showed that he left Tanzania on 16th March, 2008 and arrived in London on 17th March, 2008. On 19th March, 2008*

*he was in London. He came back to Tanzania on April 8th April, 2008. He tendered his travel passport which was admitted in this court and marked as exhibit P.1. While the evidence of PW2 Amin Nathanael a Director of Technical Audit Unit in his testimony told this Court that on 19th March, 2008 he was in Manyara Region. He did not participate in the meeting of PPRA Advisory Committee relating to retrospective approval. The minute for trip was admitted and marked as exhibit P.2 and payment voucher as exhibit P.3.*

***However, the evidence of DW2 and DW3 who are Public officers of PPRA in which DW2 was the Chief Executive Officer and DW3 the head of Legal Unit. They got a letter from Permanent Secretary Ministry of Finance dated 27th February, 2008 i.e, exhibit D12. They have respondent it through a letter dated 6th March, 2008 i.e exhibit D13. They have observed weakness in the profile of WallisTrading Inc. On 17th March they wrote a letter to Permanent Secretary Ministry of Finance informing him on how to deal with Aircraft Lease Agreement i.e exhibit P.19.***

***They also advised the Permanent Secretary to continue to issue the government guarantee..."***

At page 95: -

*"Regarding the above provision of law in relation with the case in hand the testimony of PW1 Ezra Msanya showed that he travelled to London on 16th March, 2008 and arrived in London*

*on 17th March, 2008. He came back to Tanzania on 8th April, 2008. This is appeared at page 6 and 8 of exhibit P1 Ie A travel passport…**However, DW2 and DW3 in their evidence were strongly defended that PW1 who was the Director of Stock Verification Department had participated in the said meeting although they did not have the attendance register to show the attendance of the said meeting date…."*** (Emphasis supplied)

In the light of the above, I respectfully disagree with the learned advocates for the appellants that the defence case was not considered. It is my considered opinion that bolded excerpts suggest the appellants evidence was considered by the trial magistrate. The fact that the trial magistrate was not convinced with the defence case does not necessarily mean that she did not consider the same.

On the same complaint, the appellants contends that there is a contradiction as to the exact date of which PW1 returned to Tanzania, if it was before 19th March 2008 or after. I believe the records are audible. I took this course in reliance to the principle of sanctity of the record, that the trial court record accurately represents what happened in court. *(See* the case of **Halfani Sudi vs. Abieza Chilichili,** Civil Reference no. 11 of 1996, CAT at Dsm and **Flano Alphonce Masalu @ Singu & 4 others vs the Republic,** Criminal Appeal No. 366 of 2018, CAT at Dsm, (All

unreported). Guided by this, page 13 of the trial court proceedings clearly indicates the testimony of PW1 whom had testified to the effect that, on 19th March, 2008 he was in London after leaving Tanzania on 16th March, 2008 and arrived in London on 17th March, 2008 then he left London on 07th April, 2008 and arrived in Tanzania on 08th April, 2008.

Guided by the trial court record, I am in hands with the learned state attorney for the respondent that whatever contradiction on the exact date appearing in the trial judgment can be cured once we refer to the testimony of the respective witness (PW1).

Besides, there has been an argument by the appellants' advocates that, PW1 and PW2 were dispatched with the invitation letter of the meeting of 19th March 2008 (Exhibit D21) and DW6 was the one who dispatched the same but the trial Court in it's deliberation, it concluded that the witness who dispatched the letters was not called to testify. I have actually read the proceedings and the judgment particularly. I have seen such an anomaly but I asked myself, if at all such anomaly is vital to faulty the findings of the trial Court. My answer to that was not. This is because; *one,* from his testimony, DW6 did not remember the receivers of the two letters. Thus, it can not be concluded that, PW1 and PW2 were served with the letters of invitation. *Two,* the dispatch book (Exhibit D22) could not conclusively bear weight if the person dispatching the letters

was uncertain as to whom exactly he effected the service. *Three,* being served with the letters or notification of the meeting does not necessarily mean that, a person had attended the meeting. Other evidences are required to be referred to come out with the conclusion on either existence or inexistence of such fact. Thus, by looking at the testimony of PW1 who has contended to be in London on the fateful date and the contents of Exhibit P1 which is his passport and the evidence of PW2 who contented to have been in Manyara together with the contents of Exhibit P2 which are the minutes on traveling and Exhibit P3 which is the form of claiming traveling allowance, it is very obvious that, the deficit to consider the evidence of DW6 couldn't fault the finding that the two did not attend the meeting.

As to the authenticity of the stamp expression on the passport of PW1 (Exhibit P1), the appellants have complained on the genuineness of the stamp in deed. I have taken trouble to keenly peruse the objection raised during trial on the admissibility of exhibit P1 but this complain do not transpire in the proceedings. Objections were in relation to other issues of custodianship as well as competency of the witness who tendered it.

The law is settled that if the accused person, in the course of trial, intends to object to the admissibility of a document, he must do so before

it is admitted. Thus, an objection at later stages including in appeal is considered as an afterthought. [See-**Shihoze Seni And Another vs. R** (1992) T.R.L 330, **Stephen Jason and Another vs. Republic**, Criminal Appeal No. 79 of 1999, CAT at Mwanza and **Selemani Hassan vs. Republic**, Criminal Appeal No. 364 of 2008, CAT at Mtwara (All Unreported)]. Guided by above, It is apt to note that, the complain is an afterthought and this Court cannot entertain the same.

The concern fronted by appellants concerning the aspect of the purported advice given to the Paymaster General by PPRA and the correspondence (Exhibit D20) between the appellants and the Chief secretary; they are of inoperable to faulty the findings of the lower Court, since the purported deceive could not necessarily meant only to the Paymaster general but anyone involved in the process, could have been deceived and act promptly over the process as alluded. As well, the existence and non-existence of the communication between the Chief Secretary and the appellants has nothing to do with the alleged offence of forgery. Thus, inconsequential.

But there is also a complaint that, the provision cited by the trial magistrate of section 61 (7) of the Public Procurement Act No. 7 of 2004 to have been violated by the appellants, does not exist. I wish not to be detained much here since the charge Sheet was clear under which

provisions of the Law the appellants allegations were predicated. Besides, the conviction statement at page 103 of the judgment is to the effect that, the appellants were convicted on the 6th count of forgery contrary to section 333, 335 (a) and 337 of the Penal Code Cap 16, R.E 2002 as amended in 2019. Therefore, the complained anomaly did not prejudice the appellants in either way and thus, the same is curable under section 388 of the Criminal Procedure Act, [Cap 20 R.E: 2022]. Thus, I find no merit on the whole of second ground of appeal.

Embarking to ground three of appeal, the appellants are complaining that the Paymaster General was the material witness who was supposed to be called to testify and the respondent's failure to call him without giving reasons, the Court has to take adverse inference against the respondent. On the other hand, the learned state attorney has stiffly resisted that Paymaster General was not the material witness. According to him, PW1 and PW2 were the material witnesses to testify that, the so minutes were a forged one by the appellants.

Here, I wish to make it vibrant that, *one,* the summoning of witnesses is not a *"game"* and if it was a game, it should be played not only by the prosecution and the defence but even where the interests of justice demand, by the courts since they have been given power to summon witnesses under Section 195 of the Criminal Procedure Act, [Cap 20 R.E

2022]. This comment on the powers of the courts under Section 195 of the Criminal Procedure act is, however, a side-kick. See the case of **George Stewart Shemtoi @ White vs. The Republic**, Criminal Appeal No. 11 of 2012 CAT at Tanga (Unreported). *Two,* by virtue of section 143 of the Evidence Act, [Cap 6 R.E: 2022], the number of witnesses matters less as what is important is the credibility and reliability of a witness in a case. See, **Siaba Mswaki vs. Republic**, Criminal Appeal No. 401 of 2019, CAT at Dar es Salaam (Unreported) at page 9 where the Court had this to say: -

> *"…In Criminal cases the burden of proof lies on the prosecution and it never shifts – see* ***Tafifu Hassan @ Gumbe vs. Republic****, Criminal Appeal No. 436 of 2017 (Unreported). This means that,* ***it is upon the prosecution to call material witnesses to prove a case beyond reasonable doubt*** *and in exercising this noble task they are not limited in terms of number of witnesses whom they should call."* [Emphasis added]

Guided by the above established position, I entertain no doubt that the offence of which the appellants were charged with, was forgery of the minutes of the advisory committee of PPRA. PW1 and PW2 were the members of the advisory committee whom could materially testify as to the legality of the so purported minutes. Again, anyone whom could rely and deceive by the so minutes could have been summoned to testify over

the same just like how PW10, William Frank Chitanda and PW12 Elias Peter Mihalale did and not necessarily the Paymaster General. Thus, I find no merit on the third ground of appeal.

As to the fourth ground of appeal, the appellants are complaining that the testimony given by PW1 and PW2 to conclude that the two did not attend the meeting of 19th March 2008 was not corroborated. I wish not to be detained much here, as the PW1 testimony that, he was in London on the material date, which testimony was supported by documentary evidence which is the passport (Exhibit P1). Again, the testimony by PW2 that he was at Manyara, the minutes on such journey (Exhibit P2) and a form requesting for allowance on such journey (Exhibit P3) were the documentary evidence tendered that corroborated his testimony. In my view, the fact that, the absence of an attendance register book exhibiting their attendance could in neither way be interpreted against PW1 and PW2. Their testimonial versions were supported enough with documentary evidence. Moreover, PW17 who was the PCCB investigator in order to prove the existence of this fact, he could not procure each and every detail listed by the appellants' closing submission but the so collected pieces of evidence are muchly convincing beyond reasonable doubt that, PW1 and PW2 did not attend the meeting on the material date. Therefore, this ground also lacks merit.

On ground six and seven, the appellants are complaining on the words used in conviction statement; which are ***"it is likely"*** *the 2nd and 3rd accused persons are convicted too for the offence charged that is the 6th count of forgery.* The appellants complain is that, the word used implies that, the magistrate was uncertain as to whether the two had committed the offence. On the other hand, the learned state attorney argued that, it was just a normal discrepancy which do not corrode the credibility of the trial magistrate findings.

Likewise, I need not be detained much here, as *first*, the law as provided under section 312 (2) of the CPA provides for the contents of the conviction statement. It reads: -

> *"In the case of* ***conviction****, the* ***judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted*** *and the punishment to which he is sentenced."*
>
> [Emphasis is added]

It is apparent that the conviction statement as appearing at page 103 of the Trial Court judgment met the above legal condition. *Second*, the complained words "it is likely" were preceded with the conviction statement on other counts against the Director of ATCL. It was obvious that, the phrase was meant to entail that, just like how the other accused,

the appellants also were convicted in respect of the count which was against them. From the analysis made by the magistrate and the conclusion thereafter in the judgment that forgery was committed by the appellants, there was no other interpretation from the conviction statement rather than conviction on the part of the appellants. Henceforth, this ground also lacks merit. Even if it could have been interpreted differently, still the defect is curable under section 388 of the CPA.

On the 5th ground, it is the complaint by the appellants that the charge of forgery was not proved beyond reasonable doubt basing on their submission on the rest of grounds. I believe from what I have expounded above, guided by the decision in **D.P.P vs. Shida Manyama @ Selemani Mabuba** *(supra), one,* the minutes complained of, the minutes of the advisory committee (exhibit P18), were prepared by the appellants, *two,* the minutes were false document in reliance to the testimony of PW1, PW2, PW17 and Exhibits P1, P2 and P3 whom had been recorded to have been attended the same while they were not. And *three,* the intention of forging the minutes was proved by the testimony of DW2 and DW3 as were acting promptly to fasten the process of ATCL procurement of the government guarantee to rescue the government from

incurring more loss. From their testimonial version, it is obvious that the minutes of which were proved false ones by PW1 and PW2 were prepared to deceive whoever got involved with the process just to believe and fasten the procurement of the government guarantee. The trick of course amounted to deceiving and from that view point, I have all reasons to conclude inter alia that, the case was proved beyond reasonable doubt. Thus, the ground also lacks merit.

In the upshot of all this, I hold that the appeal is destitute of merit and I dismiss it. I, in turn, uphold the trial Court's conviction and sentence imposed on the appellants.

It is so ordered.

Right of Appeal explained.

DATED at **DAR ES SALAAM** this 05th day of May, 2023.

**MUSA K. POMO**

**JUDGE**

**05/05/2023**

Judgment delivered in presence of the 2nd Appellant and Hussein Kitta, learned advocate for the Appellants while for the Respondent republic Imani Nitume Senior State Attorney appeared.

**MUSA K. POMO**

**JUDGE**

**05/05/2023**