IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 144 OF 2019

STANLEY MURITHI MWAURA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es salaam)

(Magoiga, J.)

dated the 29th day of April, 2019

in

RM Criminal Appeal No. 188 of 2016

.....

JUDGMENT OF THE COURT

13th August & 22nd November, 2021

GALEBA, J.A.:

The case giving rise to this appeal, was commenced by presentation of a 167-page charge sheet detailing 419 counts of white-collar crimes of forgery, obtaining money by false pretence, uttering false documents and engaging in illegal acts of money laundering. The offences were allegedly systematically and discreetly committed over a stretch of four years from early 2012 to 2016. To prove the offences, the prosecution called sixteen witnesses who tendered sixteen documentary exhibits contained in over 500 printed pages. Coupled with the above, this appeal is predicated upon 18 grounds of appeal, some of

which are further divided into several sub-grounds resulting into a total of 31 substantive grievances each calling for our full attention and determination. With the above synopsis of the case, we now turn to examine what this appeal is all about in a bit more detail.

In this appeal, Stanley Murithi Mwaura, the appellant, was charged before the Resident Magistrates' Court of Dar es Salaam at Kisutu in Criminal Case No. 188 of 2016, where he was subsequently found guilty and convicted on all four hundred and nineteen (419) counts he faced. The charges, as hinted above, were in respect of forgery contrary to sections 333, 335(a) and (d) (i) and 338 of the Penal Code [Cap 16 R.E. 2002] now [R.E. 2019] (the Penal Code), obtaining money by false pretence contrary to section 302 of the Penal Code and uttering false documents contrary to section 342 of the Penal Code and acts of money laundering contrary to sections 12(a) and 13(a) of the Anti-Money Laundering Act, No. 12 of 2016 (the AMLA). In the process of committing the above crimes, it was alleged, that the appellant illegally obtained TZS. 911,382,335.50 from account number 0010010425192700O1 operated by Professional Paint Centre Ltd (PPCL) at Azania Bank Limited, Masdo branch in Dar es salaam (Azania Bank) between the years 2012 and 2016 as earlier indicated.

According to the charge sheet, the offence of forgery consisted of the 1st to the 99th counts, wherein the appellant was alleged to have forged 99 cheques on diverse dates between 5th February 2012 and 10th March 2016. Forgery also consisted of the 397th to 419th counts wherein the appellant was alleged to have forged 22 bank statements in relation to account number 0010010425192700O1 operated by PPCL at Azania Bank. The other offences, that is, obtaining money by false pretence, uttering false documents and money laundering, were all in relation and corresponding to the 99 forged cheques, the subject of the 1st to the 99th counts in the charge sheet.

Subsequent to the conviction, the appellant was sentenced to a heavy monetary fine of Tanzania Shillings Nine Billion Nine Hundred Million (TZS. 9,900,000,000.00) along with momentous imprisonment terms totalling to over 2,000 years had it not been for the sentences imposed to run concurrently. The details of the sentences were **first,** for the offences of forgery, he was sentenced to a jail term of seven years in respect of each of the ninety-nine counts for forging cheques. **Second,** he was sentenced to seven years imprisonment in respect of each of the ninety-nine counts for obtaining money by false pretence and **third,** for uttering false documents, the appellant was sentenced to seven years imprisonment in respect of each of the ninety-nine counts

of that offence. **Fourth,** for the ninety-nine counts of money laundering, the appellant was sentenced to payment of fine of Tanzania Shillings One Hundred Million (TZS. 100,000,000/=) in respect of each of the ninety-nine counts, or to serve a jail term of six years imprisonment for each of the ninety-nine counts, in case he defaulted to pay the said fine of TZS. 9,900,000,000/= in total. **Fifth,** for forging the twenty-two bank statements, the appellant was sentenced to seven years imprisonment in respect of each of the counts and **sixth**, he was ordered to pay back to PPCL the TZS. 911,382,335.50, he allegedly obtained from the company's bank account.

The abridged material facts giving rise to this appeal, as per the record of appeal, is that Ahmed Zacharia Hamil (PW1) and Vida Ahamed Zacharia (PW2) who happened to be husband and wife, were co-shareholders (co-owners) and co-directors of two companies, PPCL and Tropical Paints East Africa Limited (TPEAL). The said owners of the two companies were also joint signatories to current account number 0010010425192700O1 operated in the name of PPCL at Azania Bank. The two companies were dealing in distribution of paints and related home decoration materials operating from the same premises in Kariakoo Dar es salaam.

The appellant started to work on a part-time basis with both companies in 2011 but on 20th July 2012, he was formally employed by TPEAL as a Business Development Manager but was also a custodian of cheque books for the two companies and was responsible for preparation of cheque payments to various suppliers and creditors of PPCL. As PW1 was a frequent traveller, he would sign PPCL blank cheques and leave them for filling in appropriate figures for settlement of liabilities that could arise in his absence, certainly after such cheques would have been counter signed by PW2. The appellant, is alleged, to have seized the opportunity of being the custodian of the signed blank cheques to fill in different sums in the cheques, forge PW2's second signature, insert the payee's name as Stano Enterprises, his sole proprietorship (Stano) and deposit the cheques to account no. 3003211121395 operated at Equity Bank Tanzania Limited (Equity Bank) by Stano. Three cheques out of the ninety-nine were deposited in the appellant's personal bank account held at KCB Bank Tanzania Limited (KCB Bank).

To conceal the forgery, it was alleged, that the appellant would present to his employer forged bank statements which were not revealing any money paid to Stano. The forged bank statements were

twenty-two, which account for the last twenty-two counts of forgery in the charge sheet.

The appellant disputed the above allegations, stating that although he was personally employed by TPEAL, Stano was doing business with PPCL, so the payments to it were lawful and justified. He claimed that like other suppliers, Stano was supplying materials to PPCL from Nairobi.

As indicated earlier on, the trial court having failed to obtain proof that Stano had any business relationship with PPCL, it convicted and sentenced the appellant as stated above. The appellant's appeal to the High Court was not successful, it was dismissed for want of merit and the decision of the trial court was upheld. This appeal is challenging the dismissal of the appellant's appeal in the High Court, and in so doing the appellant lodged two memoranda of appeal, one by his advocate lodged on 11th December 2019 and another by himself lodged on 12th December 2019. His advocate's memorandum of appeal contained six grounds and the appellant's own had sixteen grounds of appeal. In addition to the above grounds, on 17th May 2021, the appellant lodged a supplementary memorandum of appeal containing yet one more ground of appeal.

At the hearing of this appeal on 11th August 2021, the appellant appeared virtually *via* a video link from Ukonga Central Prison in Dar es

salaam and had the legal representation of Mr. Nehemia Nkoko learned advocate who physically appeared before us. The respondent Republic was represented by Mr. Ladislaus Komanya teaming up with Mr. Christopher Msigwa, both learned Senior State Attorneys. Prior to commencement of hearing, Mr. Nkoko prayed for and obtained leave under Rule 81(1) of the Court of Appeal Rules 2009, (the Rules) to present and argue a new ground of appeal based on a point of law which had neither been specified in his memorandum of appeal nor contained in his supplementary memorandum.

In arguing the appeal, Mr. Nkoko abandoned the memorandum of appeal he had lodged and retained eighteen grounds in total, which are; the new ground referred to above, one ground in the supplementary memorandum of appeal and sixteen grounds in the memorandum of appeal which was lodged by the appellant himself.

We will start with the grounds which raise threshold questions. Such grounds are; **first,** the new ground which Mr. Nkoko obtained leave to argue whose substance was that the plea that was taken by the appellant in respect of counts 26 to 419 is defective. **Second** is ground five in which the appellant is complaining that his conviction was illegal because the trial court did not observe the provisions of section 210(3)

of the Criminal Procedure Act, [Cap 20 R.E. 2002] now [R.E. 2019] (the CPA). **Third** is ground six where the appellant is alleging that all exhibits except exhibit P13, the cautioned statement, were not read in court so they ought to be expunged from the record. **Fourth** is ground seven in which the appellant is challenging the trial court for having failed to comply with the mandatory requirements of section 312(1) and (2) of the CPA. **Fifth** is the nineth ground where the appellant is moving this Court to hold that the charge sheet is bad for it is duplex contrary to the provisions of section 133(2) of the CPA and the **sixth** point which is the sole ground in the supplementary memorandum of appeal, the appellant is complaining that the first appellate judged erred in law for upholding a conviction based on the proceedings which offended section 231 (1) of the CPA.

To tackle the above grounds, we will start with ground nine, which is to the effect that:

> *"9. That, the first appellate court erred in sustaining the appellant's conviction in the counts of forgery without considering that the appellant was embarrassed by being charged in duplex charge contrary to the mandatory provision of CPA, (Cap. 20 R.E. 2002)."*

In respect of this complaint, Mr. Nkoko argued that the alleged forged cheques had several categories of forgery lumped up together in every count. He argued that in each of the 99 cheques there was both forging and signing the alleged signature of the second signatory, PW2. To bolster his argument, he relied on the case of the **Director of Public Prosecutions v. Morgan Maliki and Another,** Criminal Appeal No. 133 of 2013 (unreported), where it was stated that a charge is duplex if it consists of more than one distinct offence in the same count. Mr. Nkoko referred us to page 1,006 of the record where the first appellate judge held that indeed the charge was duplex but he challenged him for not having held that the appellant was prejudiced. If we understood Mr. Nkoko well, to him, forging a signature of PW2 on a cheque, inserting in the cheque the name of a false payee and writing in the cheque the money figures for no consideration, each of such acts constituted a distinct offence in respect of the same cheque. In reply Mr. Komanya submitted that there was no duplicity at all because the sections cited in the statement of offence created only one offence of forgery.

To start with, we will revisit the law. The law forbidding lumping of more than one offence in one count, is section 133(2) of the CPA, which provides that:

"(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."

So, it is settled position of law that a charge with a count containing more than one offence is a duplex charge in terms of the above section and the effect is to render it fatally defective according to this Court's decisions in **Issa Juma Idrisa and Another v. R,** Criminal Appeal No. 218 of 2018, **Director of Public Prosecutions v. Pirbaksh Ashraf and Ten Others,** Criminal Appeal No. 345 of 2017 and **Adam Angelius Mpondi v. R**, Criminal Appeal No. 180 of 2018 (all unreported).

The question for our determination in this ground of appeal is whether there were more than one offence in each of the 99 counts of forgery. We will sample out the first count as an example in order to show if the particulars of offence disclose ingredients of more than one offence, and if it does, other offences constituent part of the count will be identified. It states:

"1ST COUNT

STATEMENT OF OFFENCE

FORGERY; Contrary to sections 333, 335(a) and (d) (i) and 338 of the Penal Code [Cap 16 R.E. 2002]

PARTICULARS OF OFFENCE

STANLEY MURITHI MWAURA, on 6th February 2012 within the city and Region of Dar es salaam, with intent to deceive or defraud, forged AZANIA BANK LTD, MASDO BRANCH cheque number 167641 valued Tanzania Shillings four million nine hundred fourteen thousand and twenty-three (Tsh. 4,914,023) by purporting to show that it was drawn by PROFESSIONAL PAINT CENTRE LTD in favour of STANLEY MURITHI MWAURA."

It is the counts like the above that Mr. Nkoko submitted that they contained more than one offence. We will proceed to examine the provisions of the Penal Code cited in the counts in order to determine whether Mr. Nkoko is right. Sections 333, 335(a),(d) (i) and 338 of the Penal Code provide as follows;

"333. Forgery is the making of a false document with intent to defraud or to deceive.

335. Any person makes a false document who –

(a) makes a document which is false or which he has reason to believe is untrue;

(b) and (c) N/A

(d) signs a document-

(i) in the name of any person without his authority, whether such name is or is not the same as that of the person signing;

338. Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker, is liable to imprisonment for life and the court may in addition order that any such document be forfeited to the United Republic."

The analysis of the above provisions, in our view, is that section 333 of the Penal Code defines what the offence of forgery is. Section 335 creates the offence of forgery and section 338 punishes it. Mr. Nkoko argued that forgery at section 335(a) and signing at section 335(d) (i) are two distinct offences. In this case one document for each of 99 counts was forged and the combined effect of the evidence of PW1, PW2 and F8215 DC Alistides Rutagwerera Mashauri, (PW7) is that the cheques were forged by inserting a wrong payee's name in every cheque, by counter signing them and by inserting money figures in the cheque leaves. In other words, forging the cheques involved those three (3) unlawful acts. Those acts were a series of the same transaction

seeking to complete a single offence of forgery as defined at section 333 of the Penal Code. What we note is that section 335 creates one offence of forgery and details possible acts that can be carried out in completing it. In this case we asked Mr. Nkoko to tell us the other distinct offence in the counts other than forgery, but he was unable to mention one. He only stated that signing was different from forgery. With respect to learned counsel, we were unable to comprehend, other than the offence of forgery, any other distinct offence in section 335 of the Penal Code from the submissions of Mr. Nkoko. That is why we agree with Mr. Komanya that section 335 creates only one offence known to law. For the same reason we do not agree with the holding of the first appellate judge at page 1,006 of the record of appeal that the charge was duplex. In the circumstances, the 9th ground of appeal has no merit and we dismiss it.

The next ground we propose to determine, is the new ground in which Mr. Nkoko was complaining that the plea in respect of counts 26 to 419 was defective. The complaint may be phrased as follows:

> *"The learned first appellate judge erred in law by upholding a conviction of the appellant without considering that the plea in respect of counts 26 to 419 was defective."*

This complaint was a result of how the trial magistrate recorded the appellant's plea on 28th June 2017 when the charge was read over to him. This is what the record is, in respect of the challenged plea:

> ***"26th count – 99th Count;***
>
> *Accused: I DID NOT FORGE*
>
> *Court: EPNG in all Counts 26th to 99th Count.*
>
> ***100th count – 198th Count;***
>
> *Accused: NOT TRUE. I DID NOT OBTAIN MONEY BY FALSE PRETENCES.*
>
> *Court: EPNG in all Counts 100th to 199th Count".*

This style of recording the plea was repeated for counts 199 to 297, 298 to 396 and 397 to 419. The argument of Mr. Nkoko was that, counts 26 to 419 were therefore not read over to the appellant, and such was an incurable irregularity that breached the provisions of section 228(1) of the CPA. He relied on the case of **Ex D. 8656 CPL Senga s/o Idd Nyembo v. R,** Criminal Appeal No. 16 of 2018 (unreported) in moving the Court to nullify the proceedings and the judgment, to quash the conviction, to set aside all the sentences and to unconditionally release the appellant from prison.

In reply, Mr. Komanya submitted that it is not correct that each count involved was not read over to the accused person. According to

him, each count was read over to the accused, but the anomaly was with recording of the plea, in that, the trial magistrate did not record the responses of the appellant in respect of each count but for a number of grouped counts. He contended that after the appellant had pleaded not guilty to all 419 counts a trial was commenced in terms of section 228(3) of the CPA. He referred the Court to page 210 of the record of appeal where the trial court indicated that the amended charge was read over to the accused person. He submitted that recording a plea is a matter of style and has nothing to do with prejudice to the appellant. He contended that section 228(2) of the CPA does not provide for a style of plea recording, so the style adopted by the learned trial magistrate did not offend any law. He submitted that the appellant's advocate did not show how his client was affected or prejudiced by the recording of his plea in a generalized form and that if this Court is to hold that the trial court omitted to observe the requirements of section 228(1) of the CPA, then it be pleased to hold that such omission is curable under section 388 of the CPA, as the aforesaid section 228(1) provides for the requirement to read the substance of the charge but not the style of recording a plea of an accused.

In determining this ground, we will revisit the relevant record of the trial court but before we do so, it is appropriate, we think, first to

consider the substance of the law alleged to have been offended and the consequences of omitting to observe the provision, if it was indeed, not observed. Section 228(1) of the CPA provides as follows:

> *"228 -(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge".*

Clearly, this section requires a trial magistrate, prior to commencement of hearing of a criminal matter, to cause the substance of the charge to be read over to the accused in a language he well understands for him to plead. Trite law in this jurisdiction is that, if the charge is not read to the accused person, a subsequent trial is a nullity- See **Rojeli s/o Kalegezi and Two Others v. R,** Criminal Appeal No. 141 of 2009 and **Amiri Omari v. R,** Criminal Appeal No. 299 of 2015 (both unreported), because, in such an instance, the accused is denied an opportunity to adequately prepare his defence- See **Tizo William v. R,** Criminal Appeal No. 364 of 2017 and **James Andrea @ Mwenge v. R,** Criminal Appeal No. 44 of 2017 (both unreported) among many other authorities. The question in this case, is whether, this requirement to read over the charge and require the accused to respond or to plead, was complied with.

According to the record of appeal, at page 210, it goes:

> ***"PSA:*** *This case is for mention and investigation is complete, I however pray to substitute the charge sheet.*
>
> *Court: Substituted charge read over to the accused as;*
>
> ***1st Count:***
>
> *Accused: NOT TRUE, I DID NOT FORGE*
>
> *EPNG".*

The above process repeated itself up to the 25th count after which the trial court started to record the plea of the appellant in groups as indicated earlier on. On that date the appellant was represented by Mr. Nkoko who was assisted by Mr. Hassan Kiangio both learned advocates, and the respondent was represented by Mr. Timon Vitalis, learned Principal State Attorney. After the charge was read and the plea taken, at page 215 the following transpired:

> ***"PSA:*** *I pray for Preliminary hearing.*
>
> ***Mr. Nehemiah:*** *I pray for a date of Preliminary Hearing as well. The PSA can supply us with the facts before the date".*

Determination of this ground will not take a lot of our time. We will approach it with two established principles of law in this jurisdiction.

One is that court records are deemed to be accurate and authentic such that they represent what actually transpired in court – see **Shabir F. A. Jessa v. Rajkumar Deogra,** Civil Reference No. 12 of 1994 (unreported). Other decisions on the same position are **Paulo Osinya v. R,** [1959] EA 353, **Halfani Sudi v. Abieza Chichili,** [1998] TLR 527 and **Ex D. 8656 CPL Senga s/o Idd Nyembo** (supra). For instance, in **Halfani Sudi** it was observed that;

> *"(i)A court record is a serious document. It should not be lightly impeached.*
>
> *(ii) There is always a presumption that a court record accurately represents what happened."*

Two, the other principle of law is that where there is failure or omission to comply with a procedural requirement in the course of trial, the question the appellate court should ask itself, before it can nullify or impeach the proceedings, is whether such failure or omission occasioned a miscarriage of justice on the part of the party complaining - see **Richard Mebolokini v. R,** [2000] TLR 90. Other decisions in which the principle was considered include **Jumanne Shabani Mrondo v. R,** Criminal Appeal No. 282 of 2010 and **Flano Alphonce Masalu @ Singu And 4 Others Versus R,** Criminal Appeal No 366 of 2018 (both uunreported). In **Flano Alphonce Masalu (supra)**, it was held that:

> *"...in our earlier decision in* ***Jumanne Shabani Mrondo Versus Republic****, Criminal Appeal no 282 of 2010 (unreported) where we confronted an identical irregularity; we emphasized that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice."*

In this case, although Mr. Nkoko submitted that the charge was not read to the appellant, there is no material on record to support his argument. The record before us shows clearly that the charge was read over to the appellant and he pleaded not guilty to each count. Although we agree with Mr. Nkoko that the trial court had to record separately the appellant's plea in respect of each count, which it failed to do, we do not, however, agree with him that such failure prejudiced the appellant, the omission being a procedural lapse. In our view the appellant was not prejudiced with failure to record his response to each count from count 26 to 419 because, **first**, on that day the appellant was present in court and he had able representation of two learned advocates, Messrs Nkoko and Kiangio. **Second,** when the prosecution sought to open up its case on 1st August 2017 in terms of section 229(1) of the CPA the said advocates for the appellant had no objections to raise in respect of the omission to read the charge over to their client. In our view, had the charge not been read over to the appellant previously, the advocates

would not have easily stated that they were ready for trial of their client's case, they would have demanded that the charge be read over to him first. We say so because advocates being officers of the High Court under section 66 of the Advocates Act [Cap 341 R.E. 2019], legal counsel are duty bound to assist courts to reach at a just decision. **Third,** we have carefully studied the appellant's 9-page long evidence in defence from page 296 to page 305, the substance of the defence which is so elaborate does not suggest that it is from a person who did not understand what he was defending himself against. **Fourth,** at the hearing of this appeal, Mr. Nkoko informed us that him and his client had been availed with the charge sheet, prior to the hearing which means the appellant and his legal counsel had abundant opportunity to study the charge even before it was to be read over to the appellant in Court. In the circumstances, the new ground of appeal that the appellant's plea was defective, has no merit and we hereby dismiss it.

The next ground for our consideration is ground 5 which is a complaint that:

> *"5. That, the first appellate court erred in law by upholding the appellant's conviction in a case where the evidence of witnesses was un-procedurally*

recorded contrary to the mandatory provisions of section 210 (3) CPA, (Cap. 20 R.E. 2002)."

The appellant in this ground is challenging the trial court for failing to inform him of his right to have his evidence read over to him after recording it. By that omission, he argued that the court breached the provisions of section 210(3) of the CPA. He relied on the case of **Mussa Abdallah Mwiba and Two Others v. R,** Criminal Appeal No. 200 of 2016 (unreported). Further, he submitted that because of failure to afford him the above right, the trial court misquoted him and erroneously recorded some facts which he did not adduce in his evidence at pages 298, 300 and 304 of the record of appeal.

In reply to that ground Mr. Msigwa submitted that, although there is no record that the provisions of section 210(3) of the CPA were complied with, such non-compliance did not affect the appellant's fair trial. He contended that the appellant's allegations that his evidence was erroneously recorded has no basis because the court record is deemed to be authentic and cannot be easily impeached relying on the case of **Ex D. 8656 CPL Senga s/o Idd Nyembo** (supra). He moved the Court to treat the anomaly as curable under section 388 of the CPA.

We have carefully reviewed the record of the trial court and noted that indeed it is silent on whether the appellant was afforded such a right, as required by section 210(3) of the CPA which provides that:

> *"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."*

We have however noted that at page 305 of the record of appeal, at the closure of the defence case which ended with the appellant's own evidence, the latter's advocate, Mr. Nkoko immediately after re-examining his client, he made the following prayer:

> *"**Advocate**: We pray to close our defence case and we will make final submissions."*

We have also examined closely the appellant's defence evidence and noted that the court grasped the appellant's crucial points in his defence that he was supplying materials to PPCL and that is the reason why the money from that company was paid into his sole proprietorship's bank account.

In this case, the appellant relied on the case of **Mussa Abdallah Mwiba** (supra) where omission to comply with section 210(3) of the

CPA led to quashing the conviction and setting aside the sentence. From the judgment of **Mussa Abdallah Mwiba** (supra), **firstly,** one cannot ascertain whether before the trial court, the appellant was represented by counsel. **Secondly,** we do not know also if the defence in that case was properly grasped by the trial court like in the case before us. **Thirdly,** in that case, although the trial court failed to observe the requirements of section 210(3) of the CPA, still the prosecution evidence was so shaky to the extent that, this Court instead of ordering a retrial, it had to release the appellant from prison. Such circumstances are very different from those obtaining in this case, where the complainant is alleging that its money was paid to the appellant's enterprise unlawfully and the appellant putting up a defence that the money was paid to Stano quite lawfully in settlement of lawful invoices for valid business transactions.

In the circumstances, it is our considered position that the omission by the trial court to comply with section 210(3) of the CPA was a curable irregularity under section 388 of the same Act for the lapse did not occasion a failure of justice. That said, we hold that the 5th ground of appeal has no substance and we dismissed it.

Next is ground 6, which is couched in the following terms:

"6 That, the first appellate Judge erred in upholding the trial court's verdict based upon un-procedurally admitted documentary exhibits while;

(i)All electronic exhibits were retrieved from the bank system and tendered contrary to Electronic Transaction Act of 2015.

(ii)All documentary exhibits were not read aloud in court after being admitted in evidence.

(iii) Exhibit P4 was not cleared before being admitted in evidence."

The appellant's submission in respect of the first limb above was that employees holding the position of system administrators from the banks which sent witnesses, were supposed to appear in court as witnesses and testify in order to demonstrate that the systems from which the exhibits were generated were sound and authentic at the time of generating those exhibits. As for the second limb the appellant's complaint was that the first appellate court erred in law for upholding the appellant's conviction based on documentary exhibits which were not read in court after they were tendered and admitted. In this regard, the appellant relied on the cases of **Rashid Amiri Jaba and Another v. R,** Criminal Appeal No. 204 of 2008 (unreported) and **Robinson Mwanjisi and Three Others v. R,** [2003] TLR 218. The appellant, prayed in his written submission, that all the documentary exhibits ought

to be expunged from the record except exhibit P13 which was tendered and admitted properly.

Lastly, the appellant complained that the manner of handling of exhibit P4 was even worse, for it was not cleared before it could be admitted in evidence.

In reply to the first limb of the appellant's complaint in ground six, Mr. Komanya submitted that as for the competence and soundness of the systems that generated the electronic documents, Happy Usiri (PW9) testified that the system that generated the exhibits was sound and that that evidence was corroborated by Grace Fintan Wang'anya (PW10). Counsel relied on sections 78 and 78A of the Evidence Act [Cap 6 R.E. 2019] (the Evidence Act) moving the Court to hold that in view of those sections, the documents complained of were properly admitted.

As regards the second segment, that the documents were not read in court, Mr. Msigwa contended that, it is true that all documents, except the cautioned statement, exhibit P13, were not read after the same were admitted but added that some of them were not read for valid reasons. The reasons he cited were **first,** the bulkiness of the documents especially the bank statements, the mandate files and the ninety (99) cheques. Mr. Msigwa submitted that in any event, the

appellant was not prejudiced by failure to read the documents because the substance of all exhibits that were not read over to the defence was explained to the appellant during the proceedings. He went ahead to particularize each exhibit and the page in the record of appeal where the relevant content of a particular document was explained to the appellant.

On the third part of ground 6 in respect of exhibit P4, Mr. Msigwa submitted that although the exhibit was not tendered as required by law, but its substance is contained at page 223 of the record of appeal. Based on his submission, he contended that even if the documents were to be expunged, the substance of their content would still be intact on record.

Equipped with the above submissions of parties, we are in a position to determine limbs (i) (ii) and (iii) of the 6th ground of appeal. We will start with ground 6(i) in relation to the alleged noncompliance with section 18(2) of the Electronic Transactions Act in respect of the bank statements as exhibits. That section provides:

> *"18.-(1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.*

(2) In determining admissibility and evidential weight of a data message, the following shall be considered-

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained;

(c) the manner in which its originator was identified; and

(d) any other factor that may be relevant in assessing the weight of evidence."

Whereas the appellant's position was that the above provision was offended, Mr. Msigwa for the respondent submitted that, the bank statements were tendered properly under the provisions of section 78A of the Evidence Act, which provides:

"78A.-(1) A print out of any entry in the books of a bank on micro-film, computer, information system, magnetic tape or any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such print out, and when such print out is supported by a proof stipulated under subsection (2) of section 78 that it was made in the usual and ordinary course of business, and that the

book is in the custody of the bank, it shall be received in evidence under this Act.

(2) Any entry in any banker's book shall be deemed to be primary evidence of such entry and any such banker's book shall be deemed to be a "document" for the purpose of subsection (1) of section 64."

Before getting to determining this ground, there are two principles that are part of our law that we keep live in our mind. One of them to which we have made reference already in this judgment is that, where there is a procedural irregularity or an omission to observe a particular procedure in seeking to determine substantive rights of parties the crucial question to ask, before impeaching or nullifying the impugned decision, is whether the irregularity or lapse occasioned a failure of justice on the part of the party complaining of the omission. If the omission occasioned no injustice, the Court would gloss over the omission and treat it as inconsequential. The second principle is that each case must be decided based on its unique set of circumstances as to the facts surrounding the dispute in question. With those two observations, we will proceed to discuss, the contested provisions of the ETA and of the Evidence Act.

Section 18(1) of the ETA is a permissive section; it seeks to allow data messages and information stored in electronic gadgets to be

tendered in evidence just as any other paper exhibits or documentary evidence. Subsection (1) of section 18 of the ETA reflects the contents of section 64A (1) of the Evidence Act which provides that:

> *"In any proceedings, electronic evidence shall be admissible."*

Issues of admissibility and weight of electronic evidence are guided by section 64A (2) of the Evidence Act read together with subsection (2) of section 18 of the ETA quoted above. Section 64A (2) of the Evidence Act provides thus;

> *"(2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transactions Act."*

The point here is that, the above are procedural provisions establishing the manner of presenting electronic evidence before the court. Section 18(2) complained of requires that for electronic evidence to be admitted the trial court must consider the criteria detailed at paragraphs (a) (b) (c) and (d) of section 18(2) of the ETA. Admittedly, it is true there is no record that the court considered those points but the bank statement complained of, were printed from banks where PPCL and the appellant had bank accounts and Happy Usiri (PW9) when

tendering exhibit P10 which was a bank statement which was printed from the computer linked to Azania Banking System, she testified that there were no possibilities of tempering with that system. The other document is exhibit P11 which was a bank statement of the appellant's own account from Equity Bank. This was tendered by Godfrey Henry Kiama (PW12), a bank official from the appellant's bank. He testified at page 268 of the record of appeal that Equity Bank system does not permit editing or alteration of any entries. Like exhibit P11, exhibit P16 was the bank statement from the appellant's own bank account generated by KCB banking system. The document was tendered by Godfrey Joseph (PW16), who during cross examination stated that the statement cannot be edited by anybody and it is automatically dated.

Further, exhibits P10, P11 and P16 were all tendered to demonstrate that there were payments that were made from PPCL to the appellant and Stano, which fact the appellant never denied. The points made among others, at page 3 of his written submissions, is that:

> *"The appellant on his side conceded knowledge of those 99 cheques paid to him personally and through his company STANO ENTERPRISES."*

This is the reason why we think that even if there was to be a procedural error in tendering the documents, the substance of the

charge sought to be proved, that is money movement from PPCL account to that of the appellant is, essentially not disputed. What is disputed is whether the transactions perpetrated fraud and criminality. In the circumstances, we hold that tendering exhibits P10, P11 and P16 was proper in terms of sections 64A (2) and 78A (2) of the Evidence Act read together with section 18(2) of the ETA especially after the banking officials had testified on the soundness of their respective banking computer systems from which the documents were electronically stored and mechanically generated from by printing.

Next is ground 6(ii) and (iii), in which the complaint is that except for exhibit P13, the rest were not read over to the appellant after being admitted. The appellant, by that argument is moving the court to expunge the exhibits. As a matter of procedure, after a document is admitted in evidence, it must be read to the accused person, as per the decision of this Court in **Robinson Mwanjisi (supra)** and in **Huang Qin and Xu Fujie v. R,** Criminal Appeal No. 173 of 2018 (unreported).

However, in the case of **Chrizant John v. R,** Criminal Appeal No. 313 of 2015 (unreported), the Court did not expunge the post-mortem report and the sketch map of the scene of crime after noting that the prosecution witnesses explained the substance of those documents in

their evidence and by way of cross examination, even though the documents were not read out methodically. The Court observed:

> *"In the circumstances of the instant case however, we rush to agree with Mr. Ngole that since the Republic called PW4 Florence Kayumbi, the doctor who conducted the autopsy, and because the evidence of that witness capitalized on exhibit P1* ***and he explained in detail the deceased's cause of death, also that his advocate was given chance to cross examine him, it cannot be accepted that the appellant was denied opportunity to know the contents of exhibit P1****. So, also is the question of the sketch map because PW3 Insp. Angelo was called to testify and clarified/explained the contents of that document."*
>
> [Emphasis added].

Further in the case of **Ernest Jackson @ Mwandikaupesi and Another v. R,** Criminal Appeal No. 408 of 2019 (unreported), on the same scenario, this court observed;

> *"Although the record does not expressly indicate that the said documents were methodically read out as indicated, it is noteworthy that in the rest of their respective evidence in chief the witnesses canvassed the contents of the documents and thereafter they were cross examined so substantially on the*

documents by the defence counsel to leave no doubt that the appellants and their counsel were fully abreast of the contents of the two exhibits. Given these facts, it cannot be said that the appellants were denied to know the contents of the documents. We would follow the course we took in ***Chrizant John v. R,*** *Criminal Appeal No. 313 of 2015 (unreported), where even though the contents of certain documentary exhibits were not methodically read out after their admission, we ignored the anomaly as we were satisfied that the witness who tendered them testified fully on their contents."*

With the above understanding we will then proceed to determine whether the failure to read the exhibits at the trial court in this case was fatal and therefore the documents are liable to be expunged. We will start from exhibit P1 to P16 except exhibit P13 which was not disputed.

Exhibits P1, P2 and P3 were letters appointing the appellant into the employment of TPEAL and the work permits. In this case there was no dispute that the appellant was employed by the company and that he was Kenyan so he would only legally be employed in Tanzania when in possession of a properly renewed work permit issued by the Immigration Department. It is our holding therefore that failure to read

these documents did not occasion a miscarriage of justice on the part of the appellant.

Exhibit P4 were handwritten letters allegedly written by the appellant explaining on the three (3) cheques that were retrieved from the appellant's home and the missing cheque register. The contents of these documents were very well known to the appellant and his advocate, because at the time of clearing it before admission, Mr. Nkoko, who was appearing for the appellant during the trial, at page 223 of the record of appeal is recorded to have told the trial court that he had shown the letters to the appellant and the latter had told him that the signatures on the letters were not his. In the circumstances it cannot be said, at the same time, that the appellant or his advocate were not aware of the contents of the exhibit.

Exhibit P5 were cheque counterfoils showing beneficiaries of cheque payments settled by PPCL. The documents were inspected by Mr. Nkoko, and he found that there were also documents from CBA Bank which he requested the court to exclude from the record because they were irrelevant to the case. That request was heeded and the non-contested documents were admitted as P5. In our view, if the applicant or his advocate had no knowledge of the contents of the documents, Mr.

Nkoko would not have been able to distinguish the irrelevant documents and concede admission of the non-contested ones. We hold therefore that failure to read exhibit P5 was not prejudicial to the interests of the appellant for his counsel was versed with the documents.

Exhibit P6 were the 99 cheques. After tendering them, PW1 explained what the cheques were all about and stated that the payee was either the appellant or Stano. In his defence the appellant testified that payments by the cheques were lawful payments to Stano for the materials supplied to PPCL. In the circumstances to hold that the appellant was prejudiced by not reading the cheques would be to expect too much from the trial court for nothing. We cannot, therefore in the circumstances, expunge any of the cheques, irrespective of whether they were read over to the appellant or his advocate or not.

Exhibits P7 and P10 are bulky bank statements stretching over 162 and 87 pages respectively. **Firstly,** it is least expected that a witness would read every detail of these entire documents, because not every detail would necessarily relate to the disputed money. **Secondly** during cross examination Mr. Nkoko for the accused person asked the witness many questions relating to the bank statements, and that to us, brought the relevant substance of the documents to the knowledge of the

appellant and his advocate, thereby meeting the objective of reading the document immediately after admission.

Exhibit P8 was a report on specimen signatures whose substance was well explained by PW7 at page 252 to 253 of the record of appeal. The expectation here is that Mr. Nkoko was sufficiently diligent to grasp the gist and substance of of the report.

Exhibits P9, P11, 12 and P15 were bank account opening forms (Equity Bank), bank statement, bank account opening forms (KCB Bank) and documents from BRELA respectively, all relating to Stano. Existence of Stano and its bank account were acknowledged by the appellant that his company had an account at Equity Bank. It is from that account that the bank statement was generated. Failure to read these documents would not in any way prejudice the appellant, for registering Stano at BRELA, opening the bank account and entries in it were all matters quite in his knowledge and none of such truths was disputed.

P14 was a seizure certificate. The details of the seizure certificate and what was seized were well detailed by the witness at page 285 of the record of appeal.

Finally, P16 was the appellant's own bank statement from KCB Bank, whose details are by all intents and purposes in the knowledge of

the appellant. In this case even by reading the submission of the appellant one notes clearly that the appellant understood the full substance of all exhibits.

Based on the foregoing discussion, the appellant was not prejudiced by tendering any document at the trial. In the premises, ground 6(ii) and (iii) has no substance and we dismissed it.

The other ground of a threshold nature, was a complaint in the supplementary memorandum of appeal, which is as follows:

> *"That the learned trial judge erred in law and fact to uphold the appellant's conviction without considering that the trial was defective for the failure to comply with the mandatory provisions of section 231(1) of the Criminal Procedure Act [Cap 20 R.E. 2002] now R.E. 2019."*

In supporting this ground, Mr. Nkoko submitted that the trial court did not explain to the accused his rights on how to defend himself including to call witnesses. He submitted that as long as the above provision was not complied with, the trial was vitiated. He relied on the cases of **Maduhu s/o Nigho v. R,** Criminal Appeal No. 560 of 2016 and **Simaton Patsoni @ Toshi v. R,** Criminal Appeal No. 167 of 2016 (both unreported). On that basis, the learned advocate moved the Court

to nullify the proceedings and the judgment, to quash the conviction and set aside all the sentences imposed on the appellant.

In reply to that ground, Mr. Msigwa contended that it is true that there is no evidence on record to demonstrate that section 231 was complied with, but the omission did not occasion a failure of justice, because **first** the appellant gave evidence on oath including tendering exhibits. **Second**, at page 305 of the record of appeal the appellant prayed to close his defence, at will with no compulsion from the trial court or anybody. Counsel for the respondent relied on the cases of **Chrizant John** (supra) and **Bahati Makeja v. R,** Criminal Appeal No. 118 of 2006 (unreported) moving the Court to dismiss that complaint because, not only that the appellant enjoyed the rights that he is complaining not to have been afforded, but also he was represented by counsel at the time that he is alleging that such rights were violated.

According to the submission of parties and what transpired at the trial, the relevant subsection of section 231 of the CPA which is complained of, although not specified, is necessarily sub-section (1) of that section, which provides:

> *"231.-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to*

require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted, the court shall again explain the substance of the charge to the accused and inform him of his right-

(a) to give evidence whether or not on oath or affirmation, on his own behalf; and

(b) to call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."

According to the record of appeal, it is indeed correct that when the prosecution closed its case on 16th November 2017, it is not on record that the rights provided at the above section were mentioned to the appellant or his advocate. Nonetheless, as indicated earlier on, the crucial question is whether such an irregularity occasioned a miscarriage of justice, as the omission was a procedural lapse.

In the case of **Bahati Makeja** (supra), while interpreting section 293 of the CPA which is applicable to trials in the High Court but which is also *in pari materia* with section 231 of the CPA this Court stated that:

> *"It is our decided opinion that where an accused person is represented by an advocate then if a judge overlooks to address him/her in accordance with s. 293 of the CPA the paramount factor is whether or not an injustice has been occasioned. In the current matter there was no injustice occasioned in any way at all. It is palpably clear to us that the learned judge must have addressed the accused person in terms of s. 293 of the CPA and that is why the learned advocate stood up and said that the accused person is going to defend himself on oath.* ***But even if the judge had omitted to do so, the accused person had an advocate who is presumed to know the rights of an accused person and that he advised the accused person accordingly and hence the reply."***
>
> [Emphasis added].

Like in the above case, at the trial, the appellant was represented by two learned advocates, Messrs Nkoko and Kiango and when the prosecution closed its case on 29th November 2017, Mr. Nkoko submitted that he was praying for time to prepare his client and on 11th

December 2017 he informed the trial court that the case was for the defence and he was ready to proceed with the defence. The appellant was sworn and he was led by his advocate and fully defended himself. In our view, although the trial court might not have explained the rights as provided under section 231 (1) of the CPA, still the appellant exercised the same rights. In any event, the appellant having been represented by counsel, it is our firm position that there was no injustice that was occasioned to the appellant. The decisions in **Maduhu s/o Nigho** (supra) and **Simaton Patsoni @ Toshi** (supra) are distinguishable because, before the trial court in those cases, the appellants were not represented by advocates. In the circumstances, the ground of appeal contained in the supplementary memorandum of appeal lodged in this Court on 12th December 2019, is hereby dismissed for want of merit.

The last issue of a threshold bearing was raised in ground 7 with two limbs. That ground is to the effect that:

> *"7. That, the first appellate court erred in upholding the trial court's decision without considering that;*
> *(i) Trial court's conviction was vitiated by the absence of section of the law under which conviction was based. Hence the trial court's judgment was vitiated*

by non-compliance of the mandatory provision of section 312 (2) (CPA, Cap. 20, R.E. 2002).

(ii) The trial court's judgment was faulty for being made from casual inferences and conclusions without analysing and evaluating (points of determination) the evidence on record contrary to case law."

Arguing in support of the first limb in respect of breach of section 312(2) of the CPA, the appellant, argued that after being found guilty, he was convicted without the trial court disclosing the law under which he was so convicted at page 903. The appellant relied on the case of **Shida Lwanda Aidan @ Kaka and Another v. R,** Criminal Appeal No. 166 of 2017 (unreported) and moved the Court to fault the conviction.

In reply to the above submission, Mr. Msigwa contended that although the Court did not cite the provisions upon which a conviction was entered on the same page as the conviction, the sections upon which the appellant was convicted, were referred to in the introductory part of the judgment, hence meeting the requirements of the above stated section. According to him, failing to cite the provisions on the same page as a conviction is not a fatal irregularity as the provisions were indicated elsewhere in the judgment.

Resolution of the above complaint will not take much of our time to resolve. We will start with the said section 312(2) of the CPA which provides that:

> *"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."*

In this case, at page 903 of the record of appeal, while convicting the appellant, the trial court stated:

> *"Out of the aforesaid, the court finds the prosecution case with substance, well proved beyond reasonable doubt and I hereby find the accused guilty in respect of all counts he was charged with and I convict him forthwith."*

So, we agree that indeed, the appellant is right in arguing that at page 903 when the trial court convicted him, it did not cite the sections under which he was convicted. However, paragraph one of the judgment at page 895 of the record of appeal, it is clearly shown which sections created each of the four (4) offences charged. It would have been different if throughout the judgment, there would be no provision creating any of the offences. In the circumstances we hold that as the

judgment refers to the sections creating the offence, the omission to write for the second time the same provisions creating offences at page 903 of the record of appeal close to the conviction clause is curable under the provisions of section 388 of the CPA. In the circumstances the first complaint of ground 7 has no merit.

The complaint of the appellant in the second limb of ground 7, is that the High Court erred to uphold a judgment in which the trial court did not evaluate the evidence adduced. According to him, that omission violated section 312(1) of the CPA and in his submission, he contended that the trial court did not analyse the evidence of witnesses in the judgment, relying on the case of **Shija Masawe v. R,** Criminal Appeal No. 158 of 2007 (unreported). He challenged the first appellate court to have supported such a judgment which had been reached without analysis of evidence.

Section 312(1) of the CPA which is alleged to have been breached provides that;

> *"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the*

court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."

With due respect to the appellant and his advocate, we wish to observe that whereas the complaint in the ground of appeal was that section 312(1) of the CPA was not complied with, the submissions of the appellant were supporting a complaint that the court did not analyse evidence. In supporting the violation of section 312(1) of the CPA, the appellant was supposed to submit in elaborating on which ingredients of a valid judgment were missing in the judgment of the first appellate court, which the appellant did not do. If it is for the fact that the trial court did not detail the points for determination or reasons for the judgment, we have reviewed the judgment of the trial court and we are satisfied that at pages 900 to 903 of the record of appeal, the trial magistrate stated the reasons for his decision. Among such reasons is that the cheques were forged by the appellant as he was custodian to them and because he never supplied anything to PPCL to entitle Stano to be paid anything as it was not its creditor under any arrangement. As the trial court gave reasons for its judgment, we find the second limb of the 7th ground devoid of merit.

At this point we are through with the grounds that were predicated upon underlying threshold issues and we are now aligned to start considering the remaining issues, but before we can get there, we think it is appropriate to put to the fore two principles that will guide us all along as we henceforth proceed. The **first,** is that on second appeal, the Court cannot readily disturb the concurrent findings of facts by the trial and the first appellate courts unless it can be shown that their decisions are demonstrably wrong or clearly unreasonable or the decisions are a result of a complete misapprehension of the substance, nature or non-direction on the evidence and or where there is violation of some principle of law or procedure that, in the process, occasioned a miscarriage of justice.

The **second** is the principle that, a new complaint which was neither raised nor considered by the High Court on first appeal, cannot be entertained by the Court on a second appeal – see **Diha Matofali v. R,** Criminal Appeal No. 245 of 2015, **Martine Masara v. R,** Criminal Appeal No. 428 of 2016 and **Mustapha Khamis v. R,** Criminal Appeal No. 70 of 2016 (all unreported) just to mention, but a few.

In respect of the latter point, Mr. Msigwa submitted that the complaints in grounds 14 and 15 were not raised at the High Court. He

therefore, argued that this Court has no jurisdiction to entertain the grounds of appeal and urged us to decline their determination. In rejoinder we did not hear Mr. Nkoko putting up a contrary view.

Nonetheless, we will determine whether Mr. Msigwa's contention has substance. According to the memorandum of appeal and the submission of the appellant, his grievance in the 14th ground of appeal has four (4) offshoots upon which the appellant is complaining against the first appellate court's act of upholding the appellant's conviction by the trial court. **Firstly,** that PW7, a police officer and handwriting expert did not explain his qualifications before he could adduce his evidence. **Secondly**, that the specimen handwriting of the appellant sent to PW7 were not established to belong to him. **Thirdly,** that the chain of custody of the documents from the collector of the documents, to the investigator to PW7 was not established and proved and **fourthly,** that PW7 failed to lay foundation as to how he came into possession of the documents.

The 15th ground was based on two heads of arguments. **One**, was that the total sum of money on the tendered cheques is different from TZS. 911,382,335.50 which is the amount agreed to have been debited from PPCL account and credited to the appellant's account and his

business firm's account. **Two**, there was evidence that the appellant was doing business with PPCL because in 2012 four cheques were paid in his own name and **three**, that the prosecution witnesses failed to tell the court who were PPCL's suppliers. These complaints, according to Mr. Msigwa were not raised, argued or determined at the level of the first appellate court.

In the search for truth about the present complaint, we have thoroughly reviewed the record of appeal, particularly the sixteen-point petition of appeal with complaints of the appellant form the trial court to the High Court which is contained at pages 908 to 914 of the record of appeal. We have as well, carefully compared those complaints with the above grounds complained of, and we are satisfied that the complaints in grounds 14 and 15 were not raised or argued at the High Court, except, the point raised in ground 15(i) on the total amount of the 99 cheques which issue is also raised in ground 4(i), the rest matters raise new issues which this Court cannot entertain. For that reason, we decline to attend to grounds 14 and 15 by way of appeal, except ground 15(i) which is considered in this judgment along with grounds 4 and 16.

With those two grounds aside, from this point onwards we shall concentrate our full attention to the remaining grounds, which are

grounds 1, 2, 3, 4, 8, 10, 11, 12, 13, 15(i) and 16, which according to convenience, some will be determined together and others on standalone basis.

As the central question from whose determination, solutions to all other charged offences depend, is forgery, we will start with grounds 10, 11(ii) and (iv), 12 and 13 in which the basic complaint is that forgery was not proved at the trial. Those grounds are as follows:

> *"10. That, the first appellate court erred in law and fact by upholding the appellant's conviction relying on the improbable, incredible and unreliable oral evidence of PW2 as circumstances of the case indicate that PW2 knew about her signatures on the cheques and authorized the same.*
>
> *11(ii). Allegation that the appellant wrote cheques (P6) to pay himself without authorization of PW2 is an afterthought.*
> *(iv). It is unfathomable that PW1, PW3 and PW6 working under one roof would not notice the number of cheques used for unauthorized transactions.*
>
> *12. That, the first appellate court erred in law and fact by upholding the appellant's conviction in counts of*

forgery based on circumstantial evidence that the appellant is the only one who filled or caused to be filled all disputed cheques (Exhibit P6 collectively) while it failed to properly analyse and evaluate elements of circumstantial evidence as they are wanting, hence arriving at an erroneous decision.

13. That, the first appellate court erred in law by upholding the trial court's decision that was biased, double standard and based upon the prosecution's written submission believing that PW1, PW2 and PW6 were acquainted with the handwriting of the appellant on disputed Exhibit P6 while;

(i) He failed to believe PW9, PW10 and PW11 who testified that they were acquainted with the signature of PW2 as her company had regular transactions at their bank (AZANIA).

(ii) PW9, PW10 and PW11 gave unchallenged evidence that the signatures on the cheques were authenticated either manually/electronically and they were genuine signs belonging to PW1 and PW2."

As far as proof of forgery of the cheques was concerned, PW1 testified at page 227 that none of the 99 cheques in dispute was paid to any of their company suppliers, the cheques were paid to Stano which was not one of their customers. He stated that he knew the appellant's handwriting and he is the one who wrote the cheques. PW2, a co-

signatory to PPCL's account, at page 235 to 236 of the record of appeal stated that the 99 cheques were prepared by the appellant because she knew well his handwriting as she had worked with him on a daily basis since 2011 to 2016 when he was arrested following the fraud leading into the case at hand. Her evidence was corroborated by that of F8215 DC Alistides Rutagwerera Mashauri, (PW7) who was the handwriting expert. According to his evidence, PW7 was a trained handwriting expert within the meaning of section 47 of the Evidence Act and was appointed to act as such under section 205(1) of the CPA after being gazzetted in GN No. 180 of 2015. In his study, he examined handwritten texts from the appellant marked "C1 to C7" and concluded that those undisputed documents were written by the same person as that who wrote on the cheques which were marked "A1 to A99". He found out that no part of any cheque had any handwriting of PW2 who had also submitted sampled written documents marked "B1 to B7". In reaching to the findings he made, PW7 used Video Spectral Comparator (VSC) 6000, an advanced imaging device for document examination for purposes of perfect detection of forgeries on cheques. Thereafter he compiled a report at page 601 to page 607 of the record of appeal which was tendered before the trial court as exhibit P8 without objection from Mr. Nkoko, learned defence advocate.

In addition to the above prosecution evidence on the issue of forgery, the appellant's own cautioned statement added considerable credit to it. It was admitted as exhibit P13 at page 283 of the record of appeal and according to that document, the appellant, revealed himself being a sole instrumentality in the fraud complained of. His confession recorded voluntarily at the Police in Kiswahili at page 782 of the record of appeal is thus:

> *"**SWALI:** Je unaitambua kampuni iitwayo STANO ENTERPRISES?*
>
> ***JIBU:** Ndiyo ninaitambua ni kampuni yangu niliisajili BRELA mwaka 2010/2011 kama sole proprietor na inajishughulisha na usambazaji wa food stuffs and animal feeds raw materials ilikuwa na ofisi zake MBAGALA ila kwa sasa ilishafungwa na inafanya kazi kwa oda tu. Kampuni hiyo ina akaunti katika benki ya EQUITY ambayo ipo tawi la Kariakoo na akaunti namba yake ni 3211121395.*
>
> ***SWALI:** Je kampuni ya STANO ENTERPRISES imeshafanya biashara na kampuni ya Professional Paints Center Limited?*
>
> ***JIBU:** Hapana haijawahi kufanya biashara na kampuni hiyo.*
>
> ***SWALI:** Je, pesa zilizokuwa zinalipwa kwenye kampuni ya STANO ENTERPRISES kutoka*

PROFESSIONAL PAINTS CENTER LIMITED zilikuwa ni za nini?

JIBU: *Pesa hizo mimi ndie nilikuwa nikiiba kutoka kampuni ya PROFESSIONAL PAINTS CENTER LIMITED na kuziweka kwenye kampuni yangu ya STANO ENTERPRISES.*

SWALI: *Je wewe ulikuwa unaziwekaje wakati wewe haukuwa signatory wa kampuni?*

JIBU: *Mara nyingi wakurugenzi ambao ndio watia sahihi walikuwa wanasaini kabisa na kuniachia mimi nijaze jina la kampuni inayotakiwa kulipwa ndio nilikuwa natumia mwanya huo kuandika jina la kampuni yangu na kwenda kuziweka kwenye kampuni yangu.*

SWALI: *Je umeweka mara ngapi?*

JIBU: *Sina kumbukumbu vizuri ila nakumbuka niliaza kuweka Januari 2015 na sina uhakika pesa zimeishafika kiasi gani."*

The Kiswahili dialogue above between Assistant Inspector Mohamed and the appellant being part of the cautioned statement, can be translated as nearly as possible to the following English text:

*"**QUESTION:** Do you know STANO ENTERPRISES COMPANY?*

ANSWER: *Yes, I know it, and I am the owner. It was registered at BRELA in the year 2010/2011 as the sole proprietor. Its business is the supply of food stuffs and raw materials for animal feeds. It had offices at MBAGALA but currently it is closed for day-to-day operations, it is doing business as and when there are specific orders. The sole proprietor operates account No. 3211121395 with Equity Bank at its Kariakoo Branch.*

QUESTION: *Has STANO ENTERPRISES ever had business dealing with PROFESSIONAL PAINTS CENTER LIMITED?*

ANSWER: *No, the two have never had any business relationship before.*

QUESTION: *The money which was paid to STANO ENTRPRISES by PROFESSIONAL PAINTS CENTER LIMITED was in respect of what services?*

ANSWER: *That was the money which I used to steal from PROFESSIONAL PAINTS CENTER LIMITED and deposit it in my company's account.*

QUESTION: *you were not the company's signatory, how then, did you manage to debit money from their bank account to your company's bank account?*

ANSWER: *On many occasions, the directors used to sign cheques and leave blank spaces where I could fill in the name of the payee. I took advantage of that*

loophole to fill in the name of my business firm as a genuine payee and that way the money was being debited and credited in my company's account.

QUESTION: *how many times did you do such transactions?*

ANSWER: *I cannot remember with exactitude, but I started the process around January 2015 and I am not certain as to how much amount I might have debited from that account and credit my company's."*

The above absolute admission and unqualified confession of the appellant, in our view, perfectly harmonized with and complimented the prosecution in terms of adding not only weight but also credibility of the evidence of PW1, PW2 and PW7 on the issue of proof of forgery of the cheques.

Before we can conclude the issue of forgery, the appellant particularly in ground 13, argued that the trial court was supposed to disbelieve the above evidence of PW1, PW2 and PW6 (who were working with the appellant for four years) and believe that of PW9, PW10 and PW11 (the bankers at Azania Bank) especially on the issue of handwriting. We have carefully reviewed the evidence of those witnesses and we have noted that PW9 at pages 260 to 262 of the record of appeal does not testify on any aspect of authenticity or

otherwise of any cheque. Thus, her evidence was irrelevant in the context of the issue of forgery. Grace Fintan Wang'anya (PW10), a supervisor in customer service department, testified that the payee was regularly Stano and she used to verify the signatures of the signatories before payment could be effected. Doris Swai Malya (PW11) testified that Stano was a regular payee from PPCL and that the latter never asked them to stop any payment. This is the evidence that the appellant is challenging the first appellate court to have disbelieved and upheld his conviction for forgery.

On our part, we uphold the position of the two courts below, of believing the prosecution witnesses because **first,** PW2 was the actual signatory of the cheques and she disputed counter-signing any of them. **Second,** PW7 the hand writing expert confirmed not only that the alleged signatures of PW2 were not signed by PW2 but also that such signatures on the cheques were signed by the appellant. Expert evidence like that of PW7 to the trial court was not binding, but for the trial court to disregard the expert evidence, it had to have valid reasons to do so – see **Fayed Hussein v. R,** (1957) EA 844 and **Hassan Salum v. R** (1964) EA 126. The two courts therefore, were entitled to believe the evidence and act upon it in the context of section 47 of the Evidence Act.

There were allegations, particularly in ground 12 that forgery was based on circumstantial evidence, which is partly true, in that no person physically saw the appellant signing the cheques, but it is also true that exhibit P13, the cautioned statement was recorded by the appellant himself. The law requires that for circumstantial evidence to hold the accused guilty, the evidence must be watertight and amongst the tests set in the case of **Mark Kasimiri v. R,** Criminal Appeal No. 39 of 2017 (unreported) is:

> *"That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else."*

In our view, this test was passed, because in the instant case the appellant is the only person who handled the cheques and presented them to either his own bank account or to Stano's bank account and enjoyed their proceeds.

That said, we are satisfied that the offence of forging all 99 cheques was proved beyond reasonable doubt and the appellant's conviction in that respect cannot be faulted. Accordingly, grounds 10, 11(ii) and (iv), 12 and 13 are hereby dismissed for want of merit.

Before crossing over to the next set of grounds for consideration, it is significant that we make one observation as regards two categories of offences, uttering the false documents and obtaining money by false pretence. In this appeal, there are no distinct grounds challenging proof of these two offences. Proof of them depended on proof of forgery. If proof of forgery succeeded, proof of the two offences would naturally succeed and *vice versa*. Thus, by holding that forgery of the 99 cheques, was positively proved against the appellant as we have just done, it follows naturally that presenting the cheques for encashment was uttering false documents in the context of section 342 of the Penal Code. The same is the case with obtaining money by false pretence. An admission by the appellant that he was the beneficially of the proceeds of the forged cheques, was proof of the offence of obtaining the money illegally contrary to section 302 of the Penal Code. Thus, both uttering false documents and obtaining money by false pretence were proved at the trial, because in any event, presenting the cheques for encashment by the appellant was not one of the disputed acts and even

appropriating their proceeds by the appellant and Stano, his business firm was never contested.

Having done with the first three categories of offences, that is forgery, uttering false documents and obtaining money by false pretence, next in logical sequence for our consideration are grounds 1, 2 and 3 in which the appellant is faulting the first appellate court for upholding his conviction for acts of money laundering. Those grounds are to the effect that;

> *"1. That, your lordships, the first appellate court erred in law and fact by upholding the trial court's decision that the offence of money laundering was proved while;*
> *(i) It failed to notice that the three stages of Money Laundering (placement, layering and integration);*
> *(a) Were not satisfactorily established.*
> *(b) Were not sufficiently demonstrated by the evidence on record.*
> 2. *That, the first appellate Judge, erred in law and fact in holding that as long as forgery is proved: Money Laundering is automatically committed hence arriving at an erroneous decision.*
> 3. *That, the first appellate court arrived at an erroneous decision by upholding the trial court's decision on counts of money laundering while;*

(i) The investigator (PW5) never suspected and concluded that those transactions involved in exhibits P6 collectively were money laundering transactions in his investigation.

(ii) The offence of money laundering was fabricated against the accused merely to deny his fundamental and constitutional right to bail.

In support of the above grounds, the appellant submitted that according to the definition of money laundering contained at section 3 of the AMLA, the offence was not established because the aspects of placement, layering and integration were not, in his case, established by the prosecution. He referred us to the case of **R v. Maxwell Namata and Another,** Criminal Case No. 45 of 2013 (unreported), which was decided by the High Court of Malawi sitting at Lilongwe, where that Court stated that in order to hide traces of the offence, money laundering takes shape after establishment of placement, layering and integration.

In reply to those grounds, Mr. Msigwa submitted that the offence of money loundering is both a process under section 3 of the AMLA as well as an offence under section 12 (a) to (e) of the same Act. He contended that as the appellant was charged under section 12(a) of the

AMLA, money laundering was proved after proving forgery which is a predicate offence. The learned Senior State Attorney referred us to the case of **DPP v. Harry Msamire Kitilya, Shose Sinare and Sioi Solomon,** Criminal Appeal No. 105 of 2016 (HC) (unreported), where the High Court observed that for an offence under section 12 to be established, it does not necessarily need to have all the processes under section 3 of the AMLA proved.

In rejoinder Mr. Nkoko submitted that the offence which his client admitted *vide* the cautioned statement, at page 782 of the record of appeal is theft and not obtaining money by false pretence. So, according to him money laundering as an offence was not established.

The contentious issue as indicated above is whether for the offence of money laundering to be proved it must be shown that there was placement, layering and integration in terms of movement of the proceeds of crime, or proof of a predicate offence like forgery is enough to hold a suspect liable for the offence under the AMLA. We will start with section 3 of the AMLA which is an interpretation section in the AMLA statute. It provides:

> *"money laundering" means engagement of a person or persons, direct or indirectly in conversion, transfer, concealment, disguising, use or acquisition of money*

or property known to be of illicit origin and in which such engagement intends to avoid the legal consequence of such action and includes offences referred in section 12;"

As this section refers to section 12 of the AMLA, we think, it is significant also to consider section 12(a) under which the appellant was charged. It provides as follows:

"12. A person who-

(a) engages, directly or indirectly, in a transaction that involves property that is proceeds of a predicate offence while he knows or ought to know or ought to have known that the property is the proceeds of a predicate offence;

commits offence of money laundering".

As section 12(a) of the AMLA, refers us to a predicate offence, it is of importance to revisit the same law in order to investigate how does it define "a predicate offence". A list of predicate offences under that law is contained at section 3 of that Act which lists thirty-one offences. As the offences under that law are that numerous, we will only quote the part that is relevant to this judgment, that is section 3(o), which reads:

"predicate offence means:"

(a) to (n) N/A

(o) forgery

(p) to (ee) N/A"

[Emphasis is added]

Forgery is therefore a predicate offence as per both section 3 and 12(a) of the AMLA. On this this point, we are of the settled position that, for the offence of money laundering under section 12 of the AMLA to be proved, the prosecution need not necessarily prove the process of laundering the money so to speak, that is, placement, layering and integration. It suffices to prove that the suspect dealt with the proceeds of a predicate offence by engaging in a transaction involving such proceeds. We however agree with the appellant that the prosecution did not prove that there was placement, layering and integration.

There was too, a complaint that the investigator did not testify that the offence of money laundering was committed. Respectfully, that complaint is superfluous, for proof of money laundering in the context of the crimes in this case were proved by PW1, PW2 and PW7 whose evidence on forgery was corroborated by that of the appellant himself by way of a cautioned statement. Another argument that does not lead us anywhere was the complaint that the offence of money laundering was included in the charge in order to deny the appellant bail. We do

not think that argument is fair or even true, in the face of the evidence of PW1, PW2 and PW7, who proved forgery, a predicate offence hence, money laundering. In our view, the appellant was charged for the offence of money laundering, because he committed the offence and not because of seeking to deny him bail.

In this case, the offence of money laundering in the context of section 12(a) of the AMLA was proved when determining grounds 10, 11(ii) and (iv), 12 and 13 in which forgery, being a predicate offence, was established. In the event, we are unable to fault the findings of the court bellow in view of the appellant's complaints. In the circumstances, although the first ground of appeal is allowed, the second and the third are dismissed for want of merit.

The remaining grounds, (grounds 4, 8, 11(i) and (iii), 15(i) and 16) will be determined sequentially and where convenient, in groups except that ground 8 will be considered on its own and because it is touching on the issues of sentencing, we think, it is appropriate and logical to make it the last and resolve it at the very end of this judgment. So, we proceed to grounds 4, 15(i) and 16, which are to the effect that:

"4. *That, the first appellate Court erred in law and fact by sustaining the trial court's decision while the case was not proved beyond reasonable doubt as:*

(i) There is variance as regards the total amount of money allegedly obtained by the appellant and the evidence on records.

(ii) There is variance between the charge and Exhibit P11 regarding the number of cheques allegedly deposited in the Bank account named STANO ENTERPRISES.

15(i) The summed value in all cheques, in exhibit P6 collectively does not tally with the stated amount (TZS. 911,382,335.50) mentioned in the evidence.

16. That, the first appellate court failed in its duty to step into the shoes of the trial court in order to evaluate and analyse the evidence in the form of rehearing as:

(i) Exhibit P11 (Bank statement of STANO ENTERPRISES) was in contradiction with exhibit P10 collectively as number of cheques does not tally with one another.

(ii) Exhibit P10 (Bank statement of Professional Paints Canter Limited) was in contradiction with the evidence on record as the number of cheques paid to STANO ENTERPRISES Account differs between the charge and evidence (exhibit P10).

(iii) Exhibits tendered (P11) did not reflect the exact picture of its transactions history from year 2010 when it was incorporated."

Our understanding of the complaints of the appellant in these grounds is **first**, that there is a mismatch as to the amount which is alleged to have been swindled as per the charge sheet and the evidence tendered to support that charge. The **Second** complaint seems to us to be, that there is a variance in the number of cheques between the charge and exhibit P11, the appellant's business firm's bank statement. **Third,** that the number of cheques which debited the money from PPCL bank account does not match with the number of cheques that were deposited in the account of Stano. **Fourth,** that the bank statement of the appellant's entity did not reflect the exact transactions that had been carried on at that account since 2010 when it was opened to the end of the statement in 2016.

We will start with the first complaint in grounds 4(i) and 15(i) that the amount of money the appellant was ordered to pay to PPCL was not supported by evidence. According to him, although he was ordered to pay TZS. 911,382,335.50, the authentic amount on exhibit P6, (the 99 cheques) was TZS. 824,308,843.50. Mr. Komanya argued this ground together with grounds 1, 2, 3 and 12, however we did not hear him,

particularly stating his position on the difference in figures that the appellant pointed out as his complaint.

Nonetheless, we will attend to that issue on our own, for it involves, if true, a misapprehension of evidence, in which case we, as a second appellate court, are duty bound to interfere with, and if necessary, disturb the concurrent findings of two lower courts. See **Hassan Mzee Mfaume v R,** [1981] TLR 167 where it was held that:

> *"(ii) a judge on first appeal should re appraise the evidence, because an appeal is in effect a rehearing of the case.*
>
> *(iii)Where the first appellate court fails to re-evaluate the evidence and to consider material issues involved on a subsequent appeal the court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."*

Other decisions on the same point include **Lukanguji Magashi v. R,** Criminal Appeal No. 119 of 2007 and **John Balagomwa and Two Others v. R,** Criminal Appeal No 56 of 2013 (both unreported).

As held in **Hassan Mzee Mfaume** (supra) we are mandated therefore to get into the shoes of the two courts below and re-evaluate the evidence or remit the matter to the High Court to do it, but we will not take the latter stance because that will lead to unnecessary delay in

determining this matter. So, in attending to this complaint we added up the figures on each of the 99 individual cheques and we found out that the total amount is not the said TZS. 911,382,335.50, but it is TZS. 824,308,843.50 as submitted by the appellant. That is to say, the amount that was proved by presentation of the cheques is the latter figure and not TZS. 911,382,335.50. However, we do not agree with the appellant that the charge had a different figure from the amount proved. We take that position because, the total amount of money in the charge sheet is equal to the amount in exhibit P6 (the cheques) which the prosecution tendered as evidence. The other way of saying it, is this, whereas the prosecution proved PPCL to have been defrauded the amount TZS. 824,308,843.50, as per exhibit P6, (the 99 cheques) instead of abiding by that amount, the court quoted a wrong figure, TZS. 911,382,335.50 and ordered the appellant to repay it to the PPCL, which amount is wrong for there is no basis upon which the court could have arrived at it. The appellant's argument that, because of that variance in figures, this Court has to hold that the entire case in respect of all counts was not proved, has no merit. In our view, the remedy to that anomaly is not to allow the appeal, rather it is to rectify the amount that the appellant was ordered to repay, by replacing it with the appropriate figure of TZS. 824,308,843.50 which was proved at the trial.

That said, the complaint of the appellant at grounds 4(i) and 15(i) relating to the total amount of the cheques has merit.

The complaint in grounds 4(ii) and 16 (i) and (ii), is that although the prosecution's case was that the money was defrauded by using the 99 cheques, the cheques that were deposited in Stano's bank account at Equity Bank as per exhibit P11, from PPCL were 105 in number. The appellant's complaint was that some payments to Stano from PPCL were lawful. He argued further that, if PW1's testimony was that PPCL never had any genuine business with Stano, then PW1's credibility is questionable for failing to complain in respect of all 105 cheques.

Resolution of this complaint will not detain us for long because, it is the choice of Director of Public Prosecutions (the DPP) to charge a suspect with only the offences that she has ability to prove beyond reasonable doubt against that suspect under sections 132 and 133 of the CPA. There is no law in existence that compels the DPP to charge a suspect with all suspicious transactions or acts that she has no evidence to prove against the suspected offender. Thus, the DPP was at liberty and had a prerogative to charge any offences and leave out others, especially those, that she did not have enough evidence to substantiate. It would therefore be erroneous for us to hold, as the appellant would wish us to do, that because there are some cheques that were paid to

Stano but were not made part of the charge, then the case against him was not proved beyond reasonable doubt. In determining whether an offence is proved or not, the court was not bound to look at the offences that the appellant was not charged with, rather, the court was duty bound to weigh and consider the evidence on record to determine the charge which is presented before it. It is also not correct to determine the credibility of a witness by considering matters out of the case before the court. We are therefore of a firm position that grounds 4(ii) and 16 (i) and (ii) have no merit.

The complaint in ground 16(iii) is to the effect that, although Stano's bank account was opened in 2010, the transactions subject of the case, do not show the history or entries in his bank account from the year 2010. We have failed to deduce any grievance from that complaint, because as stated by the appellant himself, the offences according to the charge were committed from 2012 to 2016, and that was the evidence of all witnesses. There was no complaint that the appellant committed any offence in 2010 or 2011. It follows therefore, that any entries or details of Stano's account in 2010 or 2011 would have no relevance to the case. In our view the complaint in this limb of ground 16 has no substance.

Finally, except for the finding we have made at ground 4(i) that the money proved to have been defrauded is TZS. 824,308,843.50 and not TZS. 911,382,335.50 as shown in the judgment, the 4th and 16th grounds of appeal have no merit and we dismiss them.

Next for our attention is ground 11 which had four limbs but having resolved limbs (ii) and (iv) together with grounds 10, 12 and 13, our focus at the moment will be the remaining segments of that ground which are limbs (i) and (iii). In those two limbs, the complaints are that:

> *"11. That, the first appellate court erred by upholding the appellant's conviction based on incredible, unreliable and unsafe oral evidence of PW1, PW2, PW3 and PW6 that it is the appellant who forged disputed exhibits (Exhibit P6 collectively) while;*
> *(i) Considering that audits were regularly done and no loss detected during the 5 years period, PW1 and PW2's evidence was merely concocted to implicate the accused.*
> *(ii) and (iv) (already resolved with grounds 10, 12 and 13).*
> *(iii)PW3 and PW6 were witnesses with interest and accomplices."*

In support of the first point, the appellant submitted that PW1, PW2, PW3 and PW6 testified that there were annual audits being carried out with PPCL books of account, how could have the scam escaped

detection of both internal and external audits if the evidence of these witnesses was reliable. He moved the Court to fault the first appellate court to have accorded weight to the evidence of these witnesses, who failed to detect the fraud all along while there were all the time regular audits.

The other complaint of the appellant is that PW3 and PW6 had interest to serve, because the alleged forged bank statements were taken from the bank by PW3. The appellant wondered how could he have been charged alone leaving out PW6 while the latter was his supervisor and was participating in bank reconciliation of PPCL books of account. He submitted that if the charge was to be fair, then PW6 was supposed to be joined to the case as a co-accused. He faulted the second appellate court to have concurred with the trial court which had taken the evidence of these witnesses as sound and credible.

Although by way of introduction, Mr. Komanya informed us that he would argue ground 11 with grounds 10 and 13, we did not hear him making a serious rebuttal challenging the submissions by the appellant.

On this ground, (11(i)), if we were to agree with the appellant's argument that because the systematic acts of forgery were not detected over a long period of time despite periodic audits, we would also be

holding as a legal position that offences committed over long periods of time without being detected by official detection systems are not eventually triable upon discovery that such crimes were indeed committed. With respect to the appellant, we cannot agree with him. Regarding his complaint in that respect, our firm position is that, the fact that a crime remains undetected for a long time, despite periodic audits, cannot in itself mean that the culprit should go scot-free even after detecting the fraud. So, we find no merit in the argument of the appellant in supporting the first limb of the 11th ground of appeal.

The argument that PW6 was supposed to be made a co-accused is misconceived because a decision to prosecute and who to charge is the exclusive domain of the DPP in whom the sole discretion and mandate dwell. No entity or person including the appellant shares those powers of the DPP.

The final appellant's argument in this ground is that PW3 and PW6 had interests to serve because they were employed by the complainant, PPCL. The argument being that they cannot have given evidence to the detriment of their employer's interests. This argument although sounding logical on the surface, with respect, the same has no foundational legal substance. **First,** there is no law in existence in this

jurisdiction which prohibits any employee to give evidence in favour of his employer against a fellow employee who commits criminal offences. **Second**, the evidence of those witnesses was necessary because they knew the appellant and his roles in the company and his participation in the offences charged. **Third,** the appellant did not indicate to us that the challenged witnesses were disqualified to give evidence under section 127 (1) of the Evidence Act which provides that;

> *"Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause."*

That said, we find nothing lawful that would have led the two courts bellow to discredit the evidence of PW3 and PW6 or any other witness for being related to PPCL, the complainant. In the circumstances the third limb of the 11th ground of appeal has no merit.

We observed earlier on that we would determine the 8th ground of appeal after we had resolved all others. That was the plan because the complaints in that ground were oscillating around issues of sentencing, which aspect is always considered as the last in a legal process, where consideration of the sentence is necessary. That ground is as follows:

"8. That, the first appellate court erred in law and fact by upholding the appellant's conviction and sentence while the trial court failed to abide by sentencing principles and mitigating factors as:

(i) The appellant being a first offender was entitled to a lower sentence.

(ii) The trial court failed to pronounce at the end of sentence that all jail sentences have to run concurrently.

(iii) The trial court failed to consider time period the appellant spent in custody waiting for final determination of the trial that is from 06.06.2016."

This ground of appeal, calls upon this Court to vary or reverse the sentences of two lower courts, which entails an interference with those courts' discretion. That standpoint is hardly ever taken by this Court. The position on the issue was pronounced in the case of **Uhuru Jacob Ichode v. R,** Criminal Appeal No. 462 of 2016 (unreported), where this Court observed that:

"As a general rule, the Court of appeal will not readily interfere with the exercise of discretion of a judge when passing sentence, unless it is evident that it has acted on a wrong principle, or overlooked some material factors."

According to this Court's decisions in **Selemani Makumba v. Republic** [2006] TLR 379 and **John Mbua v. R**, Criminal Appeal No. 257 of 2006 (unreported), the Court can also interfere with the sentencing discretion of the trial court when the sentence meted is manifestly excessive or patently inadequate. With the above caution in mind, we will now proceed to consider the eighth ground which is subdivided in three parts.

The complaint in ground 8(i) was that, as the appellant was the first offender, he was entitled to a sentence or sentences with less severity than those imposed. He cited to us several decisions of this Court including **Uhuru Jacob Ichode** (supra). In respect of this complaint, Mr. Msigwa submitted that the trial court was right and it should not be faulted, we however, did not benefit from his reasons for his submission, because he offered none.

Nonetheless, we will determine this ground on our own according to the law. In terms of the proceedings of 19th March 2018 as recorded at pages 903 and 904 of the record of appeal, after conviction of the appellant, part of the mitigation of the appellant was that he was the first offender. The appellant's argument was that the mitigating factor and other factors were not considered. On this argument, the appellant

is both right and also wrong. He is right in some counts and wrong in others and we will demonstrate how.

Starting with the offences of forgery of cheques and uttering the false documents. In terms of sections 338 (quoted earlier on) and 342 of the Penal Code, the maximum punishment provided for those offences is imprisonment for life. In our view therefore, imprisonment of 7 years in respect of forgery and uttering false documents was proper sentence, in that mitigation factors were considered even by implication otherwise the appellant would have been sentenced to life imprisonment, which is the sentence prescribed for those offences. For avoidance of doubt, we refer to section 342 of the Penal Code providing for the punishment for uttering a false document. It provides:

> *"342. Any person who knowingly and fraudulently utters a false document is guilty of an offence and is liable to the punishment, provided for in respect of the offence of forgery in relation to that document."*

As the punishment provided for forgery is life imprisonment then uttering a forged cheque in the context of the above section is life imprisonment. That is why we have stated above that 7 years imprisonment in respect of uttering the forged cheques is an appropriate

sentence. So, we do not agree with the appellant that the mitigation factors were not considered in respect of the above two stated offences.

However, that is not the case with respect to forgery of the bank statements and obtaining money by false pretence in terms of sections 337 and 302 of the Penal Code providing punishments for those offences respectively. The sections provide as follows:

> *"337. Any person who forges any document is guilty of an offence,* ***and liable****, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided,* ***to imprisonment for seven years.***
>
> *302. Any person who by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen, is guilty of an offence and is liable* ***to imprisonment for seven years."***
>
> [Emphasis added]

On forgery of the bank statements in respect of counts 397 to 419 and obtaining money by false pretence for counts 100 to 198, the appellant was imprisoned for the maximum jail term provided, which is 7 years. We think that was not right, because it does not suggest that

mitigation factors were considered, particularly that the appellant was the first offender. In the case of **Gideon Nelson Mapunda v. R** [1982] TLR 318, this Court held that:

> *"While we agree that corruption must be vigorously discouraged, we think that the maximum sentence should rarely be imposed for a first offender as that will have no margin for punishment for a subsequent or particularly grave and serious offence".*

For that reason, we think interference with the sentence regarding forgery of the bank statements and obtaining money by false pretence, is a deserved measure and we will adjust the punishment later on, in the judgment, to reflect consideration of the mitigation factor.

Next in line for our consideration, is the sentence that was meted by the trial court in respect of Money Laundering and upheld by the first appellate court. We need to determine whether the sentence was lawful or the appellant's complaint has merit, that the sentence is illegal.

As regards money laundering, the punishment section in the charge sheet is section 13(1)(a) of the AMLA which provides that:

> *"13.-(1) Any person who contravenes the provisions of section 12 shall, on conviction-*

(a) if the person is an individual, be sentenced to a ***fine not exceeding five hundred miliion shillings and not less than one hundred million shillings*** *or an amount equivalent to three times the market value of the property, whichever is greater* ***or to a term of imprisonment not exceeding ten years and not less than five years."***

In respect of this offence, in the context of the appellant's complaint, we find no error because the fine imposed was the minimum provided which is TZS. 100,000,000/= and the alternative jail term of imprisonment was six years. According to the law above, when the offence of money laundering is proved, the sentence is between five and ten years. In this case the term of imprisonment imposed by the trial court being six years in respect of each count, it is quite within the range between the two limits. For that reason, this Court cannot interfere with the sentences meted for the offences of money laundering. We are therefore done with the appellant's complaints in respect of the extent of the sentences imposed as raised at ground 8(i), in which case we shall then proceed to ground 8(ii).

Arguing ground 8(ii), the appellant submitted that, as the offences with which he was convicted were committed in the same transaction, the sentences for the counts in all the four categories of offences were

supposed to be directed to run concurrently. His complaint was that, according to the judgment, the sentences which were imposed on him were ordered to run concurrently within the same offence. For instance in obtaining money by false pretence the sentence of 7 years was ordered to run concurrently with the 99 counts for that offence only but not with other offences like forgery and others.

In reply to this complaint Mr. Msigwa agreed that the sentences were supposed to be ordered to run concurrently as argued by the appellant and he supported the appellant. This issue, will be disposed of fairly quickly because there is in place statutory guidance as well as many decided cases on the very aspect. Section 168(2) of the CPA provides that:

> *"Where a person is convicted at one trial of two or more offences by a subordinate court the court may, subject to the provisions of subsection (3), sentence him for those offences to the several punishments prescribed for them and which the court is competent to impose; and those punishments when consisting of imprisonment, shall commence the one after the expiration of the other in such order as the court may direct, unless the court directs that the punishments shall run concurrently."*

The position in the above section has already been interpretated by this Court. In a recent case of **Ramadhani Hamisi @ Joti v. R,** Criminal Appeal No. 513 of 2016 (unreported), after having considered many of its previous decisions and even from the neighbouring Republic of Kenya, this Court observed as follows:

> *"The law is settled that the practice of the courts in this jurisdiction is that, where a person commits more than one offence at the same time and in the same series of transaction, save in very exceptional circumstances, it is proper to impose concurrent sentences."*

In reaching that observation, this Court considered several decisions including **Festo Domician v. R,** Criminal Appeal No. 447 of 2016 and **Peter Mbugua Kibui v. R,** Criminal Appeal No. 66 of 2015 (both unreported), the latter being from the neighbouring Republic of Kenya.

We are bound by the above authorities. As the offences of forgery, uttering false documents and obtaining money by false pretence were committed in the same transaction, the sentences imposed upon the appellant for those offences must have been directed to run concurrently. Accordingly, the appellant's complaints in ground 8(ii) have merit in respect of the three offences mentioned.

However, the sentence of 6 years that was imposed upon the appellant following his conviction in respect of each of the 99 counts of money laundering would not legally be ordered to run concurrently with the other sentences because it had a fine option of TZS 100,000,000/= on each of the counts amounting to TZS 9,900,000,000/= which the appellant had to pay in case he opted not to go to jail. Had the offence been under the Penal Code the relevant law would have been section 29(e) and the proviso to section 36 both of the Penal Code in which case, the appellant would either pay the full fine of TZS 9,900,000,000/= or serve all years imposed on each of 99 convictions in respect of money laundering counts. But as we did not find any section in the AMLA *in pari materia* with the above section of the Penal Code, the appellant gets the benefit. Nonetheless, the imprisonment sentence in money laundering convictions cannot run concurrently with other sentences because it has a fine option. Thus, the complaint in the second limb of the 8th ground has no merit in respect of the sentence meted for money laundering offences. That disposes of the second part of the 8th ground of appeal. We shall then draw to the very last part of this judgment, ground 8(iii).

The third complaint of the appellant in the 8th ground of appeal is that at the time of sentencing him to imprisonment, the trial court was

supposed to consider and apply the period from 6th June 2016 when he was arrested and held in custody till the date that he was convicted and sentenced to imprisonment, to reduce his jail term after conviction. In support of his position, he cited to us section 172(2)(c) of the CPA and relied on the case of **Katinda Simbila @ Ng'wanakilala v. R**, Criminal Appeal No. 15 of 2008 (unreported).

In reply to that submission Mr. Msigwa made a sweeping reply that the court was right and the complaint has no substance and moved us to dismiss the complaint. However, we did not get an advantage of his reasoning behind the non-committal submission he made.

The issue for our resolution is whether courts in Tanzania must, in fulfilment of the requirements of 172(2)(c) of the CPA, make orders after sentencing that the time that the accused remained in custody waiting for his trial, shall be counted out and taken off from the term of imprisonment imposed thereby reducing the latter period of stay in jail. We will start with section 172(2)(c) of the CPA which was sought to be relied upon by the appellant and which the appellant complained that it was offended by the trial court. That section with side notes *"Release on bail pending confirmation and powers of confirming court"* provides:

"172.-(1) N/A.

(2) Where –

(a) and (b) N/A

(c) a person has been in remand custody for a period awaiting his trial,

his sentence whether it is under the Minimum Sentences Act, or any other law, shall start to run when such sentence is imposed confirmed, as the case may be, and such sentence shall take into account the period the person spent in remand."

With respect to the appellant, we are unable to read anything in the above provision compelling the sentencing subordinate court to include pre-conviction detention period as part of the statutory sentence eventually meted upon the accused upon conviction. Section 172 of the CPA as may be noted from the side notes, relates to bail pending sentences referred to the High Court for confirmation and not like in this case where the matter went to the High Court on Appeal. In any event, the pre-conviction period may only be considered as a mitigating circumstance but it cannot be treated or be counted as equivalent to time served as an imprisonment term, for that would be tantamount to treat a suspect as a prisoner since his arrest which would be unlawful, and which this Court cannot do. In the case of **Anna Jemaniste**

Mboya v. R, Criminal Appeal No. 295 of 2018 (unreported), on the same point this Court observed thus:

> *"In conclusion, we wish to consider the invitation by the appellant to the effect that the five years she has been behind bars prior to being sentenced should have been taken into account in sentencing her. We, with respect, decline this invitation. The pre-conviction time spent by the appellant under custody may only be considered as a mitigating factor in sentencing where a discretionary penalty is involved, but it cannot be counted as time served. The appellant was innocent then until the date he was found guilty of the offence. That is when the sentence is supposed to be reckoned from."*

See also this Court's decision in **Khamis Said Bakari v. R,** Criminal Appeal No. 359 of 2017 and **Vuyo Jack v. the Director of Public Prosecutions,** Criminal Appeal No. 334 of 2016 (both unreported).

It is in view of the above context, that the trial court was right not to consider the pre-conviction period as part of the jail sentence. Accordingly, the complaint of the appellant in ground 8(iii) is misconceived.

In the circumstances, the 8th ground of appeal is partly upheld and partly it is, to the above extent, dismissed.

In the event, this appeal is hereby dismissed except that the judgments of the trial court and that of the first appellate court are partly reversed as follows:

1. The appellant is ordered to refund the complainant, PPCL with TZS. 824,308,843.50 instead of TZS. 911,382,335.50, as previously ordered by the trial court and confirmed by the High Court which orders are accordingly reversed.

2. Regarding the sentence for forgery of the bank statements and obtaining money by false pretence, the appellant shall serve 5 years instead of the maximum 7 years that had been imposed on him.

3. The sentences for all counts in the three categories of offences, that is, forgery of the cheques, uttering false documents and obtaining money by false pretence, shall run concurrently counting from the date that the appellant was convicted.

4. If the fine as imposed by the trial court shall not be paid in full, the sentences of six years imprisonment in respect of all money laundering convictions shall be served concurrently.

5. As a matter of clarification, the sentence for money laundering offences shall run consecutively with the sentence for forgery, uttering false documents and obtaining money by false pretence.

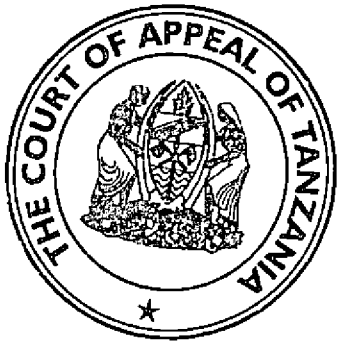
DATED at **DAR ES SALAAM**, this 16th day of November 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of November, 2021 in the presence of Mr. Nehemia Nkoko learned advocate for the appellant and Mr. Ladislaus Komanya, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRAR
COURT OF APPEAL