

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: OTHMAN, C.J., LUANDA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 211 OF 2012

PIUS NEEMA ISAYA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the conviction and sentence of the High Court of Tanzania
at Arusha)**

(Sambo , J.)

dated the 28th day of September, 2013

in

Criminal Appeal No. 57 of 2011

JUDGMENT OF THE COURT

22nd November & 2nd December, 2013

LUANDA, J.A.

Ms Ellen Rwijage learned State Attorney did not oppose the appeal and rightly so. This is because the evidence on record does not at all establish the offence of obtaining money by false pretences ^{c/}s 302 of the Penal Code, Cap. 16 R.E. 2002. If anything it is a civil dispute.

Elaborating, she said in order for the offence of false pretence to stick, the prosecution must establish two ingredients namely false pretence and intention to defraud. In this case she submitted that there is nothing in evidence to suggest that the appellant had intended to defraud PW1 Allen Zephania by false pretences in order to obtain Tsh. 139M/= as shown in the Charge Sheet. She made particular reference to page 27 whereby when PW1 was cross-examined by the appellant said it was a personal agreement between the two – PW1 and the appellant. It is her contention that since there was an agreement between the two, which agreement was not disclosed in evidence, it cannot be said the appellant by false pretence to have intended to defraud PW1. She thus supported the appeal.

In the District Court of Babati at Babati, the appellant was charged with obtaining money by false pretence c/s 302 of the Penal Code, Cap. 16 R.E. 2002. The particulars of the offence reads:-

*That PIUS s/o NEEMA ISAAYA is charged
between 20th day of July, 2009 and 5th
November, 2009 at NBC area within Babati*

*District in Manyara Region with intent to defraud
did obtain Tsh. 139,000,000/= from ALLEN
ZEPHANIA after falsely presenting to him that he
is a businessman while infact it was not true.*

The material evidence against the appellant was given by PW1. According to PW1, the appellant is known to him for some time while he was a Branch Manager of NBC in Babati and paid a visit to the appellant's residence.

It is the evidence of PW1 that the appellant approached him with a view to securing an overdraft to boost his businesses from the Bank. The appellant wanted to borrow Tsh. 33m/=. PW1 assisted the appellant and the Bank approved Tsh20m/= only. However, while the appellant's loan was being processed, he approached him and asked him for a loan of Tsh 7m/=. He gave him. Thereafter the appellant keep on asking him on diverse dates to advance him loan which he gave him. It is his evidence that he either gave it to the appellant or his son one John Pius. The total sum of the loan he gave the appellant was Tsh 139m/=. However, PW1

was not forth coming in explaining how he gave such huge sum of money to the appellant! It is this arrangement which PW1 said when he was asked by the appellant that it was "a personal arrangement" between him and the appellant.

In the first place it is doubtful whether PW1 had really given such huge amount of money to the appellant without such an arrangement being reduced into writing! We are saying so because ordinarily parties to such an agreement involving such huge sum of money would resort to reducing their oral agreement into writing as a safeguard to any eventuality like death. Second, going by PW1 evidence as pointed out by Ms. Rwijage that there was a personal arrangement, he did not disclose what were such arrangement. Whatever the position, that clearly shows that the parties had their own arrangement as to its terms, including the mode of payment. That arrangement does not amount to false pretence.

Lastly, PW1 did not at all give evidence to show that the appellant was not a businessman.

From the foregoing reasons, we find the appeal to have merits. The same is allowed. The conviction is quashed and sentence set aside.

Since the appellant has been released on parole, we make no order for his release.

It is so ordered.

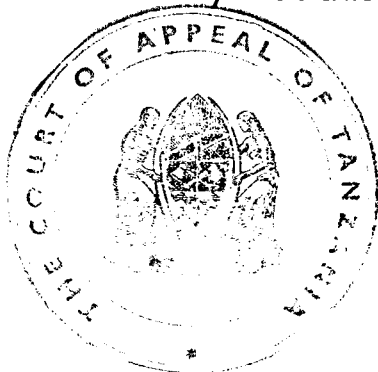
DATED at **ARUSHA** this 29th day of November, 2013.

M.C. OTHMAN
CHIEF JUSTICE

B.M. LUANDA
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL