IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KIMARO, J.A., MANDIA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 40 OF 2014

ELIAS MELAMI KIVUYO ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Massengi, J.)

Dated 28th day of January, 2013
In
Criminal Appeal No. 42 of 2012

JUDGMENT OF THE COURT

12th June, & 3rd July, 2014

MANDIA, J.A.:

The appellant appeared in District Court of Arusha at Arusha jointly with two others to answer a charge sheet containing one count of conspiracy to Commit an Offence c/s 384 of the Penal Code. In addition to the joint count of conspiracy, the appellant also faced alone, in the same charge sheet, four other counts of obtaining money by false Pretences c/s 302 of the Penal Code. The trial court found the charge of conspiracy not proved and acquitted all the accused persons charged with it. It however found the appellant guilty of all the four counts of obtaining money by false pretences and passed an omnibus sentence of seven (7) years for all the counts where he was convicted. The appellant was aggrieved by the

conviction and sentence and preferred an appeal to the High Court of Tanzania at Arusha where his appeal was dismissed. He has now preferred this second appeal.

The appellant raises two substantive grounds of appeal in his memorandum of appeal where he argues that the first appellate court failed to scrutinize the evidence of PW4, and that the first appellate court erred by acting on the exhibits tendered by the complainant. At the hearing of this appeal, the appellant appeared in person, unrepresented, while the respondent Republic was represented by Mr. Khalili Nuda, learned State Attorney.

The appellant had nothing to add to the memorandum of appeal he filed. On his part Mr. Khalili Nuda started off by supporting the conviction entered by the trial court and sentence passed. He also argued the appeal generally.

A brief background of the case shows that in October, 2009 the appellant intimated to a broker dealing in cars and houses, PW2 John Kivuyo, that he was selling his farm. PW2 then passed the information to another broker who was also a friend by the name of Lembrisi Thomas Siara. The latter found a prospective buyer PW1 Ibrahim Musa Guezye. On 21/11/2009 the two brokers John Kivuyo and Lembrisi Thomas Siara

arranged a meeting at Njiro Amani Bar where the prospective buyer PW1 Ibrahim Musa Geuzye met the seller Elias who is the appellant. After the meeting the two brokers together with the prospective buyer and seller went to the farm situated seven kilometres away, inspected it and measured its size. The area of the farm was found to be two acres. The four people negotiated the sale price and arrived at a figure of ten million shillings at five million per acre. From the farm the four people went on the same day to see the ten cell leader of the area where the farm is situated, PW3 Absalim Senyeye. In his evidence PW3 Absalim Senyeye is on record as saying at P 42 of the record thus:-

> *"They came and they were four people are Elias, John Kivuyo, Lembrisi Siara and Ibrahim Geuzye. They asked if I saw Elias, I admitted to land as his as he has cultivated a farm near by road. They asked if he own the same, I told them that he own the same as I have never seen anyone else cultivating it."*

Further on, at P 44 the witness was cross-examined by the second accused person in the trial court and he said:-

> *".....I told the buyer that Elias is the one who has been cultivating the farm, and thus we thought that the same did belong to him."*

The buyer of the farm PW1 Ibrahim Musa Geuzye gave evidence that after the inspection of the farm and confirmation of ownership by the ten cell leader, the appellant used to visit him to ask for small sums of money on agreement that such sums should be off-set against the agreement sale price of ten million shillings. The sums of money were witnessed by PW2 John Kivuyo, the appellant's broker. On 30/11/2009 the appellant acknowledged in writing to have received shs 500,000/= from PW1 Exhibit P1. On 7/12/2009 the appellant received in writing another shs 500,000/= Exhibit P2. On 21/12/2009 the appellant acknowledged in writing to have received shs 1500,000/= Exhibit P3. This made a total of shs 2,500,000/=. On 2/1/2010 PW1 Ibrahim Musa Geuzye, the appellant, the ten cell leader PW3 Absalim Senyeye, PW2 John Kivuyo met for payment of the balance of the sale of the sale agreement shs 7,500,000/= to make the total amount of ten million shillings. Ibrahim Musa Geuzye testified that he paid the shs 7,500,000/= to the appellant, a fact corroborated by PW2 John Kivuyo and PW3 Absalim Senyeye the ten cell leader. The payment was made at a place called Soweto Garden. Confirmation of payment is in the evidence of the ten cell leader PW3 Absalim Senyeye who is on record (at p. 43) as saying:-

"...After the introduction, the buyer Ibrahim informed us that they were conducting the sale. I wanted to see the contract and I discovered that by that time the 1st accused had already collected 2.5 million in installments. Then the buyer did pay Tshs 7.5 million and handled (sic) the same to Elias."

All witnesses to the sale testified that the appellant asked to be allowed to go and bank the money and was allowed. After banking the buyer, seller and the witnesses to the sale agreed to go to the farm site for handing over of the farm. On the way it rained and all parties agreed to postpone the handing over to the following day. After the postponement the appellant vanished. PW1 lodged a complaint to the Police after the appellant kept putting him off. He is on record as saying (p. 36):-

"At the Police Station, I lodged my complaint and the accused was arrested. After they were arrested I did talk to Elias and I told the OC/CID that I wanted Elias to pay back my money. Then he was giving promises without fulfilling them thus the case was brought to court".

It appears that the handing over of shs 7,500,000/= by PW1 Ibrahim Musa Geuzye to the appellant was not receipted. What was recorded was the

total amount agreed by the parties as the sale price of the shamba i.e. 10,000,000/= (ten million shillings) as shown in Exhibit P4.

After the report to the Police PW4 F2218 Detective Constable Kijanda of Arusha Police Station was detailed to conduct investigations into the case. He arrested the appellant Elias Malemi Kivuyo, Kisioki Laitei @ Abel Kasaine and Isdori Gervas @ Mrisho Kivuyo. He found out that the contract for sale of the farm was allegedly witnessed by the appellant's guardian called Abel Kasaine who had signed the document. He found out the person who signed the document. He found out the person who signed the document as Abel Kasaine was Kisioki Laitei, and that there was a real Abel Kasaine who was the owner of the farm subject to the contract of sale Exhibit P4 who denied selling the farm. PW4 testified that he recorded the statement of Abel Kasaine on 15th May, 2010 and learnt that Abel Kasaine, who was an old man aged over 80 years died in early 2011. PW4 also testified that the contract for sale was signed by one Isdori Gervas who presented himself, when signing the contract, as Mrisho Kivuyo. He therefore preferred charges of conspiracy to commit an offence against the appellant, Kisioki Laitei and Isdori Gervas, three counts of Obtaining money by false pretences against the appellant alone and a fifth count of obtaining money by false pretences against all three accused

persons. PW4 testified on 12/5/2011. On this date the prosecutor gave notice that on the next hearing date he would tender the statement of Abel Kasaine under section 34 B of the Evidence Act, Chapter 6 R.E. 2002. The trial court ordered that the appellant and his co-accused persons be served with a copy of the statement. The case then was adjourned three times for one reason or another. It was not until 28/6/2011 that the public prosecutor tender the statement under section 34 B of the Evidence Act. Before tendering the statement he asked the court for directions on who should tender the statement in evidence, and the court received the statement as Exhibit P5 from the prosecutor. The prosecutor then read out the statement in court. The trial magistrate then noted that section 34B (4) of the Evidence Act, after which the prosecution closed its case. On 8/9/2011 the trial court found that the accused person had a case to answer. The case did not proceed to hearing of the defence case and was adjourned five times for one reason or another. On 28/11/2011, five months after the prosecution closed its case on 28/6/2011 one Mr. Ngemela for the second accused filed a preliminary objection that the charge sheet is defective and also that the Republic had no *locus standi* in the case. One month later, on 29/11/2011 the trial court dismissed the preliminary objection and the case proceeded to defence hearing on 22/12/2011. The substance of the appellant's defence is that at the time

of his arrest the agreement for sale of the farm had not been concluded. He went on to say the reason that the agreement for sale was not concluded was that he got an emergency trip, and informed the prospective buyer Mzee Ibrahim Geuzye to wait until he came back from his trip. When he returned he telephoned the prospective buyer so that they finalise the agreement for sale. The latter replied that the agreement had been concluded at Soweto Bar. He replied that no agreement for sale of property could be done in a bar but the prospective buyer did not listen to him. He offered to return the shs 3,000,000/= which he had taken from the prospective buyer but before he could arrange for his wife to draw the money he was arrested and charged.

The appellant was arraigned with two others but these were acquitted when the charge of conspiracy fell through. The two others were Kisoiki Laitetei who witnessed the agreement for sale of the farm in the name of Abel Kasaine, and Isdori Garvas who witnessed the sale of the farm as Mrisho Kivuyo. The trial court argued that by signing the agreement for sale as witnesses under assumed names this fact alone did not establish that the two (i.e. Kisioki Laitetei and Isdory Gervas) knew that the farm did not belong to the appellant. The trial court made a finding of fact that Kisioki Laitetei signed because the appellant paid him

for signing and he also obliged because the appellant was his co-worker, while Isidori Gervas signed because the appellant paid him well and offered to hire his taxi for the whole day. In other words, the trial court found that the two had no intention to defraud, hence their acquittal. The trial court then found that there was no common intention between the three accused person so he acquitted them all of the charge of conspiracy.

As for the appellant, the trial court convicted him of all the counts of obtaining money by false pretences on the ground that the appellant knew that the farm he was selling belonged to his father in law and there was no proof that he was authorized to sell the farm on behalf of the father in law.

The appellant fielded his co-accused in the trial court Kisioki Laitetei DW2 and Isdori Gervas DW3 whose evidence is to the effect that they signed the agreement for sale of the shamba as witnesses only. Further at page 74 of the record there appears this bit of evidence from DW2 Kisioki Laitetei:-

> *"As with regard to Mwarusha custom, the child cannot sell farm without concerning the father. Elias had already agreed with his father in law."*

This fact was disclosed by DW2 when he was being cross-examined by the prosecutor. On the other hand there is the testimony of the

appellant's wife DW3 Joyce Abel who denied knowing of the sale of the farm. She testified that the appellant sold the farm without notifying the family and further on she said categorically that ***Abel Kasaine did not have a farm that he was selling.***

When the case went on appeal the appellate High Court dismissed the appeal with the following argument:-

> *"Concerning the appellant's allegation that the trial court did not consider his evidence to the effect that he never conducted sale agreement with PW1 I am of the considered view that it is not true that the trial court never consider his evidence, the truth is that the appellant's defence did not shake the prosecution evidence. In the case of* ***Magendo Paul and Another vs. Republic (1993)*** *TLR 219; it was stated by the Court of Appeal that:*
>
> > *"If the evidence is so strong against an accused person as to leave only a remote possibility in his favour which can easily be dismissed, the case, is proved beyond reasonable doubt."*
>
> *The prosecution evidence was so strong and proved beyond reasonable doubt that the sale agreement of a farm was concluded between the appellant and*

PW1 and the appellant received a total of Tshs 10,000,000/= as payment for that sale pretending to be the owner of the farm while knowing he is not the owner. The above fact was proved even by DW2 and DW3 who witnessed the execution of the final sale agreement. The appellant did not shake the prosecution evidence".

Both the trial court pinned liability on the appellant that he received money from the sale of a farm not belonging to him. None of the witnesses who gave evidence testified that the farm sold did not belong to the appellant. The evidence of PW1 Ibrahim Musa Geuzye and that of PW2 John Kivuyo the broker as well as that of the ten cell leader where the farm is situated shows that all these three witnesses labored under a belief that the appellant was the owner of the farm because he had tilled the land for a long time. To be more exact when PW3 Absalim Senyeye was testifying he said at P.44 of the record:-

*"I told the buyer that Elias is the owner who has been cultivating the farm, and thus **we thought** that the same did belong to him."*

This means none of the witnesses who gave direct evidence gave evidence showing **that** the appellant **did not own the farm**. The only evidence

showing that the appellant **did not own** the farm came in the form of the statement tendered in court by the prosecutor and received by the court on 28/9/2011, purportedly under Section 34B(4) of the Evidence Act, Chapter 20 R.E. 2002. In **MAJULI LONGO AND JUMA SALUM @ MHEMA versus THE REPUBLIC,** Criminal Appeal No. 261 of 2011 (unreported) this court had occasion to comment on statements introduced under Section 34B of the Evidence Act, and we had this to say:-

> *"We also think the High Court put a correct construction to section 34B (2) of the Evidence Act, Cap 6 R.E. 2002 that before a statement is admitted under that provision, all the conditions (a) to (f) shown under that provisions must be met. If therefore, other party (parties) object(s) to the statement being so tendered in evidence, it cannot be received in evidence. In the present case, counsel for the appellants objected within the prescribed time to the statement being tendered, but the learned trial judge overruled the objection and ruled it admissible. With respect, that was a misdirection. Under that provision, a trial court cannot admit a statement which does not cumulatively comply with those conditions-precedent. We are further of the view that it was not open for the trial court to examine and decide*

on the soundness or otherwise of the objection that a party could raise under that provision. To do so would be to defeat the intention of the legislature which was to restrict the use of such statements; because in accepting that such statements be admitted, accused persons would be forfeiting their rights to cross-examine their makers which is part of the process of fair hearing. The conditions-precedent were therefore meant to protect those rights."

See also **REPUBLIC v HASSAN JUMANNE** (1983) T.L.R. 432 and **DIRECTOR OF PUBLIC PROSECUTION vs OPHANT MONYANGHA** (1985) T.L.R. 127.

As we remarked earlier, the statement was recorded by DC Kyanda on 15/5/2010 but it was not him who tendered it in evidence. The statement was tendered by the prosecutor on 28/9/2011. PW5 - DC Kijanda had testified on 12/5/2011, but about four months previously but he was not recalled to tender in evidence a statement he recorded. Instead, the record shows both the prosecutor and the court in a predicament as to who should tender the statement, and then the court resolving the predicament by accepting the statement from the prosecutor.

The statement itself appears as follows:-

POLICE FORM 2A ***TANZANIA POLICE***

CASE FILE No…… Page No…….

WRITE PARTICULARS IN BLOCK CAPITALS

Statement of Kasaine s/o MIGWALA @ ABEL KASAINE Occupation Mkulima

Race/ Tribe/Nationality Mwarusha Religion Mristo Age 90 years Address Business (in full)…… ……..

Address: Home (in full) BANGATA CENTRE

Telephone No. House 0753-837654. Office / Work - 0767 640615 Mobile – 0767- 674015 others

DECLARATION UNDER SECTION 34B (2) © OF THE EVIDENCE ACT, 1976.

This statement (Consisting of ……..pages each signed by me) is true to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence, I shall be liable to prosecution for perjury if I have willfully stated in it anything which I know to be false or which I do not believe to be true. Made at (place) BANGATA VILLAGE on the 15th Day of May, 2010 Time 15.00 HRS ……Signed.

MAELEZO KAMILI: - Mimi ndiye mwenye jina na anwani hapo juu. Ninakumbuka mwaka 1961 nilinunua shamba toka kwa ndugu yangu aitwaye

ELIAMANI SANARI ambaye kwa sasa ni marehemu nilinunua Tshs. 500/= na shamba hilo lina hekta mbili na nusu na liko kijiji cha Olekeriani. Tangu wakati huo shamba hilo nimekuwa nalilima na nilipoona siwezi kwenda kulima watoto wangu wa kiume walikuwa wanalima. Mwaka 2007 shamba hilo nilimpatia mtoto wangu wa kike aitwaye Joyce d/o Elias ili awe analima na tugawane yanayopatikana. Lakini mwaka 2009 mwishoni tulimweleza hilo shamba asilime na kwa sasa shamba hilo limellmwa na PHILIPO s/o SANARE. Na taarlfa ya kuuzwa kwa shamba hili tullipata mwaka huu 04/02/2010 na waliuziwa shamba hilo mara ya kwanza waiikuja hapa kuwa shamba hiio limeuzwa na ELIAS s/o MELAMI ambaye ameoa bintl yangu. Hivyo shamba hilo sijampatia mtu yeyote na wala sijaiiuza kabisa. Na haya ndiyo maelezo yangu nimeyatoa kwa Kiswahili yako sahihi kabisa

Thumbprint

R/O F2218 D/C Kijanda

***UTHIBITISHO**: - Mimi D/C Kijanda nathibitisha kuandika maelezo haya kwa usahihi chini ya kifungu 10(3) cha CPA Na. 9 ya 1985 R.E. 2002.*

R/O F 2218 D/C Kijanda.

We have already found that the conditions –precedent in Section 34B (2) (a) to (f) must be followed cumulatively for the section to be applicable. Condition (a) is the background information which must be supplied as to why section 34B (2) should be invoked. Condition (b) requires proof that the maker of the statement has signed it. Condition (c) is a declaration by the maker of the statement that he made the statement while knowing that if it were tendered in evidence he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be also or did not believe to be true. To be noted here is that the condition is couched in the past tense, which shows that the declaration is made **after** the statement has been made, not before it. Condition (d) requires the statement to be served on the opposite side, while condition (e) requires that any objection to the tendering of the statement be made within ten days of service of the statement. The last condition, condition (f) requires the statement, if made by an illiterate person, to be read over to the illiterate person, and for the person who has read over the statement to the maker to certify that he has read over the statement.

If we may ask, have all the six conditions been met in the case at hand? We are of the opinion that condition (a) has been met since it is not

contested that the maker of the statement is dead. Condition (b) has been met since there is a thumbprint purporting to be that of the late Kasaine s/o Migwale @ Abel Kasaine. Condition (c), which is a declaration by the maker of the statement has not been met. We have remarked above that the declaration is couched in the past tense, which means the declaration should be made after the statement is made because of the words *"he made the statement knowing."* In this case the declaration is made before the statement which is not in conformity with conditions (c). Condition (d) has been met since there is evidence that notice has been given. Condition (e) has been met since no objection has been raised in the intention to introduce the statement in evidence. Condition (f) has not been met since there is no declaration by the recording officer PW4 F2218 D/C Kijanda certifying that he read over the statement to the maker. The only certificate D/C Kijanda made is that he recorded the statement correctly under Section 10 (3) of the Criminal Procedure Act, 1985. The certificate under (f) is important because the maker signed the statement with a thumbprint, showing that he was illiterate, so the reading over would have complied with condition (f) of Section 34B (2). We find that in Exhibit P5 four conditions have been met, but two have not. The statement therefore did not qualify to be admitted into evidence under

section 34B (2) and both the trial court and the first appellate court should not have relied upon it. The statement is accordingly discounted.

If the statement of Kisaine Migwala @ Abel Kisaine is disregarded, what other evidence exists showing that the appellant had not authority to sell the shamba? On the prosecution side there is no such evidence. In fact the evidence of the ten cell leader PW3 Absalim Senyeye support the appellant when he testified that the appellant is the person he saw cultivating the shamba, so he thought the appellant was the owner.

We have also examined the defence of the appellant. He testified that the sale transaction had not been completed at the time of his arrests. He said after receiving the money he got a sudden trip and telephoned the prospective buyer to wait for his return for the sale arrangements. The appellant further testified that when he returned he telephoned the prospective buyer with a view to complete the sale arrangements but the latter refused to meet him and reported him to the Police. He claims that he offered to return the money which the prospective buyer paid but before he could do that he was arrested. The trial court did not consider the appellant's defence, and the first appellate court did not make any reference to this default. The defence is very important while considering

whether there was an intent to defraud or not. Black's Law Dictionary, the Abridged 6th Edition, at P. 292 defines intent to defraud thus:-

> ***"Intent to defraud*** *means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property."*

Smith & Hogan's CRIMINAL LAW, 9th Edition by J.C. Smith at Page 552 defines obtaining by false pretences thus:-

> *"The obtaining must be by deception. It must be proved that D's false representation actually deceived P and caused him to do whatever act is appropriate to the offence charged. The deception must precede the relevant act."*

In **MWANGI NYONGAH v REPUBLIC** (1965) E.A. 526 it was held, *interalia,* that

> " *(i) .....*
>
> *(ii) It is settled law that in false pretences there is no obtaining unless the dupe intends to pass the property in the thing given to the accused, while in stealing there is no theft in the taking, however fraudulent were the means by which delivery was*

obtained , if the dupe of his own free will passes not only possession, but the right of property."

The appellant was charged with obtaining money by false pretences. The quotation from Smith & Hogan **(supra)** and the Mwangi Nyongah case (supra) shows that the essential ingredient of the offence of obtaining money by false pretences is the trick or deception played on the person who parts with his/ her property, and that the trick must be played upon the owner before the act of surrendering the property. The record shows that PW1, Ibrahim Musa Geuzye had, through a broker looked for and obtained a plot of land to buy and that the appellant, through a broker PW2 John Kivuyo had offered to sell a piece of land of the size of two acres. There was evidence that there was a sale witnessed by a ten cell leader PW3 Absalim Senyeye and up to the time of the sale everybody, including the ten cell leader, believed the appellant to be the owner of the property. Up to the time of the sale therefore, there was no trick or deception played on the mind of the prospective buyer Ibrahim Musa Geuzye (PW1). The appellant in his defence had adduced evidence that the sale was interrupted by a sudden trip he took with prior information of the buyer, and that when he returned to resume the sale arrangements he was reported to the police. Both the trial court and the first appellate court

did not consider the appellants' defence which tended to show that there was no false pretence involved in the transaction. Since the evidence of the eye witnesses to the sale which the appellant said was not complete at the time of his arrest did not show the existence of any deception, and since the statement of Kisaine Migwale @ Abel Kisaine has been discounted, the elements of the offences of obtaining by false pretences have not been proved. The trial and the first appellate court failed to see this point when they failed to appreciate the law in false pretences. This happened because they did not at all discuss the appellant's defence. This Court has held that failure to take into account a defence presented by an accused person can be a non-direction which can be total as it has been held in **LOCKHART – SMITH v R** (1965) E.A 211, **ELIA STEVEN v R** (1982) TLR 313, **HUSSEIN IDD & ANOTHER v R** (1986) TLR 283 and **SIZA PATRICE v R,** Criminal Appeal No. 19 of 2010 (unreported). This misdirection in the law has led to a wrong interpretation of the facts which has in turn led to a wrong conclusion by the trial court, a conclusion which was supported by the first appellate court. As a second appellate Court, we have a mandate to interfere where a conclusion is made based on wrong interpretation of the law. We are convinced that the facts adduced in the trial court do not support the conclusion of law made there and supported by the first appellate court. We accordingly allow the appeal.

The conviction entered is quashed and the sentence set aside. The appellant shall be released from custody unless he is held on some other lawful cause.

DATED at ARUSHA this 1st day of July, 2014.

N.P.KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL