IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A, And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 92 OF 2021

METHOD KALUWA CHENGULA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Coast Region at Kibaha)

(Kabate, PRM with Extended Jurisdiction)

Dated the 21st day of December, 2020

in

Extended Jurisdiction Criminal Appeal No. 62 of 2020

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JUDGMENT OF THE COURT

17th February & 10th March, 2023

MWANDAMBO, J.A.:

The appellant Method Kaluwa Chengula was tried before the District Court of Mafia on three counts of obtaining money by false pretences contrary to section 302 of the Penal Code. The trial District Court convicted the appellant on two out of three counts he was charged with and sentenced him to seven years imprisonment on each ordered to run consecutively. On appeal against both conviction and sentence, the first appellate court before the Resident Magistrate's Court of Coast Region presided over by Kabate, PRM -

Extended Jurisdiction, dismissed the appeal against convictions but allowed it in part against sentences by ordering them to run concurrently. The appellant is now before the Court on his second and final appeal faulting the first appellate court for dismissing his appeal and sustaining conviction.

The indictment of the appellant resulted from the following facts. The appellant was a public employee with Mafia District Council in Coast Region as an Assistant Land Surveyor in the Department of Land, Natural Resources and Environment. His duties included, amongst others, land surveys. According to the prosecution, the appellant masqueraded himself to the residents of Mafia in need of surveys of their land particularly, Kitomondo residents and collected sums of money from them as land surveying fees payable to Mafia District Council. It was the prosecution case that Mafia District Council had not instructed the appellant to do any land surveys for the people from whom he collected money as land survey fees neither did the appellant remit the money, he collected to Mafia District Council who could have issued relevant receipts. As the appellant did not provide receipts to the people who had paid money for land survey fees, they lodged complaints with Eric Chrisantus

Mapunda, the District Executive Director (PW6) who feigned ignorance of the survey exercise and receipt of any money allegedly collected by the appellant on behalf of the District Council as land surveys fees. Eventually, the appellant was arraigned before the District Court on three counts of obtaining money by false presences as alluded. The first count alleged that, on 08/11/2013 the appellant by false pretence and with intent to defraud, obtained TZS. 755,000.00 from Mfaume Njozi Mussa as payment from 36 Villagers as land surveying fees to be conducted by Mafia District Council, a fact which he knew to be false.

In the second count, the prosecution alleged that, on September, 2014, the appellant received a sum of TZS 1,200,000.00 from Shehe Hemedi @ Mgangare whereas the third count had it that on 30/10/2014, the appellant with intent to defraud, received TZS 3,000,000.00 from Haidary Yusuph Msomi as land surveys fees payable to Mafia District Council for a land survey project a fact which he knew to be false.

As the appellant pleaded not guilty to all counts, the prosecution sought to prove the case through the evidences of eight witnesses some of whom tendered documentary exhibits. Critical of

all were PW1 Mfaume Njozi Mussa whose testimony intended to prove that the appellant received TZS 755,000.00 from him acting on behalf of 36 Villagers of Kitomondo; subject of the first count. He was supported by PW2 and PW3 who claimed to have been villagers of Kitomondo who contributed money for the survey of their land by the Mafia District Council through the appellant but to no avail. Next in the line was Haidary Yusuph Msomi (PW4) who claimed to have paid TZS 500,000.00 to the appellant towards survey of his 8 acres land at Msufini Area, Kilindoni. PW4 was supported by Ahmad Jumbe Alawi (PW5), a ten-cell leader at Kilindoni Village who claimed to have witnessed payment of TZS 1,300,000.00 to the appellant and his colleague; Sunday Mzamu.

The prosecution fielded PW6 whose evidence was largely meant to disown the appellant's alleged representation to the people from whom he received money towards land survey fees on the instructions of his employer. He was supported by Chuchu s/o Ochieng Silvary (PW7), an Assistant Land Officer with Mafia District Council. The last witness for the prosecution was Ally s/o Said Katonya (PW8) an investigator with the Prevention Control and Combating of Corruption Bureau (PCCB). PW8's evidence was

directed at proving that his office received complaints from some people in Mafia involving corruption in relation to land surveys which he investigated. In the process, he tendered a caution statement recorded from the appellant which was admitted as exhibit PE 11.

Upon the closure of prosecution case, the trial learned Resident Magistrate ruled that a prima facie case had been established sufficient for the appellant to enter his defence which he did distancing himself from the accusations against him. By and large, the appellant stated that his job description (exhibit DE1) did not give him the mandate to do any of the assignments he was alleged to have done on his own except through the instructions of his superior; Sunday Mzamu.

The trial court found the case against the appellant sufficiently proved in count one and three and convicted him as alluded to above. The appellant's appeal before the first appellate court hit a snag, for that court sustained conviction on both counts but set aside the trial court's order in respect of sentences and ordered them to run concurrently. Before us, the appellant faults the first appellate court on five grounds through his memorandum of appeal he lodged ahead of hearing. Before the appeal could begin for hearing, the

appellant sought leave to add three grounds which, upon our examination were basically arguments to be canvassed when addressing the grounds of appeal rather than being grounds of appeal as such. Be it as it may, the grounds appearing in the memorandum of appeal together with the so-called additional grounds raise two main areas of complaint namely; failure to consider the defence case in full and that the case against the appellant was not proved to the standard applicable in criminal cases. Realizing his position as a layman, the appellant let Mr. Emmanuel Maleko, learned State Attorney who appeared for the respondent Republic to address the Court in response to the grounds of appeal reserving his right to rejoin should such need arise.

Mr. Maleko was very brief in his submissions in opposition to the appeal. Addressing the Court on the first complaint, Mr. Maleko was adamant that the trial court fully considered the defence but rejected it because it did not shake the case for the prosecution and hence the finding of guilt and the resultant conviction. The learned Senior State Attorney reinforced his argument with an excerpt from the trial court's judgment at page 145 of the record of appeal where it stated that the accused tried to shift a burden of proof to Sunday

Mzamu that he was working under his directives simply because he was at large. Apparently, a similar complaint was raised before the first appellate court as a first ground of appeal albeit in a different language but the substance appears to be the same. The first appellate court took the view that the appellant had not raised any defence to counter the prosecution evidence which it considered to be watertight. According to the first appellate court, the appellant only tendered his job description which could not remotely address the evidence tendered by the prosecution.

It is plain from the judgment of the trial court that after summarizing the evidence for the prosecution, the learned trial Magistrate landed with the finding that the appellant's defence simply attempted to shift blame on Sunday Mzamu merely because he was at large. It thus found the prosecution evidence proved the offence beyond reasonable doubt. For all intents and purposes, the first appellate court followed the same path by summarizing the prosecution evidence followed by a conclusion that the defence evidence consisting of a job description was too remote to displace the case for the prosecution.

The appellant's complaint on failure to consider his defence in full is the same as failure to evaluate the evidence for both the prosecution and defence. It is trite that, evaluation of evidence entails subjecting the entire evidence to scrutiny before making any finding of guilt or otherwise. We have said so in many of our decisions that summary of the evidence is not the same as evaluation of it. See for instance: **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 of 2014 and **Mkulima Mbagala v. Republic**, Criminal Appeal No. 207 of 2006 (both unreported). As seen earlier, the trial court did not analyse the evidence on record before making of a finding of guilt against the appellant. For instance, the appellant stated in his evidence that he was instructed by his boss; Sunday James Mzamu to prepare a budget for the survey of land for 36 Villagers of Kitomondo. To that effect, he tendered a letter dated 06/11/2013 titled: *"kuandaa bajeti ya uandaaji wa ramani ya mipango miji na upimaji wa awali (demarcation) katika eneo la Kitomondo Kilindoni - siku 10"* (exhibit DE3). The appellant also stated that he was instructed to attend a meeting with the villagers and indeed he tendered a letter to that effect (exhibit DE2).

The appellant also stated in evidence that there was nothing which he did without the authorization of his head of department. However, the trial court not only did it fail to analyse the prosecution case on its own but also failed to subject it against the appellant's defence. It rejected his defence without discussing it stating that the appellant was only shifting blame on the absent Sunday Mzamu Regrettably, the first appellate court fell into the same trap. It believed the prosecution evidence simply because the appellant did not counter such evidence except tendering a job description which, according to the learned PRM – Extended Jurisdiction, was not remotely relevant to the prosecution case. Put it differently, like the trial court, the first appellate court believed the evidence for the prosecution wholesale without evaluating it together with the defence evidence.

Under the circumstances, the inevitable conclusion we have to make is that the concurrent finding of fact by the two courts below was plainly a result of misapprehension of the evidence on record by not considering the evidence which warrants our interference at this stage. We shall do so when considering the general complaint that the case against the appellant was not proved to the required

standard. Otherwise, we have found merit in the appellant's complaint that his defence was not only not considered in full but also it was not considered at all neither by the trial court nor the first appellate court.

Next, we shall turn our attention to the complaint whether the prosecution proved its case against the appellant on the required standard on the first and third counts. To prove the offence under section 302 of the Penal Code, it was incumbent upon the prosecution to lead evidence establishing the key ingredients of the offence; false pretence, fraudulent intent and inducement in obtaining the amount stated in the charge sheet.

To start with, none of the witnesses for the prosecution stated that the appellant made any false representation to 36 Villagers of Kitomondo represented by PW1 neither did PW4 lead evidence to that effect. On the contrary, the said witnesses focused on the receipt of the money by the appellant and Sunday Mzamu. Indeed, from our evaluation of the evidence particularly exhibit PE1, the recipient of TZS 755,000.00 subject of the first court was Sunday Mzamu. The appellant was merely a witness. Under the circumstances, had the two court below examined this evidence in the light of the appellant's

defence, it should not have convicted him. He could not have been convicted of obtaining money by false pretence by merely witnessing another person. Contrary to the trial court, by the prosecution's own evidence, it was Sunday Mzamu who obtained the money and thus there was simply no case for the appellant shifting blame on the real culprit or that the appellant did not marshal any evidence to shake the prosecutions case as the first appellate court found. The upshot of the foregoing is that the prosecution did not prove its case on the first count.

Regarding the third count, the particulars of the offence show that the amount involved was TZS 3,000,000.00. However, exhibits PE4 and PE5 tendered by PW4 reflect an amount less than the amount stated in the charge sheet. It will be recalled that PW4 told the trial court that he gave the appellant a sum of TZS 500,000.00 and TZS 800,000.00 was given to Sunday Mzamu. We are mindful of the consequences of variance between evidence and the charge. It is trite that where there is a variance between the charge and the evidence and in the absence of any amendment of the charge it is tantamount to the prosecution having failed to prove its case on the required standard in criminal cases. See for instance the Court's

decisions in **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017, **Noah Paulo Gonde and Another v. Republic**, Criminal Appeal No. 456 of 2017 and **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No. 175 of 2018 (all unreported).

Mr. Maleko conceded as such but was adamant that in view of the appellant's admission in the cautioned statement through PW8, such confession was sufficient to prove the case against the appellant. While it is trite that the best evidence is the accused's own confession to the offence, we are unable to go along with Mr. Maleko in his contention. We have examined exhibit PE8 and it is clear to us that the so-called cautioned statement was taken in connection with offences allegedly committed under section 23 (1) and 28 (1) of the Prevention, Control and Combating of Corruption Act quite distinct from the offence under section 302 of the Penal Code, subject of the charge laid at the appellant's door. The alleged confession, if any, was irrelevant to the case the prosecution sought to prove against the appellant. At any rate, upon our examination of exhibit PE11, we have not found any resemblance of a confession to the ingredients of

an offence obtaining money by false pretence under section 302 of the Penal Code.

In fine, we are satisfied that the appellant was wrongly convicted. He was convicted against the weight of evidence proving the case against him beyond reasonable doubt. Consequently, we are constrained to quash his convictions and sentences meted out to him and substitute with an order acquitting him of both counts, subject of this appeal. The appellant shall be released from custody forthwith unless held for any other lawful cause.

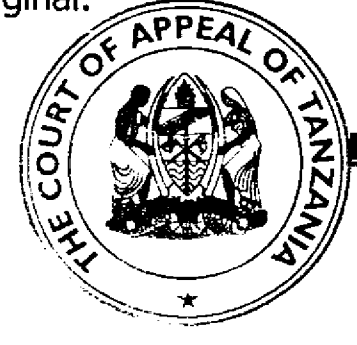
DATED at **DAR ES SALAAM** this 8th day of March, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of March, 2023 in the presence of Appellant in person through Video Link from Ukonga Prison and Mr. Emmanuel Maleko, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL