IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
CRIMINAL APPEAL NO 31 OF 2019

EMMANUEL KOTEH_____ **APPELLANT**

VERSUS

THE REPUBLIC _____**RESPONDENT**

(Arising from the Decision and Orders of the District Court of Tarime Hon. Mpaze RM, in Criminal Case No 160 of 2017 dated 13.02.2018)

JUDGEMENT

Date of last order; 30.07.2019
Date of Judgment; 16.09.2019

GALEBA, J.

In this appeal the appellant **MR. EMMANUEL KOTEH,** is challenging the decision and orders of the District Court of Tarime which together with **MR. ENOCK NYAITORE RAMADHANI** (the 2nd Accused) were convicted on two counts of obtaining money by false pretense contrary to **section 302 of the Penal Code [Cap 16 RE 2002]** (the Penal Code). Consequent to the conviction, on 13.02.2018 the two were sentenced to serve a term of 3 years in jail and thereafter to pay compensation of Tshs 1,000,000/= to PW1 and 4,300,000/= to PW2.

In summary, according to the charge mounted against the appellant, the 2nd accused person and **MRS. CHRISTINA ENOCK NYAITORE,** the 3rd accused person, is that on 07.12.2016 at Sokoni village in Tarime District in the administrative Region of Mara, the

appellant together with the two accused persons by false pretense and with intent to defraud did obtained Tshs. 4,350,000/= from one **ROSEMARY KUZENZA (PW2)** and Tshs. 1,000,000/= from one **MOSHI DENSON MAKANYA (PW1),** on the pretext that in consideration thereof, PW1 and PW2 would be supplied with a total of 178 pieces of wax vitenge clothes made in and imported from the Federal Republic of Nageria, which was in fact not true.

According to the prosecution facts that were admitted at preliminary hearing (PH), the appellant and the 2nd accused person admitted the offence on 24.02.2017 at Mwanza Central Police. The admission was before police officers No **E 4577 D/SGT DANIEL** and **F. 4397 D/C BAHATI**. Somewhere in this judgment the relevance of this piece of fact will be apparent.

The appellant denied the charge and 3 witnesses were called. They were **MOSHI DENSON MAKANYA (PW1), ROSEMARY KUZENZA (PW2)** and **F 4397 D/CPL MUSTAPHA (PW3).** Although **D/SGT DANIEL** and **D/C BAHATI**, were listed during PH that they would be called to testify but during the actual hearing the prosecution omitted to call them. Although, the prosecution was in possession of the confession of the appellant and that of the 2nd accused, those documentary evidences were not tendered to support the prosecution case.

The substance of the evidence of **MOSHI DENSON MAKANYA (PW1),** was that in November (without specifying the year) the 2nd accused person went to her house and he told her of the appellant being a business man and preacher and that he is dealing in imported wax vitenge from Nigeria. She had Tshs 1,000,000/= which she was ready to invest but because that would not be enough she called **ROSEMARY KUZENZA (PW2)** who had Tshs 4,300,000. The same day the 2nd accused called the appellant and both PW1 and PW2 at the

home of the 2nd accused at 2.00 o'clock in the afternoon they gave the money to the latter and the 2nd accused gave it to the appellant. The agreement was to supply the wax clothes in 2 days but that did not work out till they reported the matter to the police and later to the court. During cross examination she stated that the money was given to the appellant on 07.12.2016.

The evidence of **ROSEMARY KUZENZA (PW2)** was that on 05.12.2016 DW1 called her and introduced her to the business of wax vitenge from Nigeria. When she arrived, PW1 called the 2nd accused who came with his wife, the 3rd accused. Then the 2nd and 3rd accused persons left PW1 and PW2 at the home of PW1. PW2 went to Lamadi to get the money and came back and by 2.00 o'clock in the afternoon she had the money. Later the 2nd accused called PW1 because the appellant had arrived at the 2nd accused home. In the evening hours PW1 and PW2 went to the 2nd accused home and found the appellant, 2nd and the 3rd accused persons. She gave Tshs 4,350,000/= to the 2nd accused who in turn gave the money to the appellant. The agreement, according to this witness, was that the appellant would supply 145 pieces of wax vitenge in 2 days of the payment. The promise was not fulfilled. During cross examination she repeated that the transaction took place on 05.12.2016 although also she asserted having met the appellant for the 1st time on 06.12.2016. During reexamination this witness stated that the money defrauded was Tshs 3,350,000/=.

D/CPL MUSTAPHA (PW3) testified that he was given the case file involving the accused persons and he drew the charge and lodged it in court.

The defence also tendered evidence whose details I will not go into, for reasons that shall become apparent.

Based on the above evidence on 13.02.2018 the trial court convicted the appellant and the 2nd accused and sentenced them as earlier stated that acquitting the 3rd accused person.

In this appeal, it is that decision that the appellant is up against. With the services of Mr. Onyango Otieno, learned advocate, the appellant filed an appeal containing 4 grounds of appeal, the first ground being;

> ***"1. That the trial magistrate erred in law and fact by admitting evidence which is self contradictory and uncorroborated by prosecution witnesses which led to the appellant's conviction."***

We will go to other grounds only if this ground shall not survive this Court's analysis of evidence and submission of counsel for and against its merits.

Appearing before me for arguing this appeal were Mr. Otieno learned advocate for the appellant and for defending the respondent was Mr. Nimrod Byamungu learned State Attorney.

Submitting on this ground Mr. Otieno complained that there was a discrepancy of Tshs. 50,000/= between the charge and the evidence. He submitted that that meant that a charge was not proved beyond reasonable doubt by the evidence brought by the prosecution. He stated that there were even discrepancies as to dates when the appellant was arrested. He stated that item 6 in the facts submitted by the prosecution during preliminary hearing stated that the appellant was arrested on 24.02.2016 but at page 14 of the typed proceedings PW1 stated that the appellant was arrested but does not mention the date.

Mr. Otieno went on to submit that PW2 was not consistent as to the date on which she met the appellant for the first time. He submitted that PW2 testified at page 16 of the proceedings that she met the appellant for the first time on 05.12.2016 but then a while later at page 18 she stated that she met the appellant for the first time on 06.12.2016.

The other aspect on the contradictions according to Mr. Otieno was the amount of money in the charge sheet and the evidence which was brought to support the same charge. He submitted that whereas the charge sheet refers to Tshs 5,350,000/= the evidence sought to prove Tshs 5,300,000/=. He added that the judgment also refers to the latter amount.

He submitted that these contradictions were very material and went down to shaking the roots of the prosecution case and in supporting his position, Mr. Otieno cited **CIVIL APPEALS NO 114 AND 115 OF 2009 BETWEEN YOHANA DIONIZI AND SHIJA SIMON VERSUS REPUBLIC** in which it was held at page 7 of the typed judgment that ***"the existence of contradictions or inconsistencies in the evidence of a particular witness and one's case as whole, is a basis for finding of lack of credibility, provided that the said discrepancies are serious, sufficient and go to the root of the issues being adjudicated."***

He moved the Court to find that the conviction was unlawful on account of contradictions in the evidence of the witnesses.

In reply to this ground, Mr. Byamungu stated that the difference in the dates is not fatal because the same did not prejudice the appellant. He stated that the witnesses were consistent as to how they met and how they gave the money to the appellant. He stated

that variance in dates in the proceedings is curable under **Section 234(3) of the Criminal Procedure Act [Cap 11 RE 2002] (the CPA)**, which provision, according to him was enacted in order to cure problems where witnesses cannot remember dates of commissions of offences in question. He stated that as the testimony was being given 8 months after commission of the offence it is possible for the witnesses to have forgotten dates. He stated that the witnesses were found credible by the trial court citing the case of **OMARI AHAMED VERSUS REPUBLIC [1983] TLR 52** where the Court held that ***"the trial court's findings as to credibility of a witness is usually binding on appeal court, unless there are circumstances on the record which call for reassessment of their credibility."*** He cited yet another decision of **SADA ABDALLA RAJABU AND OTHERS VERSUS REPUBLIC [1994] TLR 132** where it was insisted that a trial court is better placed to assess credibility of witnesses than an appellate court which merely reads transcripts of the record.

Mr. Byamungu submitted that the discrepancies in figures of the money in the charge and the evidence and the judgment should be disregarded because they were clear that they gave the money to the appellant and the second accused person although they were forgetting the figures of the amount of money they gave to the accused persons. Counsel for the respondent submitted that should the court find that the omission was grave then it be pleased to invoke the provisions of section 388 of the CPA to cure the anomaly.

From now on this Court will consider the merits and demerits of this ground and we will start with the date of the alleged commission of the offence. According to the charge, the offence was committed on 07.12.2016. This means that the accused persons were put to notice that they were facing a charge on account of crime which was committed on that date (07.12.2016) and not any other date.

On this aspect of dates, PW1 during examination in chief states that the offence was committed in November without specifying the year. To appreciate the evidence on this aspect I will quote at some length the testimony of this witness as recorded at page 13 and 14 of the proceedings. PW1 testified that;

> ***"In November Enock came to my home told me (sic) that there is a preacher from Nairobi; who is at Mwanza, he is a faithful preacher who normally takes those vitenge from Kenya to Tanzania, he told me the said preacher if he will take vitenge will pay you well. He also told me that even his wife has come for him. I asked him how much capital will it need, he told me 10 million. I said I have no that money.***
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> ***I asked Erick how long have you known the preacher he said for long, he convinced me by telling me even his wife went there. Erick then said to pay Tshs. 5,000,000/= for a certain pieces. I had no that money he told me to pay 1,000,000/= for 33 pieces. I did not pay, I called Rose, I asked her if she has money to pay, I called Rose who came in which we gave this 2nd accused Tshs 5,300,000/= my money was Tshs 1,000,000/= it was notes of Ths 10,000/= Rose is a doughter of my friend.***
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> ***At about 14.00 hours we left to my home with Rose and went to Enock's home and we met Enock, his wife, Oketh, Rose and I. Enock reside at sokoni from home to Enock (sic) it is like minutes (sic) by foot.***
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> ***We all counted the money we gave to Enock and Enock gave to Emmanuel (1st accused) were communicating in Swahili and Enock interpret (sic) in English....."***

In other words, according to PW1, in his examination in Chief, the crime was committed in November although the year is not specified. But that was PW1's first position. During cross examination, the same witness was of a different view, this is what he stated to the first question during cross examination by the appellant;

> "***Yes. On <u>7/12/2016</u> it was the first day I know him through Enock. I gave you money, 14 hrs five people. You, I, Rose, Enock's wife, Enock and Rose."***

From the evidence of PW1 it is not known on which date was, the crime committed if any, according to this witness. There are two dates; one is an indefinite date in November and another is 07.12.2016. This witness had also issues with the name of the person they gave the money; at some point it was ERICK but sometime he could as well be ENOCK. The evidence of this witness was not only at disharmony with the charge, but the same evidence was not at harmony with itself. It was self contradictory. We will now move to the evidence of PW2.

During her evidence in chief at page 16 of the proceedings PW2 stated as follows;

> ***"On 5.12.2016 Moshi called me informing there is business as she was told by his neighbor she told me to come and listen. I came I met with Moshi she told me there is a man called Emmanuel he is a Nigerian selling vitenge. And she told me Enock the one who introduce (sic) to him that Enock is the one who brings the said vitenge from Emmanuel.***
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> ***Moshi called Enock who came with his wife I asked Enock how can I get the said cargo, Enock said the said preacher told me***

to ask people who need vitenge. If you need I will call him. The wife of the said Enock insisted it is true his husband is the one who is normally taking the said cargo from border having received that proof I told Enock to communicate with Emmanuel.

Enock and his wife left we remained there with Moshi. At evening hours, Enock called Moshi telling her that Emmanuel have (sic) arrived. We met Enock, Emmanuel, wife of Enock and I. Enock was interpreter. "

During cross examination PW2 stated that she met the appellant for the first time on 06.12.2016.

These are some of the issues that were irritating Mr. Otieno on one hand but which issues that Mr. Byamungu was comfortable with. This Court will harmonize the position in a moment. Mr. Byamungu submitted in the alternative that if I am to agree with the appellant's position then the anomaly is curable under section 234(3) of the CPA. This court is not in agreement with that position, because that section provides for circumstances where there is a variance in time between the evidence and the charge sheet not where there is a variance in days like the circumstances in this case.

Let us set records straight as we get closer to the end of this ground. The position of law is this, on matters like the one obtaining in this case; when there is a difference in dates between the charge and the evidence the appeal must succeed because the appellant is taken not to have understood the nature of the allegations facing him. In all cases evidence must establish the offence as committed on the date in the charge sheet. That is the law as it stands today in Tanzania. The relevant decided cases are **ABEL MASIKITI VS REPUBLIC**

CRIMINAL APPEAL NO 24 OF 2015 (UNREPORTED), MOHAMED KANINGU VS REPUBLIC [1980] TLR 279, JUSTINE MTELULE VS REPUBLIC CRIMINAL APPEAL NO 482 OF 2016 (CA IRINGA UNREPORTED), MASASI MATHIAS VS REPUBLIC CRIMINAL APPEAL NO 274 OF 2009 (CA UNREPORTED), VUMILIA PENDA MUSHI VS REPUBLIC CRIMINAL APPEAL NO 327 OF 2016 (UNREPORTED) and **RYOBA MARIBA MUNGARE VS REPUBLIC CRIMINAL APPEAL NO 74 OF 2003 (UNREPORTED).**

For instance in **ABEL MASIKITI VS REPUBLIC** it was held that;

> ***"in a number of cases in the past, this court held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur."***

In this case the charge states that the offence was committed on 07.12.2016. PW1 gives two dates one November without specifying the day and the year and the other is 07.12.2016. PW2 gives two dates none of which is 07.12.2016. She gave 05.12.2016 and 06.12.2016. In these circumstances a charge of an offence which was committed on 07.12.2016 cannot be said to have been proved. In the circumstances we uphold the first ground.

At the beginning we stated that the defence tendered evidence whose details we would not go into for reasons we indicated that would become apparent sooner or later. The reason we did not bother to go to the details of the defence is that, had the trial court directed itself properly it ought to have acquitted all accused

persons for want of disclosure of the case to answer by the prosecution. No accused ought to have defended a case that was not substantiated by the prosecution.

As a decision on the first ground is sufficient to dispose of the appeal, we will not deal with other grounds in order to make better use of the Court's time and other resources.

In the circumstances this Court makes the following orders;

1. The conviction of the appellant in relation to the charge of obtaining money by false pretense in **Criminal Case No 160 of 2017 at Tarime District Court** are both quashed and nullified.
2. The two sentences one for compensation of Tshs 1,000,000/= and Tshs 4,300,000/= on one hand and that of serving a term of 3 years in prison, on the other, are set aside.
3. The appellant, **MR. EMMANUEL KOTEH** (if he has not completed his jail sentence) is to be released forthwith from prison or any other detention facility unless he is otherwise lawfully held there.

   It is so ordered.

DATED at MUSOMA this 6th September 2019

Z. N. Galeba
JUDGE
06.09.2019

This judgment has been delivered today the 6th September 2019 in the absence of the appellant and in the presence Mr. Nimrod Byamungu, learned State Attorney for the Respondent. A party who may be aggrieved by this decision has a right of appeal to the Court of Appeal of Tanzania according to law.

Z. N. Galeba
JUDGE
06.09.2019