

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 05 OF 2020

(Appeal from the order of the Resident Magistrate's Court of Kibaha at Kibaha as per J. J. Mkhoyi, RM dated 19th December, 2019 in Criminal Case No. 79 of 2019)

KILENGE S/O SOSPETER KULENGWA APPELLANT

VERSUS

REPUBLIC RESPONDENT

Date of last Order: 13/07/2020

Date of Judgment: 14/07/2020

J U D G M E N T

MGONYA, J.

In this appeal, the Appellant, **KILENGE S/O SOSPETER KULENGWA** challenges the Judgement (impugned judgement) of the *the Resident Magistrate's Court of Kibaha at Kibaha* (the trial court) in **Criminal Case No. 429 of 2017**. Before the trial court, the Appellant stood charged with two counts; the 1st count was obtaining goods by false pretence contrary to **section 302 of the Penal Code, Cap. 16 [R. E. 2002]**. The Appellant pleaded not guilty to the charge, hence a full trial. At the end of the day, the trial court found the

Appellant guilty, convicted and sentenced the convict to **two years imprisonment** and ordered to **pay the victim the sum of Tshs. 13,920,000/= immediate after finishing to serve his sentence.**

Aggrieved by the conviction and sentence, the Appellant preferred this appeal. His petition of Appeal is based on two (2) grounds of Appeal:

- 1. That, the trial Court erred in law and facts by entered conviction basing on the PW3 while the prosecution failed to prove its case beyond reasonable doubt.***
- 2. That, the trial Magistrate erred in law and facts by failing consider the Appellant evidence and testimony and a result the trial court entered conviction against the Appellant while the nature of the transaction between the Appellant and the complainant was of a nature of Civil Case because of the contracts entered between them.***

Whereas, the Appellant prays the court to allow his Appeal and quash the trial Magistrate's order.

In submitting for the first ground of appeal, it is the Appellant's assertion that, the subordinate Court based its

conviction basing entirely on the evidence tendered by PW3, who testified that the Appellant herein that after selling the consignment that the Appellant was given, instead of giving him the money as promised, he ran away from him with the money he collected from the businessmen who bought maize flour bags from him.

It is from the same witness (PW3) it was alleged that after the disappearance of the Appellant, the matter was reported at police and the Appellant was later apprehended. It is from that point, the Appellant signed a second contract that the Appellant was supposed to pay the complainant a debt amounting to **Tshs. 17,000,000/=** being principal sum plus penalty of which the Appellant agreed.

From the above, it is the Appellant's counsel assertion that, the intention to defraud was lacking because of the contracts entered between the Appellant and the complainant, and that the surrounding circumstances does not reveal criminal intent; hence the appropriate remedy was a Civil claim.

It has been further submitted that, out of the 2nd Agreement, the Appellant was supposed to pay the complainant an amount of **Tshs. 17,000,000/=** being **principal sum plus penalty** and that before the Appellant

had effected the payment, the Appellant was arrested and was detained almost two weeks before he was taken to Court and charged with the offence of **obtaining goods by false pretence c/s Section 302 of the Penal Code** and ultimately the trial court convicted him.

On the second ground of Appeal, it is the Appellant's Counsel submission that the trial court erred in law and facts by failing to consider the Appellant evidence and his testimony and as a result, the business transaction entered between the Appellant and the complainant which was of a civil case nature, was not considered to be the contract entered between the complainant and the Appellant of which can be enforceable in law in court as a Civil matter where there is a default of ether party.

Further, it is the Appellant's Counsel assertion that the evidence tendered by the Appellant was not considered by trial court at all to the effect that the Appellant entered an Agreement with the complainant to buy 1,200 bags of maize flour and he signed a contract and took all the bags to Kimanzichana Area to sell them. However in the cause of that business, one Baraka, Appellant's assistant took the money he collected from the Appellant's customers in Kimanzichana and disappeared hence he could not find him

easily and he came into contact with him after two weeks' time.

Insisting on this point, the Appellant's Counsel insisted that the Appellant had no intention to permanently deprive the complainant 800 bags of maize flour because he promised to pay the debt amounting to **Tshs. 13,920,000/=** by signing a second contract. However, the trial court convicted him for the offence of obtaining goods by false presence contrary to the provision of **section 302 of the Penal Code;** of which is subject to the instant appeal.

From the above, it is the Appellant's Counsel concern that under the circumstances that Prosecution had failed to prove their case to command conviction, hence the prayer for the court to allow the appeal and quash the trial court's order.

From the outset, it is the Republic's reaction that Republic is strongly opposing the appeal as it lacks merits.

Responding in respect of first ground, that the trial court erred in law and facts by entered conviction basing on PW3's testimony while the presentation failed to prove its case beyond reasonable doubts, it is the Republic's concern that at the trial court, the Appellant was arraigned before the aforementioned court with the offence of obtaining goods by

false pretence contrary to **section 302 of the Penal Code, Cap. 16 [R. E. 2002]**.

It is further submitted that, under this provision, three crucial elements has to be proved against the adverse party. These elements are **false pretence, with intent to defraud and obtaining goods**.

In considering the above requirement and regarding with the evidence of **PW3**, one **Projestus Albart Kagashiki** at Pg. 12, it is the Republic's submission that all the above three elements were met, and proved beyond standard.

It is from the PW3's testimony, the Republic's State Attorney is of the view that, the Appellant had malice aforethought to commit an offence as that, malice aforethought have been manifested by such Appellant's acts before and after the event.

It is the Republic's concern that soon after the Appellant took off the cargo, he pretended to pay the remaining amount of money before escaping of nowhere to be seen. It is further observed that, if the Appellant had faced any challenges he could informed the complainant instead of escaping. The said conduct has been counted as intention to deprive the goods permanently.

Submitting on the second ground of appeal that, the Republic has strongly opposed the same stating that the same is devoid of merit as entering into agreement did not deprive the Appellant to commit criminal offence. As stated above, it is the Republic's contention that, Appellant established his malice from the beginning thus he paid only quarter of the whole amount and promised to pay the same after the cargo attained to the destination the fact which he knew to be untrue.

In this ground, the Republic agreed that to some extent with Appellant's submission, that the matter in issue draws a thin line between Civil and Criminal in nature. However, it is the learned State Attorney's view that, so long the basic elements of criminal offence were well established and met against the Appellant, they conquer with the trial Magistrate in considering that the matter this is a more of a Criminal in nature than Civil, and that the Appellant was rightly convicted as the offence was proved beyond reasonable doubt.

From the above submission, it is the Respondent's prayer that the appeal before the court be dismissed as the same is devoid of merit.

After a careful perusal of the records of the case, the testimonies adduced by the parties and the final submissions submitted by both Counsel, I should state at the outset that in

the course of determining this case, I will be guided by the contents of **Exhibit P2** being the second Agreement between the Appellant and the Director of CPL Ltd Industry one **ZHANG YONGJIE dated 23rd April, 2019.**

It is in the records of the Court that the Appellant had entered into an agreement with the Director of CPL TLD Industry one ZHANG YONGJIE to pay the sum of **Tshs. 13,920,000/= (Thirteen Million Nine Hundred and Twenty Thousand) together with disturbance cost of Tshs. 3,080,000/= (Three Million and Eighty Thousand)** all together adding up to the sum of **Tshs. 17,000,000/= (Seventeen Million Shillings).** And that all the above was from both parties to the Agreement (**Exh. P2**) by their own will without being forced.

It was also the Appellant's admission in the said Agreement that the amount in the same if not being paid, then the Agreement should be used before the Court of law as evidence against him.

Moreover, the records show that the Agreement was entered after a first agreement had been breached by the Appellant who states that the default was not of his own act

but rather contributed by his assistant who disappeared with the money after distribution of the consignment.

It is from the above that it should be noted that the CPL TLD Industry had a prior Agreement with the Appellant which was defaulted and still the Director of the named Industry above notwithstanding had faith and entered into another Agreement with the Appellant. It is from that view that I find absence of an intent to defraud from the beginning of the Agreement between these two parties which is a core ingredient to criminal cases.

The matter before the trial Court was a **Criminal Case** where the Appellant was accused for the offence contrary to ***section 302 of the Penal Code Cap. 16 [R.E. 2019]***. It is my understanding that Criminal Cases are cases where a person is accused of a crime is generally charged in a formal accusation called a Charge (for felonies or serious crimes) or information (for misdemeanours). The Government, on behalf of the people prosecutes those cases through the State/ Republic if the person is charged with a crime.

When a court determines that an individual committed a crime, that person will be sentenced accordingly. The sentence may be an order to pay a monetary penalty (a fine and/or

restitution to the victim), imprisonment, or supervision in the community (by a probation officer), or some combination of the above.

However, the course of the matter before this Honourable Court and as it appears before the trial court the matter was proceeded by an Agreement between two individuals named above, the Appellant being one of them. According to jurisprudence such a matter can well be elaborated as a **Civil Case**. In this respect, a civil case begins when a person or entity (such as a Corporation or the Government), called the Plaintiff, claims that another person or entity (the Defendant) has failed to carry out legal obligation owed to the Plaintiff. Both the Plaintiff and the Defendant are also referred to as "**parties**" or "**litigants**". In that case, the Plaintiff may ask the court to order the Defendant to fulfil that liability especially when the same is contractual, or compensate the other party for the detriment done, or both. Legal duties includes respecting rights, terms and conditions established under the certain instrument such as an Agreement / Contract as the case before us.

Civil suits before the courts, are between individuals including Corporations or companies suing each other **for not**

living up to a contract / (s) of which I find is the case in the circumstance of this Appeal as from the records of this Appeal.

Having said so and from the above, I am of the view that the matter before this Honourable Court has been misconceived from the very beginning at the trial court; as the court misdirected itself for handling the case as a criminal case while it lacks qualification to form a **criminal case**. On my firm view **this is a pure contractual matter** as also agreed by the learned State Attorney by stating so in their respective submission; of which the Appellant had frustrated the terms and conditions thereto by failure to pay the agreed amount to the claimant timely. The remedy to the same was supposed to get its reliefs from a Civil case and not Criminal as it was the case.

From the above explanation, I hereby differ with the Republic's stand on Appeal and I hereby allow the Appeal for the error identified above without costs.

Further, I proceed to quash the compensation order thereto as the Appellant has already suffered imprisonment sentence and I hereby in lieu of the same order that the Appellant herein pay half amount to the same that is Tshs. 6,960,000/- only in that respect.

Lastly, I proceed to set aside the Appellant's substituted sentence of community service for the period of 13 months as ordered by Hon. J.J. Mkhoi (RM) on 25th March, 2020.

It is so ordered.

Right of Appeal explained.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya".

L. E. MGONYA
JUDGE
14/07/2020

Court: Judgment delivered this **14/07/2020** in my chamber in the presence of the Appellant, Ms. Faraja George, Senior State Attorney and Ms. Vero RMA.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya".

L. E. MGONYA
JUDGE
14/07/2020