IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL No. 19 OF 2020

(Originating from Criminal Case No. 98 of 2018 of Nyamagana District Court)

D. P. P. .....APPELLANT

VERSUS

WILLIAM FESTO MAKUNE .....RESPONDENT

JUDGMENT

26th August, & 09th October, 2020

TIGANGA, J.

The respondent, William Festo Makune, stood charged before the District Court of Nyamagana, at Mwanza, in Mwanza Region with an offence of obtaining money by false pretence contrary to section 302 of Penal Code [Cap 16 R.E 2002] (as it was then, but now [Cap 16. R.E 2019]). He was accused to have obtained Tshs. 11,000,000/= from Johari d/o Katwikilo pretending to lease her the business apartment located in plot No. 202 Block "T" Lumumba Street, Mwanza City, the fact he knew was not true.

After full trial, the respondent was found not guilty and consequently acquitted. The appellant, Republic was aggrieved by the decision, it appealed to this court on two grounds;

i. That the learned trial Magistrate erred in law and facts by acquitting the respondent with the charge he stood charged.
ii. That the learned trial Magistrate grossly erred for failing to properly evaluate and appreciate the prosecution evidence in its totality, hence he arrived at a wrong conclusion.

The grounds of Appeal were countered by the respondent who was represented by Mr. Barack Alfred Dishoni Advocate. In respect of the 1st ground, he stated that the relationship between the parties is of civil nature; therefore, there is no place to adjudicate it criminally before civil matter is resolved.

In respect of the 2nd ground the respondent join issue, he stated that the substantial ingredients of the offence of obtaining money by false pretence were not proved beyond reasonable doubt.

He added that the complainant PW1 did not dispute the fact that for almost three years had been occupying one of the rooms within the superintendence of the respondent without paying rent to wit, the facts which waters down the criminality.

At the hearing of an appeal which was heard orally, the appellant was represented by Miss. Magreth Mwaseba, learned State Attorney, while the respondent was represented by Mr. Barack Dishon learned counsel.

Miss Mwaseba, submitting in support of the appeal, stated that the trial court misdirected itself in holding that, it was a civil case as opposed to criminal.

Miss Mwaseba submitted that under section 301, the meaning of false pretence was given, with its ingredients which in effect all were proved by evidence. It is her argument that the respondent according to the evidence, presented himself falsely, and in such pretence, he concluded an agreement that he would rent the complainant the house in one month, and that she would have entered. Due to that pretence the complainant paid Tshs. 11,000,000/= which the respondent obtained after having pretended to have such a house and that he was ready to rent it to her.

She submitted that, the trial Magistrate did not appreciate the law and evidence of PW1 and PW2 who witnessed the agreement. She asked my court to be persuaded by the decision in the case of **Adam Yusuph Vs Republic,** Criminal Appeal No. 75/2004 HC - Othuman, J (as he then was), where it was held inter alia that, in **Jonas Nkize vs The Republic** [1992] TLR 213 (Hc), Katiti, J, the Onus is on the prosecution to prove the ingredients of the offence. Relying on that authority she asked me to be persuaded by looking at the evidence, and find that the evidence proved all the ingredients of the offence.

On the second ground, she submitted that the trial court erred in its failure to analyse and evaluate the evidence leading to the improper conclusion. She submitted that before the trial court, the prosecution called

more than five witnesses who all said how the respondent and PW1 entered into contract. That contract was also tendered as exhibit without objection from the defence. She submitted that, they asked the court to visit the *locus in quo*, but at page 17 of the proceedings, Mr. Nkanda, Advocate, who was representing the accused before the trial court, now the respondent before this Court said that they have no dispute about the rooms and they found no reason to move the court. She submitted that since the defence did not object, then the court ruled that, since there was no dispute about the house and the said front room, no reason for the Court to visit the scene.

In her attempt to convince the court that there was enough evidence to prove the case, she furthermore informed the court that, they called a handwriting expert who proved that the signature on the said contract was of the respondent, who was an Accused person before the trial court.

She submitted that the respondent did not dispute in his defence but tried to come up with a defence of setoff of the debt on the incident which was post dated. She also asked if the ground will be seen to be meritorious, then an order for compensation be made.

In his reply, Mr. Barack Dishon, Advocate who represented the respondent, submitted that the case was not proved beyond reasonable doubt. He submitted further that the prosecution needed to prove three elements.

i. That a person must have done a representation whether oral or written.

ii. That he had full knowledge of what he was doing and he did that with intent to defraud and.

iii. The person against whom the representation was made believed it to be true.

All these ingredients must be proved beyond reasonable doubt. According to him, what was tendered and relied on is the agreement and nothing was said to prove the three ingredients.

He submitted that the evidence prove that the respondent had a house which he was leasing and had the capacity to lease it, according to him that was proved by the evidence proving that the complainant was still a tenant when the case was filed. He submitted that in their agreement the issue was not to lease the complainant a front room or a back room.

Further to that, he submitted that there is yet still evidence that, the victim was in another room which she occupied since 2017 and has never paid rent since that year to 2020.

He submitted that at the totality of the evidence, no false pretence was established, therefore the findings that the matter be dealt with by a civil way was proper. This is because they do not dispute to have a contract of tenancy, and both parties had the capacity to enter into contract, and that pursuant to that contract, the victim was given a room and she was in that room up to when the judgment was delivered by the trial court.

Regarding the applicability of the case of **Adam Yusuph vs The Republic** (supra), he submitted that the same is distinguishable in the circumstances of the case at hand. As in that case the accused falsely

pretended to be the right owner while he was not, unlike in this case where the respondent was proved to be the lawful owner.

Regarding the case of **Jonas Nkize**, (supra), he submitted also that the same is also distinguishable as in that case, they were dealing not with the rightful owner, unlike in this case where the appellant is the owner.

Submitting in opposition of the second ground of appeal which raises a complaint that the trial court did not analyse the evidence in its judgement, the counsel for the respondent submitted that, the trial court evaluated the evidence that is why at the end of the judgment, it concluded that, the complaint was nothing but a setoff, as they did not dispute to receive money. He asked the judgement of the trial court to be upheld and the appeal to be dismissed for the reasons he has given.

In rejoinder, Miss Mwaseba, learned State Attorney, submitted that, the submission by Mr. Dishon intends to mislead the court in this matter. To buttress that argument, she relied on the evidence given by PW1 before the trial court which was to the effect that, she was a tenant in one, out of 34 rooms, and that while occupying that room, she entered in agreement with the respondent in which the respondent pretended to have and to give her one front room. According to her, the respondent new right from the beginning, that he had no such a front room to give her.

Miss. Mwaseba, also submitted that, even after he had received the money, the respondent disappeared from Mwanza, up to when he was arrested and brought back by the police.

She further to that submitted that, the money i.e Tshs. 11,000,000/= which is a thing capable of being stolen, was obtained on the pretence that

the respondent had already issued a notice to one Marry Kweka to vacate the front room would then be handed over to the complaint by the respondent.

She submitted that, there is no setoff, counter claim or even a bonafide claim of right. She at the end, asked the appeal to be allowed, the trial court decision to be set aside, and on its place, the conviction be entered against the respondent.

Having summarised at length, the submissions by both parties, it is important to go back to the charge sheet preferred against the respondent before the trial court. The charge is obtaining money by false pretence contrary to section 302 of the Penal Code [Cap 16 RE 2019].

The particulars of the offence was that the respondent obtained Tshs. 11,000,000/= after falsely pretending to rent the victim a business apartment (a front room) located on plot No. 202 Block "T" Lumumba Street in Mwanza City the fact he knew to be not true.

The respondent pleaded not guilty to the charge, and during the preliminary hearing, which was not conducted regularly, though the irregularity did not prejudice any party, he did not admit to have committed the offence. That means, the appellant was duty bound to prove the charge preferred against the accused person, now the respondent.

For the republic to be taken to have proved the case at hand, they were supposed to prove the following ingredients of the offence as provided under section 301, which is a definition section;

(i) That, the accused person, now the respondent, made any representation, either by words, writing or conduct.

(ii) That, representation was on matters of facts or intention.

(iii) That, the representation was false and a person making it knew it to be false or did not believe it to be true.

(iv) That, he did that with intent to defraud.

(v) That, by that representation and with that intent, he obtained from the victim PW1, anything capable of being stolen or induces PW1 to deliver to any person anything capable of being stolen. In this case Tshs. 11,000,000/=

From the ingredients of the offence as analysed above, the one key word which is used is the the term "to defraud". The penal code does not define the word or term "to defraud" as used in section 302 of the Penal Code. However in the case of **Jones Ndunguru vs The Republic,** [1984] T.L.R 284, HC - my senior brother Hon. Samatta, J, as he then was, borrowed leaf from the decision of Lord Wrenbury in the case of **Re, London and Globe Finance Corporation** [1903] 1 Ch. 728 in which the term "deceive" and "to defraud."

> *"To deceive is, I apprehend to induce a man to believe that a thing is true which is false and which the person practicing the deceit knows or believes to be false. To defraud is to deprive by deceit, it is by deceit to induce a man to act to his injury. More tersely it may be put that to deceive is by falsehood to induce a state of mind, to defraud is by deceit to induce a course of action".*

This means, the offence of false pretence involves the state of mind of the person practicing deceit that what he tells or how he conducts himself does not hold any truth, but pretendingly induces the victim to believe that what he tells or does is true. It is a common knowledge that, the state of mind of a person is not easy to ascertain from his mind, as what goes by in his mind is known by himself and his God. However, the state of mind can be ascertained from the words or conducts or both, of that person either before the incident or after the incident.

From the evidence, on record, there is no dispute that the respondent represented himself by words in writings as exhibited by exhibit P1, a contract of tenancy which was concluded between the parties in which the respondent covenanted to lease a room to the victim at the annual rent of Tshs. 11,000,000/= (eleven million) as the consideration of that agreement.

The tenancy was to start on 07/06/2016 and was to last for one year. It is also evident that, the respondent did not hand over the said front room to the victim on 07/06/2016 as agreed. The issue is why did he not handover the room as agreed? The respondent does not give reason as to why he failed or did not hand over the said room.

There is no evidence showing that the contract entered was for renewing the existing one. The contract shows that, it was related to a new room not the former one which the victim was occupying at that material time. That said, it is obvious that, the money obtained from the victim was obtained on the pretence that she would be given a new room by the

respondent. The respondent had knowledge that either the room was not vacant for the victim to occupy or he did not intend to give her such a room.

It should also be born in mind that, even the allegations that the victim did not pay rent from 2017 to 2020 of the other room which she was occupying when she was concluding a new agreement in respect of the new room, and that the money paid as a consideration of the new agreement in respect of the new room did setoff that debt is unfounded, useless and unbecoming. I hold so because there is no dispute before the court which related to the payment of the rent in respect of that other room, and neither was the amount so claimed as the unpaid rent proved to be Tshs. 11,000,000/=.

It is also instructive to find that, the fact that they had a contract and that the said contract means the matter was to be pursued by civil litigation, has also no weight. What we look at in this matter, is an intention of the person when he was signing the contract. In this case, it is without doubt that, the respondent signed and concluded the contract with the victim while he was with intent to defraud as envisaged in the authority above.

Further to that, the conduct of the respondent after he had signed the agreement shows that he was guilty conscience as the evidence was that he vanished to Dar Es Salaam, until when he was arrested by the police.

Having said that, I find that the trial court was not justified to find that the offence was not proved; on the contrary, I find the evidence before the trial Court to be sufficient and to have proved the offence of obtaining money by force pretence at the required standard of beyond reasonable doubt.

That said, under the powers bestowed upon me under section 366 of the Criminal Procedure Act [Cap 20 R.E 2019], I do hereby substitute the findings of acquittal with that of conviction, and consequently find the respondent guilty of obtaining money by false pretence contrary to section 302 of the Penal Code [Cap 16 R.E 2019].

It is so ordered.

DATED at **MWANZA**, this 09th day of October, 2020.

J. C. Tiganga

Judge

09/10/2020

Judgment delivered in open court in the presence of Ms Rehema Mbuya, State Attorney, for the appellant, the respondent and his Advocate.

J. C. Tiganga

Judge

09/10/2020

Sentence

After considering the reasons given in mitigating and aggravating sentence, the accused/respondent is hereby sentenced to pay a fine of Tanzania Shillings 500,000/= (say five hundred thousands shillings), or two years jail imprisonment in default.

J. C. Tiganga

Judge

09/10/2020

Compensation order

The respondent, **William Festo Makune** is hereby ordered to pay to the victim **Johari d/o Katwikilo** Tshs. 11,000,000/= (say Tanzania shillings eleven million) as compensation as soon as practicable.

J. C. Tiganga

Judge

09/10/2020

Right to second Appeal explained and guaranteed

J. C. Tiganga

Judge

09/10/2020

THE HIGH COURT OF TANZANIA * MWANZA *