

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**HC CRIMINAL APPEAL NO.05 OF 2020**

*(Arising from Criminal Appeal No.06 of 2019 at Chato District Court, originating from*

*Criminal Case No. 79 of 2019 at Muganza Primary Court)*

**ALLY KASASI ..... APPELLANT**

**VERSUS**

**SHIJA NCHIMANI ..... RESPONDENT**

**JUDGMENT**

*Last order: 20.04.2020*

*Judgment date: 23.04.2020*

**A.Z.MGEYEKWA, J**

The appellant filed the instant appeal after being aggrieved by the decision of the District Court of Chato in Criminal Appeal No. 06 of 2019.

Before going into the merits of the appeal, it is important to comprehend what transpired at the trial court and before the first appellate court which cropped the present appeal, in a nutshell, the facts may be summarized as follows:-

The appellant instituted a suit before the Muganza Primary Court at Geita suing the respondent for an offence of cheating contrary to section 304 of the Penal Code Cap. 16 [R.E 2019]. The appellant claimed that on 2<sup>nd</sup> December, 2016 he gave the respondent Tshs. 13,400,000/= to enable the respondent to establish his business but the respondent did not service the loan. The respondent denied having committed the said offence.

Dissatisfied and aggrieved by the decision of the trial court the respondent filed an appeal before the District Court of Chato and the first appellate court decided in favour of the respondent. The appellant was not pleased with the decision of the first appellate court, hence this appeal before this court. The appellant filed three grounds of appeal as follows:-

- 1. That, the Honourable Magistrate erred in law and fact when he failed to properly re-evaluate the evidence as a whole, which includes documental, oral testimonies and where available circumstantial*

*evidence in the case as a whole that helped to prove or establish a fact to the satisfaction of the court that the fact has been proved beyond reasonable doubts thereby coming to an erroneous decision.*

- 2. That, the Honourable Magistrate erred both in law and in fact when he let his opinion, emotions, feeling and wishes take precedence over the law thereby reaching a wrong decision hence occasioning a miscarriage of justice.*
- 3. That, the Honourable Magistrate erred in law and in fact by reaching at a wrong decision without granting the right to be heard to the parties hence occasioning a miscarriage of justice.*

At the hearing of this appeal, the appellant and the respondent appeared in person and fended for themselves.

Being a layperson, the appellant opted to submit his grounds of appeal generally, he prays this court to adopt his grounds of appeal and form part of his submission. He went on submitting he has filed the instant appeal after being aggrieved by the decision of the first appellate court. He blamed the first appellate court for failure to evaluate the evidence on record.

In reply thereto, the respondent submitted that the decision of the first appellate court was correct since the court found that the appellant's evidence was incomplete since his witnesses testified against

him and they said that they were not aware amount the money which the appellant claimed to have given the respondent.

He concluded by urging this court to sustain the first appellate court decision.

In his brief rejoinder, the appellant maintained his submission in chief and argued that the trial court reached its decision after evaluating the documentary evidence since the witnesses were mere con man since they turned hostile. He concluded by stating that he leaves it to this court to go through the evidence on record and decide the matter accordingly.

Having heard the submissions of both parties, I remain with one central issue for determination, and that is none other than ***whether or not the present appeal is meritorious.***

I will address the first and second grounds of appeal that relates to the evaluation of evidence on record and the claim that the first appellant court determined the case based on his own opinion and feelings and not observing the law. If these grounds are answered in affirmative then the same will dispose of the appeal. I have gone through the court records and found that the charge against the

respondent was related to Fraudulent contrary to section 304 of the Penal Code Cap. 16 [R.E 2019]. The section provides as follows:-

*" 304. Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen or any other person to or deliver to any person anything capable of being stolen or to pay or deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or delivered but for such trick or device, is guilty of an offence and is liable to imprisonment for three years.*

I have revisited the trial court records and found that the case at the trial court was a civil case by nature since parties entered into an agreement, the amount of loan was set and time for servicing the loan was also set that means failure to repay the loan amounted to cause of action. I understand that it is possible for breach of contract to amount to a criminal case but only when the respondent could have forged the contract. The appellant was required to prove that the respondent had an intension to deceive the appellant or induced the appellant to enter into the said contract which was not the case in the instant appeal.

Additionally, in order to prove fraud, the appellant was required to prove a specific wrongful act to achieve an appropriate remedy. In the present appeal, the appellant was required to prove that the document was forged or the respondent had an intention to deceive him in order to achieve appropriate remedy but in the instant appeal the appellant claims relate to breach of contract that the respondent failed to perform the contract.

Consequently, in the instant case forgery was not proved that means there was no any connection between the appellant's claims and the alleged offence of fraud. In the first place, I must state clearly that, the Primary Court of Muganza was required to note that the criminal charge before it falls under the civil ambit and not criminal ambit, thus, treating the civil case like a criminal case was wrong. Moreover, the trial court misdirected itself by ordering compensation.

In the premises, I find that the court of the first instance, from the beginning, was not required to determine the case because it was a civil case by nature instead it ought to have dismissed the criminal proceedings and directed parties to pursue civil redress.

Consequently, for the aforesaid reasons, I proceed to quash the proceedings and judgments of the trial court and uphold the decision of the District Court of Ukerewe. Parties are at liberty to institute a civil case subject to the law of limitation. Therefore, I proceed to dismiss the appeal without costs.

Order accordingly.

DATED at Mwanza this 23<sup>rd</sup> April, 2020.

  
A.Z.MGEYEKWA

**JUDGE**

23.04.2020

Judgment delivered on 23<sup>rd</sup> April, 2020 via audio conferencing, and both parties were remotely present.



  
A.Z.MGEYEKWA

**JUDGE**

23.04.2020

Right of Appeal is fully explained.