

IN THE HIGH COURT OF TANZANIA
IN THE MWANZA DISTRICT REGISTRY
AT MWANZA

PC. CRIMINAL APPEAL NO. 08 OF 2021

**(Arising from the decision of District Court of Nyamagana District at Mwanza
Criminal Case No. 1762/2020)**

MARIAM HARUNA.....APPELLANT

VERSUS

PRISILLA MOLLEL.....RESPONDENT

JUDGMENT

9th & 30th June, 2021

RUMANYIKA, J

With respect to the charges of obtaining money by false pretenses C/s. 302 of the Penal Code, the 2nd appeal is against conviction and sentence of fine of sh. 100,000/= or a month in custody in default also sh. 500,000/= being refund to Prisilla Molel the respondent complainant as Nyamagana District Court upheld it on 12/02/2021, when the appeal was, by way of audio teleconference called on 09/06/2021 for hearing, Mariam Haruna (the appellant) had service of Zephania Bitwale learned counsel.

The appellant appeared in person.

I therefore heard them through mobile numbers 0782248476 and 0677071446 respectively.

The grounds of appeal essentially revolved around points; **one**, that the 1st appeal court improperly evaluated the contradictory and inconsistent respondent's evidence on record **Two**, that the prosecution case wasn't actually proved beyond reasonable doubts therefore the 2nd appeal court it should have held as such.

Mr. Zephania Bitwale learned counsel submitted; **(a)** that, the appellant's evidence was ignored the TV set having had been tested and found sound, the respondent paid and took it with her but shortly thereafter returned it defective and claimed back the money evidence of Sm2 notwithstanding (the principle of Caveat Emptor – case of **Atlantic Electric Ltd Vs. Morogoro Regional Corporative Union** (1984) TLR 12 that the defectiveness therefore it was but after through much as also, neither the TV set nor cash sale receipt was produced in court as exhibit. **(b)** that if anything, the appellant wasn't duty bound to prove that she sold a sound TV set to the respondent but the two courts bellow sort of shifted the burden of proof onto the appellant. We humbly submit and pray. The learned counsel further contended. That is all.

The respondent submitted that the appeal fell short of merits. That two of them they checked and packed the Tv yes, but it appears as the respondent had just gone out for transport, the appellant took advantage and exchanged it with the defective one whose production in court as exhibit it was nevertheless ordered by the trial court. That is all.

A brief account of the evidence on record reads thus:-

Sm1 Prisila William Molel stated that 30/09/2020 at about 18:00 hours and they tested at the shop, she purchased the Tv set 43 inch make Evoli for sh. 500,000/= but on arrival at home it turned out to be defective, then she returned it to vendor but the appellant did not accept it back or refund her hence the charges and case.

Sm2 Kelvin Lema son of Sm1 stated that just as the respondent had purchased the Tv set from the appellant but as she arrived home the Tv turned out to be defective, the respondent so complained and took it back to shop but the appellant did not receive it back.

Sm3 Yohana Nkoma, a boda boda rider, after the purchase from the appellant's shop (Nyerere Road, Mwanza town) the one who ferried the respondent and Tv home off he went back to work place only shortly

thereafter to be called back by the respondent complaining over the Tv being defective then for that reason he rode back the Tv and respondent to shop but the appellant did not accept it back.

Su Mariam Haruna stated that she was a business woman, resident of Lumala area, Ilemela District, Mwanza that indeed on 30/09/2020 at about 18:00 hours she duly sold the Tv set to the respondent and accordingly packed it but one having been issued a receipt and she left the shop, say 1.15 hours later the respondent came back complaining. That she in fact had sold a sound Tv set therefore she couldn't accept it defective that at the respondent's request she called her a "fundi" to fix it but the respondent could not afford the bill hence the case. That is all.

The central issue is whether the charges of obtaining money by false pretenses were proved beyond reasonable doubts. The answer is yes for six main reasons; (1) with the view of establishing that once it was sold the item was not accepted back, as a term of contract contrary to what was reasonably expected of her, the appellant did not produce a duplicate copy of the cash sale receipt leave alone EFD receipt much as in her evidence the respondent denied having had been issued one (2) caveat emptor yes, but the principle should have been only used as a shield and not a sword

3) in his testimony the appellant did not state if they had tested the Tv before they packed it (4) the parties may have checked it and found the v sound yes, but as put by the respondent the possibilities of there in etween the appellant having had taken advantage and black mailed the espondent could not be eliminated under the circumstances (5) now that ne appellant did not show that contrary to the respondent's allegations he in fact issued a receipt leave alone possibly it was a strategy of tax avoidance or something it could be a criminal offence but it is not subject f this appeal, it appears the appellant had planned it and set foundation or the offence she was charged with (6) it is trite law that verv seldom han not 2nd appeal courts reversed the concurrent factual findings of the wo courts below unless there were peculiar circumstances but in this case Mr. Zephania Bitwale learned counsel did not show one.

The Tv set it was not produced in evidence yes, but that one vitiated io conviction because parties were agreed that the appellant sold a Tv set o the respondent.

The appeal is dismissed, the conviction is upheld save for sentence which is varied to three (3) years in default of the fine. Other orders emain intact.



S.M. RUMANYIKA

JUDGE

30/06/2021

Right of appeal explained.

Judgment delivered under my hand and seal of the court in chambers
this 30/06/2021 in the absence of the parties.



S.M. RUMANYIKA

JUDGE

30/06/2021