

**IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY)  
AT MWANZA**

**CRIMINAL APPEAL NO. 12 OF 2021**

(Arising from the decision of the District Court of Ukerewe in Criminal Appeal  
No. 05 of 2021, originating from the Primary Court in the Case No. 138 of  
2020)

**HUSSEIN RAMADHAN ..... APPELLANT**

**VERSUS**

**MICHAEL LADISLAUS ..... RESPONDENT**

**JUDGMENT**

Date of last Order: 29.06.2021

Date of Judgment: 30.06.2021

**A.Z.MGEYEKWA, J**

This appeal originates from the decision of the Primary Court of Ukerewe in Criminal Case No.138 of 2020 where the respondent, namely Hussein Ramadhan was charged for obtaining money by false pretense contrary to section 302 of the Penal Code Cap.16 [R.E 2019]. A brief background of this case relevant to the instant appeal goes as: - on 13<sup>th</sup> July, 2018 around 09:00 hours at Kakukuru area in Ukerewe District within

Mwanza Region, the appellant was alleged to obtain money by false pretense. The prosecution alleged that the appellant took 255.5 kilos of sato fish valued Tshs. 1,354,150/= and two bags of *sandarusi* valued Tshs. 2400/=. Total value was to a tune of Tshs. 1,356,550/= the property of the respondent. After the charge was read over and explained to the appellant, he pleaded not guilty. As a result, the prosecution summoned four witnesses to prove their case. The appellant was found with a case to answer, he subsequently defended himself and denied the charges.

After the closure of the prosecution case and defence case, the learned trial magistrate convicted the appellant and sentenced him to serve years imprisonment. Aggrieved, by the decision of the trial court the appellant filed an appeal at the District Court trying to impugn the trial court decision. The first trial court determined the appeal and uphold the decision of the trial court.

Undeterred, the appellant lodged the instant appeal and had raised one ground of appeal as follows:-

- 1. The trial Magistrate erred in law and fact in holding that the offence of obtaining money by false presence was established.*

When the matter was called for hearing on 29<sup>th</sup> June, 2021 the appellant enjoyed the legal service of Mr. Mussa, learned counsel and the respondent had the legal service of Mr. Innocent, learned counsel.

It was Mr. Mussa who started to kick the ball rolling. He argued that the trial Magistrate erred in holding that the offence of obtaining money by false pretense was not established. He stated that a charge is the foundation of the case. He went on to state that in the instant case, the charge sheet does not read comply with the requirement stipulated under section 302 of the Penal Code Cap. 16 [R.E 2019] . Mr. Mussa stated that among the elements of the offence of obtaining money by pretense are that the words 'with an intent to defraud must be included in the charge sheet. He valiantly contended that in the instant charge those words are missing.

It was his further submission that the charge facing the appellant was not proved and the accused did not know the nature of the offence to enable him to defend himself. To bolster his argumentation he referred this court to the of **Msafiri Kulindwa v Republic** [1984] TLR 276 (HC). He insisted that a charge of obtaining money by false pretenses which do not include an averment that the pretense was made with intent to defraud is a defective charge in the eyes of the law.

Mr. Mussa did not end there, he contended that since the said words are not indicated in the charge sheet means the case against the appellant was not proved beyond reasonable doubt. He went on to state that the doubt be resolved in favour of the accused. Fortifying his position he cited

the Case of **Sultan Omary Kipezi & 6 others v Republic**, Criminal Appeal No. 154 of 2017.

On the strength of the above submission, he beckoned upon this court to allow the appeal, quash the conviction, sentence, and the order of compensation.

Opposing the appeal, Mr. Innocent argued that the trial Magistrate was correct to decide that the offence of false pretense was established. He submitted that at the Primary Court, a Criminal charge is initiated by a complaint. He claimed that the trial court relied upon the complaints brought by the complainant. Mr. Innocent went on to state that the *actus reus* and *mens rea* were proved. To fortify his submission he referred this court to page 2 of the trial court Judgement. He lamented that at the trial court the respondent claimed that the appellant requested a service from the respondent was indebt, however, until today he did not settle the said debt. The learned counsel for the appellant claimed that the applicant's Advocate was required to file an appeal against the District Court decision instead of raising a new ground which was not raised at the first appellate. Insisting, he argued that a new ground cannot be raised at the second appellate court.

In conclusion, Mr. Innocent urged this court to dismiss the appeal and allow the respondent to proceed with the execution.

In his rejoinder, Mr. Mussa reiterated his submission in chief and insisted that the charge sheet was admitted and endorsed. Stressing he stated that the charge sheet initiated the trial court proceedings to the end. Mr. Mussa stressed that a point of law can be raised at any stage. To support his position he cited the case of **Abdul Athumani v Republic** [2004] TLR.

In conclusion, he beckoned upon this court to allow the appellant's appeal, quash and set aside the lower court's decisions.

Before embarking on determining the ground of appeal, I would like to acknowledge the submission made by Mr. Innocent Michael, learned counsel for the respondent that the ground of appeal was required to be determined at the first appellate court. Although, I am not in accord with Mr. Innocent observation, in the circumstances of the case at hand, the ground of appeal is based on a point of law. A point which can be determined by a court of law at any stage. In the case of **Adelina Koku Anifa & Another v Byarugaba Alex**, Civil Appeal No. 46 of 2019 (unreported), the Court of Appeal of Tanzania held that

*" A court had a duty to take judicial notice of matter relevant to the case, even in the absence of the grounds of appeal would be obliged to address on the vivid defect."*

Equally, the Court of Appeal of Tanzania in the case of **Adelina Koku Anifa** (supra) went on to state that:-

*“...the court cannot justifiably close its eyes on such glaring illegality because it has duty to ensure proper application of the laws by the subordinate courts and/or tribunals..”*

Guided by the above authorities of the law, I think it is forethought to address and determine the sole ground of appeal that relates to point of law raised by the learned counsel for the appellant. The same will save the time of the court and the time of the parties. Since in case the point of law could not have been raised now, the same could have been raised in a later stage.

Now, I turn to determine the sole ground of appeal that the trial Magistrate erred in law and fact in holding that the offence of obtaining money by false pretence was established. It was the learned counsel for the appellant continuous that the particulars of the offence of false pretence did not state the ingredients of the offence. He went on to state that the words with 'an intent 'and 'defraud' were missing. The record shows that the appellant was charged with obtaining money by false pretence contrary to section 302 of the Penal Code Cap.16 [R.E 2019]. The charge sheet is written in Kiswahili language, for ease of reference, I reproduce it as hereunder:-

*“ MAELEZO YA KOSA”*

*Kwamba wewe HUSSEIN RAMADHANI unashitakiwa kuwa mnamo tarehe 13/07/2018 muda was saa 03:00 za asubuhi huko Kakukuru wilaya ya Ukerewe na Mkoa wa Mwanza, ulijipatia mali kwa njia ya udanganyifu ambazo ni samaki aina ya sato kilo 255 ½ zenye thamani ya Tshs. 1,354,150/= mifuko miwili ya sandarusi yenye thamani ya Tshs. 2400/= vitu vyote kwa pamoja vina jumala ya thamani ta Tshs. 1,356,550/= mali ya MICHAEL S/O LADISLAUS kwa kumdanganya kuwa utamtumia pesa hizo kwa njia ya mtandao wa M-PESA lakini matokeo yake hukufanya hivyo. Kitendo ambacho ni kinyume na sheria”.*

I have scrutinized the above charge sheet and noted that the words ‘with intent to defraud’ are missing. Therefore. I am in accord with Mr. Mussa, learned counsel for the appellant that not all inferred elements of the offence of obtaining money by false pretense were captured in the respective charge. In my respectful view, the particulars of the offense were not clear, the appellant was not enabled to fully understand the nature and seriousness of the offence with which he was charged.

It was worth noting that the particulars of the offence informs the appellant that he obtained the money from the respondent with intent to default, these are the key elements that constitute the offence of obtaining money by false pretense. However, in the instant charge sheet the words



'with intent to defraud' were lacking. In the case of **Jamal Ally @ Salum**, Criminal Appeal No.52 of 2017 the Court of Appeal of Tanzania held that:-

*“ It is our finding that the particulars of the offence of rape facing the appellant, together with evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing hi and eliminated possible prejudice.”*

Applying the above authority, this court finds that the particulars of the offense of obtaining the money by false pretense facing the appellant did not enable the appellant to appreciate the seriousness of the offense facing him thus the same did not eliminate all possible prejudices.

In the event having in mind to the aforesaid, I find that having decided that the proceedings of the trial court was based on a defective charge, and meaning that the charge not being properly before the court, the said proceedings are a nullity, the same cannot be cured under section 388 of the Criminal Procedure Act, Cap.20 [R.E 2021]. In the circumstances of this case, an order of retrial will not serve the interest of justice. The apparent deficient is most likely to be rectified by the prosecution in the event an order of retrial is made to the prejudice of the appellant. The deficiencies sufficiently dispose of the appeal.

For the reasons I have endeavored to demonstrate, I entirely allow the appeal. In consequence, I quash the proceedings and judgment of the trial



court and the first appellate court, as well as the conviction. I also set aside the sentence.

Order accordingly.

Dated at Mwanza this date 30<sup>th</sup> June, 2021.



A.Z.MGEYEKWA

**JUDGE**

30.06.2021

Judgment delivered on 30<sup>th</sup> June, 2021 via audio teleconference whereas Mr. Mussa, learned counsel for the appellant, and Mr. Innocent, learned counsel for the respondent were remotely present.

A.Z.MGEYEKWA

**JUDGE**

30.06.2021

Right to appeal fully explained.