

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**HIGH COURT CRIMINAL APPEAL NO. 25 OF 2021**

(Original Criminal Case No. 55 of 2020 of the district court of Mwanza district at Mwanza)

**ROSE KULWA MNYAWANI .....APPELLANT**

**versus**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

**6<sup>th</sup> & 22<sup>nd</sup> July, 2021**

**RUMANYIKA, J.:**

The appeal is with respect to two counts conviction of an offence of Kite – flying and a fine of shs. 400,000/= or three (3) years in jail in default C/s 332B (1) and (3) of the Penal Code Cap 16 RE. 2019. The particulars of the offence stated that being the owner of Rossa Construction Co. Ltd, together and jointly Rose Kulwa Mnyawami (the appellant) and Scolastica M. Kabudi did on 29/6/2018 and 27/7/2018 in the City and region of Mwanza issue CRDB Bank cheques numbers 221080 and 221079 for shs. 19,350,000/= and 19,300,000/= respectively to Emmy Damas Mlahoro (the complainant) which cheques were, for the reason of insufficient funds on CRDB Bank account No. 0112060749200 dishonored

and, irrespective of the notice she did not make good of it. It is also here worth noted that end of the say the said Scolastica M. Kabudi was acquitted therefore unless the context required otherwise, the latter will not feature any more in this judgment.

Messrs Innocent Michael and Lilian Meli learned counsel and state attorney appeared for appellant and the respondent Republic respectively.

The four (4) grounds of appeal revolved around points as under:-

1. That the trial court wrongly interpreted the provisions of the law thereby arriving at the wrong conclusion.
2. That the trial court ignored the appellant's defence and evidence.
3. That the prosecution case was not proved beyond reasonable doubts.
4. That the trial court improperly evaluated the evidence and convicted the appellant.

Mr. Innocent Michael learned counsel submitted that at the material time the appellant's bank account may have had insufficient funds yes, but C/s 332 (b) (1) of the Penal Code the element of ill intent was not proved much as actually the appellant was never served with a requisite demand

notice and she deposited some money even before the case was reported to police. That is all.

Ms. Lilian Meli learned state attorney submitted that the prosecution case may have had been proved beyond reasonable doubts but for the 8 days' notice issued under Section. 332 (b) (3) of the Code which was objected therefore not tendered in evidence much as it was not disputed that the cheques were drawn and signed by the appellant. That being the 1<sup>st</sup> appeal court, this court may now wish to order additional evidence and re – evaluate the evidence. That is all.

The evidence on record would read as follows;

Pw1 Emmy Damas Niyaloni a business woman stated that on 29/6/2018 the 1<sup>st</sup> accused, a close friend hers she issued her a cheque for shs. 19,350,000/= then another one for shs. 19,500,000/= on 27/7/2018 (Exhibit "P1") collectively only in the appellant's bank account one to find but insufficient funds. That she communicated it to the appellant but the latter turned a deaf eye (copy of the notice – Id "D1") then he reported the case of police.

Pw2 Eugen Mashishanga stated that as he worked with CRDB Bank Nyerere Road Brach, Mwanza, on 30/7/2018 he received the two but the

cheques were dishonored because the appellant's account had no sufficient funds (exhibit "P1") identified and immediately they were returned to the drawer.

Pw3 W.5552 D/Cpl Jane of the RCO's office Mwanza stated that on 25/2/2019, having had fully investigated the matter, with immediate effect she handed it over to the National Prosecutions Service on that one in the course, but in writing having had communicated with the bank (copy of the letter-Exhibit "P2").

Dw1 Ludovic Joseph stated that he worked with Ilemela Municipal Council who, with respect to the charges he, on 25/2/2019 stood surety of the appellant and another who, in writing before the police admitted and they undertook to deposit the money in installments but they never honored the promise (copy-Exhibit "D1").

Dw2 David Lusungu (testified as materially as Dw1).

Dw3 Scolastica Mnyawami Kabudi stated that she knew the complainant, the appellant before but the former did not prepare/ issue the cheques. That her sister appellant was an engineer who ran the construction company whom having needed but orally obtained shs. 19,350,000/= for the business from the complainant, having had repaid



some they were charged. Having had promised to deposit the money but failed.

Dw4 Rozi Kulwa Mnyawami stated that she knew the complainant whom she issued the cheque in 2018 and received the money but contrary to her promise to deposit the sum in installments, out of expectations her business went so down that she could not have honored the promise. That is all.

The issue is whether the prosecution case was beyond reasonable doubts proved.

The provisions of Section 332B (1) and (3) of the Code read;

**S.332B-(1) Subject to subsection (3), any person who fraudulently obtains credit or money of any amount from a banker by means of kite-flying commits an offence and is liable on conviction to imprisonment for a term not exceeding ten years...**

(3) Any person shall be presumed fraudulent and commits an offence under this section if the cheque drawn by him is not honoured for reason of lack or insufficiency of funds in the account and within eight days after he is informed of the dishonored cheque he fails or refuses to make good on the account.

From the quotation above and taking into consideration of the underlined key words, the point is whether the appellant obtained the credit from the banker. In fact in his testimony Pw1 cut the long story short that having had been issued the cheque by the appellant, in execution of the oral contract he just dishd out the money. If anything therefore, it was not the bank which credited the appellant but the individual Pw1 not a bank or its equivalent. Whether or not, if at all even upon receiving the requisite eight (8) days' notice the appellant did not make good of it, the latter should not have been convicted as charged. However, whether or not the appellant had paid some initial installments it is immaterial in my view because a confession leading to plea bargain and payment it exonerates no accused from criminal liability it only mitigates the sentence much as pursuant to parol rule of evidence looking at the wording the cheque gave her no grace period it being the alleged month or any such longer period to deposit the money.

Alternatively, the evidence available only constituted more or less a cognate offence of obtaining money by force pretenses from the complainant contrary to S.302 of the Code not kite – flying.

In the upshot, the conviction and sentence are quashed, set aside but as said it is substituted with offence of obtaining money by false pretenses for which the appellant is, for each count now convicted and sentenced to 5 (five) years in jail. The sentences shall run concurrently. The appeal is only to that extent allowed. It is so ordered.

Right of appeal explained.

  
**S. M. RUMANYIKA**

**JUDGE**

**17/07/2021**

The judgment delivered under my hand and seal of the court in chambers this 22/07/2021 in the absence of the parties.



  
**S. M. RUMANYIKA**

**JUDGE**

**22/07/2021**