IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 109 OF 2020

ALFRED CHRISTOMUS NDEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the decision of the Court of Resident Magistrates of Dar-es salaam at Kisutu)

(Mwaikambo- Esq, RM.)

Dated 19th February 2020

in

Criminal Case No. 230 of 2016

JUDGEMENT

25th June & 30th July2021

Rwizile, J

Since 2016, the appellant was on trial. He was accused with another fellow on two counts of conspiracy to commit an offence and obtaining money by false pretences contrary to sections 384 and 302 of the Penal Code respectively.

But facts that led to all this can be simply stated that the appellant is the contractor. He happened to sign a contract with one Antony Lukindo (Pw1) resident of Canada for building three apartments at Osterbay in Dsm. As it seems, on 17th August 2014, an amount of USD 128,000.00 was transferred to the account of the appellant at NBC from Pw1, for roofing the first apartment. Sometimes later, he sent another amount by transfer to the appellant for finishing, it was the sum of 198,421, 612. He later received reports that there was not proper finishing and construction at the site was on halt. In 2016, the appellant had not finished the same despite having received the money from Pw1. He was reported to the police and hence this case. Upon being arraigned, he denied the charges. After a full hearing, the trial court found him guilty of the second count. He was convicted of the offence and sentenced to serve sentence of 7 years in prison. He was on top, ordered to pay the sum of 116,000,000/=, the amount allegedly illegally obtained upon completing the imprisonment term.

He was aggrieved and hence this appeal where he advanced 8 grounds of appeal. For the purposes of clarity, the same grounds are reproduced as hereunder as they appear in the so-called amended memorandum of appeal;

1. That, the learned trial Resident Magistrate erred in law and fact in admitting into evidence and relying upon a stampable but unstamped construction Agreement between Pw1 and the Appellant (**Exh. P1**), which was inactionable and unenforceable in a court of law in the

contrary for contravening the mandatory provisions of **Section 25(5)** of the **Stamp Duty Act [Cap. R.E. 2002]** (as amended).

2. That, in view of the uncontroverted evidence in record that the Construction Agreement between Pw1 and the Appellant (**Exh. P1**) stipulated no specific timeline within which the Appellant had to complete and handover to Pw1 the construction project agreed upon and the fundamental breach of which was committed by the Appellant; and that it was Pw1 who stopped and prevented the Appellant from further performing the project to the finality, the Learned trial Resident Magistrate erred in law and fact in finding and holding that the Appellant had obtained Pw1's disputed monies (TZS 116,000,000/=) by false pretences in contravention of Section 384 of the Penal Code [Cap.16, R.E. 2002] (as amended).

3. That, in view of uncontroverted evidence in record that the Appellant being an independent contractor, was engaged and contracted by PW1 not for procurement of the disputed roofing material but for performance of the entire construction project the deliverable of which would eventually be the apartments which the Appellant had to construct in accordance with the specifications agreed upon but which the Appellant was prevented from constructing to the finality and handling over to Pw1 by Pw1 himself, the Learned Resident Magistrate erred in law and fact in finding and holding that the Appellant deceitfully obtained the disputed sum of Tzs. 116,000,000/= from Pw1 with intent to defraud Pw1.

4. That, the Learned trial Resident Magistrate erred in law and fact in not evaluating and factoring the defense evidence into her judgment; and for not assigning any empirical reason acceptable in the Construction industry for rejecting the Appellant's (DW1's) uncontroverted testimony that all the funds the Appellant was paid by PW1 for the project in question were exhaustively and responsively expended on the project.

5. That, had trial Resident Magistrate properly directed herself to the chequered history the case had undergone at the trial court in terms of changes of the magistrates who tried the case vis-a-viz the considerable number of the prosecution witnesses who had so far testified before her predecessors by the time she took over the conduct of the case, the Learned trial Resident Magistrate would have found that she was, in the circumstances, prejudiced to asses and rule on the demeanor of such witnesses and would have not refused the Appellant's Counsel's prayers for recalling them.

6. That, the Learned trial Resident Magistrate erred in law and fact in finding that the case against the Appellant had been proved beyond reasonable doubt; and for convicting the Appellant on the weakness of his defense as opposed to the strength of the prosecution's case.

7. That, in view of the Construction Agreement into which PW1 and the Appellant had entered (**Exh. P1**) the fundamental breach by the Appellant of which had not been previously proved against the

Appellant in a civil action in a civil justice dispensation forum in the country, the trial Resident Magistrate misdirected herself in law and fact into finding and holding that the dispute involved in the case was a contractual dispute, which had to be litigated and resolved in a civil court of competent jurisdiction in the country.

8. That, in view that no any previous record of criminal propensities calling for a deterrent sentence had been proved against the Appellant and that the Appellant had advance strong mitigating factors justifying the Court's exercise of leniency in sentencing him, the Learned trial Resident Magistrate erred in law and fact in sentencing the Appellant to serve seven –year imprisonment, which was manifestly excessive in the circumstance of the case.

Before this court, the appellant is not represented. The respondent was represented by Christine Joasi learned State Attorney. The appeal was argued by written submissions. In essence, the material submissions of the appellant on 1st to 4th grounds of appeal staged an attack on the trial court's heavily reliance on construction agreement exhibit P1. He was of the view that it was not stamped which is contrary to section 47(1) of the Stamp Duty Act. He submitted, despite relying on it, it ought not to be admitted without paying stamp duty as held in the cases of **Josephat L.K Lugaimukamu vs Father Canute J Muzuwanda** [1986] TLR 69 and **Transport Equipment Ltd vs D.P Valambhia** [1993] TLR 91. According to him, based on the terms of the agreement, he was hired to construct the apartments to the finality had Pw1 not stopped payment.

He was of the view that all the funds distributed to him did the desired work and there is no evidence proving otherwise from the construction expert.

The appellant argued on ground five that the trial court did not comply with section 214(2) of the CPA. He said, the case was heard by different magistrates before it landed to her. It was not therefore proper for her having been a successor magistrate to refuse re-calling the witnesses of the prosecution. It was in his view that the same did not afford him a chance to comment on their demeanor.

The 6th ground of appeal, attacked the evidence at the trial as to have not shown key elements of the offence charged, which are falsity and intent to defraud. It was submitted that the amount alleged obtained by false pretences was for roofing. For him, there was deception whatsoever because the appellant obtained money honestly and did not evade his responsibility. He asked this court to distinguish the case of **DPP v Ray** [1974] AC 370 which was relied upon by the trial court.

Submitting on the 7th ground of appeal, the appellant was of the view that exhibit P1 is a contract for building three apartments in a wholesome construction agreement. Any dispute according to his evaluation, would be dealt with in a civil justice forum because it would constitute a fundamental breach of contract.

Lastly submitted that the sentence imposed on him was manifestly excessive. He said, since there was no proof of the previous records the court was not entitled to impose a maximum sentence. He asked this court to quash the judgement and set aside the sentence imposed on him.

Submitted on the ground of appeal, the learned stated Attorney for the respondent was of the view that exh. P1 was an agreement that was signed by parties. It ought to be stamped by the appellant who did not for the reasons best known to him. Despite not being stamped, the attorney was clear that it does not exonerate the appellant from a liability of a duly signed agreement.

The 2nd and 3rd grounds of appeal were argued together, it was an impeachment on the appellants assertion that the agreement was for the whole project and not as single apartment. It was submitted that the appellant was to finish construction in May 2015 but did not. Still, he did so, as promised because he received 166 000,000/= in 2014 to purchase roofing materials but paid only 49,000,000/= to the supplier, Nabaki Africa. In the view of the learned state attorney those acts aimed at obtaining money by false pretences.

As to ground four, it was briefly said, the prosecution proved its case beyond reasonable doubt. In connection to ground 6, the trial magistrate according to the attorney though did not comply with section 214 of the CPA, but that is not an incurable defect since section 388 of CPA may take care of it. The seventh ground of appeal was argued to the effect that it does only deal with contractual duty of the parties but the behaviour which is a crime.

Therefore, it forms the offence charged of obtaining money by false pretences. Lastly, it was submitted that the sentence imposed was fair and met the dictates of the law.

Before going to the merits of the appeal, I wish to state that the typed proceeding of the trial court is not an accurate one. Even though it is certified by the trial court, it is not true of its content at page 19 to 27. Since the whole prosecution case was recorded by one Hon. Mwijage PRM as the original record shows.

Delving into the appeal, the appellant has in the first ground of appeal stated that exhibit P1 which is agreement was not stamped and so should not have been admitted in evidence. I have taken time to go through exhibit P1. It was admitted without an objection by the appellant's advocate Mr. Rwegasira. But the fact that is not stamped do not render the same inadmissible in evidence. Section 47(2) of the Stamp duty Act is categorical and specific on application. It is also true of the cases of **Josephat Lugaimukamu** and **Transport Equipment Ltd** (supra). But the same being civil cases are distinguishable from this case since it is a criminal case**.** Section 47 (1) (d) of the Act allows admission of the document not charged with stamp duty provided it is in a criminal case**.** From the foregoing, I have to hold that the first ground of appeal has no merit.

It has been also noted that all other exhibits from P2 to P10 were admitted without any objection on party of the appellant. In actual fact, exhibit P1 was signed by Pw1 and appellant on 12th February 2014 and 13th February 2014.

It is a proposed residential apartment for Judge William Maina on plot No 2050, Ethiopia Drive Osterbay construction. It was stage 1 block B, foundation to over-site concrete.

1. The appellant was on duty to purchase all materials required for the work as per schedule submitted to him
2. To clear the site by removing unwanted trees and top vegetable soil
3. To construct block 2B from foundation to over-site concrete and all associated works
4. Make all relevant follow-up for project inspection to the authorities concerned.

   Pw1 on the other hand and Maria W Maina had to make available the monies required to purchase materials for the project and pay the agreed labour cost as per mode of the stipulated schedule of payment. It last noted that the payment for stage 1 amounting to 28,000,000/= will be paid by Pw1 and Maria W Maina as per the appellant's request. The scope of this agreement was stated as an integral part of the contract and were stated to be binding on the parties.

Other exhibits such as P2, 3,4,5,7 and P10 are email exchanges which in a way or the other were referring to the transactions made in respect of the project between the two parties. The same are email exchanges, which in law are electronic evidence which were simply admitted even though they did not comply with the law.

To deal with the first ground, it should be noted that from the look of things, exhibit P1 was not exclusively defining the terms of the deal between the parties.

It is difficult to gauge from it, what was the scope of the work, how long was it to last and what was the consideration. But basing on those email exchanges there was a contract between the two parties on construction activities.

From exhibit P9, the appellant admits to have received a good amount of money from Pw1 for the purpose. The same is substantiated by exhibit P6 which shows the amount of 128,000.00 USD. But in exhibit P11 are other amounts of money allegedly sent to him for the same work. It is acknowledged in P9 that an amount alleged was for materials and but not all were purchased. That being the case then there was an admission by the appellant that the same monies were received for the construction. Therefore, grounds 2 to 4 have no merit. They are also dismissed.

The fifth ground of appeal attacked the trial magistrate for failure to recall the prosecution witnesses. The record shows, before she took over the case. Her predecessor had materially dealt at length with the same issue. He had made a ruling on 24th October 2018 on why, basing on the nature of the case, the difficulty and cost of recalling the witnesses especially Pw1 from abroad. It was found not practicable to recall them.

On her party she found the prosecution case closed. She was to deal with the defence case. She told the appellant and his advocate that there was no need to recall the witnesses. The appellant and his advocate did not raise their voices on that aspect before she made that ruling. It is on record that the provisions of section 214 have been complied with. On my reading of section 214(1) of the CPA.

Explicitly, the same is not coached on mandatory terms. It leaves the duty to the court to assess the evidence and see if at the interest of justice, the case may proceed where it was found or resummon the witness. The trial court exercised jurisdiction properly and since the appellant did not raise any issues as to recalling any witnesses then, there is no reason to it now. Therefore, I find this ground of appeal with no merit. It is dismissed.

The 6th ground of appeal is I think the most crucial one. It is about whether the case was proved beyond reasonable doubt. I have shown before that the appellant was charged of the offence of obtaining money by force pretences and was convicted of the offence of obtaining money by false pretences. False pretence has a legal definition. Section 301 of the penal code defines the terms as any representation made by words, writing or conduct of a matter of fact or of intention, which representation is false act and the person making it knows it to be false or does not believe it to be true, is false pretence. It is therefore apparent that what constitutes false pretence is an act or omission made willfully or with the aim of defrauding. That is why, section 302 which constitutes the offence goes with proof of an intention to defraud. This means for the offence to be proved committed there must be proof that there was an act done by the appellant which had an intension of defrauding.

Therefore, there must be evidence, from the prosecution showing so. The proof must as well show it beyond reasonable doubt. It is from exhibits P1, P6, P9 and P11 that show there were monitory transactions from Pw1 in Canada to the appellant. All were connected with the project of construction.

I have shown with exhibit P1 the terms of the same and the way the execution was to be conducted. In all fours, the appellant admitted to have failed at some point in time to complete the task in record time. There was evidence also that he did not pay the whole amount sent to him for roofing to Nabaki Africa as the supplier. I think, there may have been acts of dishonesty between the two parties.

But with all due respect to the trial court, all that does not, in all, prove that the amount of money stated in the charge sheet was obtained by fraud. The same may have not been used as it was planned. But that being based on contractual terms of constructing the apartments, it was not proved that the appellant was with intention to obtain money by false pretences. I do not see if the offence was proved. I therefore find merit in the ground of appeal. That being the case. I have therefore no reason to proceed dealing with the rest of the grounds of appeal. It is enough therefore to say, the offence was not proved, the appellant ought to have been acquitted. Therefore, I allow the appeal, by quashing the conviction and set aside the sentence. It is ordered that the same should be released forthwith unless held for some other lawful excuse.

AK. Rwizile
Judge
30.07.2021

Recoverable Signature

X

Signed by: A.K.RWIZILE

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY