

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC. CRIMINAL APPEAL NO. 14 OF 2021

(Arising from decision and order of Magu District Court Criminal Appeal No. 22 of 2020
originating from Kisesa Primary Court Criminal Case No. 79 of 2020)

PAULO MANENO CLAVERYAPPELLANT

versus

MZEE ALBETUS OBACHORESPONDENT

JUDGMENT

28th July & 11th, 2021

RUMANYIKA, J.:

The 2nd appeal is against conviction and a custodial sentence dated and issued on 13/10/2020 by Magu district court with respect to charges of obtaining property by false pretences C/s 304 of the Penal Code cap 16 RE. 2019. The first appeal court having had confirmed decision of Magu urban primary court dated 19/6/2020.

The appellant had 3 grounds of appeal which revolve around points as under:-

1. That the respondent's case wasn't actually beyond reasonable doubts proved.

2. That the 1st appeal court erred in fact and law not holding that the appellant's conviction was only based on weak defence evidence.
3. That the 1st appeal court should have found held that contrary to the law the trial court was not actually aided by assessors.

When, by way of audio teleconference the Pc. Appeal was called on 28/7/2021 for hearing, Mr. Yuda Kabugushi learned counsel appeared for Paulo Maneno Clavery (the appellant) and Mzee Albetus Clavery (the respondent) appeared in person. I heard them through mobile numbers 0769240673 and 0769370814 respectively.

In a nutshell, Mr. Yuda Kabugushi learned counsel submitted; **(1)** that in terms of the essential ingredients the charges of obtaining property by false pretences were not beyond reasonable doubts proved because; **(a)** the impugned judgment spoke loudly and clear that with regard to wages and terminal benefits as a worker, the appellant had bonafide claim of right but the respondent just chose to, and he fabricated the case **(b)** That the appellant used to keeping the mobile phones and keys with him such that no **mens rea** therefore was established against him much as the items were, but just at the respondent's disposal abandoned simply at home of the appellant's brother and, with respect to the shs. 1.10m claims

there was no proof **(2)** that the appellant was wrongly charged under the circumstances because only charges of stealing by agent stood. That is all.

On his part, the respondent submitted that his case was beyond reasonable doubts proved because the appellant had just absconded with the property. The latter's brother having had admitted it all in writing for the appellant as per exhibit, the appellant was not the respondent's employee but a mere supervisor/shop assistant and the latter had no pending claims much as they had no written contract of service or recorded the paid wages in writing.

In his rejoinder, Mr. Y. Kabugushi learned counsel further contended that if anything, the brother should not have confessed/admitted the offence for the appellant.

A summary of the evidence on record reads thus:-

Sm1 Mzee Albetus Obacho stated that he had employed the appellant as stationary shop and M-pesa business assistant but as, without reasons the latter had just abandoned it all on 13/10/2020, he reported the appellant to the police but the latter remained at large until December, 2020 where, through a mobile phone the former's brother had invited the

respondent only to collect the keys and the two mobile phones abandoned by the appellant whereby the latter distantly promised to re – surface and reconcile the books of accounts but in vain hence the case.

Sm2 James Nkoyi he simply supported the evidence of Sm1 that in his capacity as the local chair and duty invited, he witnessed the appellant's brother handing over the keys and the two mobile phones to the respondent (copy of the handing over instrument-Exhibit "A"). That's it.

Su (the appellant) is on record having had stated that now for a long time having had been employed by respondent as a pre-form I teacher and now shop and M-pesa business assistant, he had some wage arrears claims against the respondent and he gave him a notice to quite in April, 2018, but the respondent just inflated counter claims, it triggered the dispute hence the charges and case. That is all.

In upholding the trial court's decision, like beyond reasonable doubts convinced, the 1st appeal court held that by abandoning the property, and, in the back of the respondent quitting with the latter's money, the appellant exhibited **actus reus** and **men's rea** the essential ingredients of

the offence charged (cases of **Christina Mbunda v. R.** (1983) TLR 340 and **Laurence Mateo v. R (1996)** TLR 118 (HC)).

The central issue is whether the charges of obtaining property by false pretences were against the appellant proved beyond reasonable doubts much as all the way it was not disputed that the appellant had served as the respondent's stationery shop and M- pesa business assistant. The answer is no for one main reason; whether true, reasonable or not reasonable still the appellant's bonafide claim of right remained if thing the appellant's claims on wage arrears were very unfortunately ignored by the two courts below. It would have been a different scenario if, at least on balance of probabilities the respondent had disproved the appellant's allegations. Perhaps it was for the reason that neither contract of service nor payment of the wages had been reduced in writing but as far as the degree of proof in criminal trials was concerned, sufficed the evidence to shake the respondent's case and the appellant was "**home and dry**" leave alone the keys and mobile phones which one, just at the respondent's disposal the appellant had entrusted the brother. That one in my considered view it was respectfully inconsistent with any criminal mind had

the 1st appeal court considered all this, it would have arrived at a different conclusion.

Again it was very unfortunate that not only the name of the alleged brother was not in evidence stated, but also for reasons known to the respondent the appellant's brother did not appear in court much as, like impliedly Mr. Yuda Kabugushi learned counsel in my view precisely argued, however strong might be admission of the brother had nothing to do with the appellant's guilty. I think in terms of plea of guilty admission or confession to charges as the case may be, if right to be heard was that extended to representatives, leave alone those self-invited it would have defeated both the law and logic hence violation of right to be heard.

In a nutshell, the appeal is allowed. The two courts' concurrent conviction, sentence and orders are quashed and set aside. It is ordered accordingly.

Right of appeal explained.



S. M. RUMANYIKA

JUDGE

08/08/2021

Judgment delivered under my hand and seal of the court in chambers
this 11/08/2021 in the absence of the parties.




S. M. RUMANYIKA
JUDGE
11/08/2021