

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MBEYA REGISTRY**

**AT MBEYA**

**CRIMINAL APPEAL NO. 82 OF 2021**

*(Originating from the District Court of Mbarali at Rujewa in Criminal  
Case No. 75 of 2020)*

**CHIBI S/O MKULATI-----APPELLANT**

**VERSUS**

**THE REPUBLIC -----RESPONDENT**

**JUDGEMENT**

*Date of last order: 04.10.2021*

*Date of Decision: 08.10.2021*

**Ebrahim, J.:**

The Appellant herein was arraigned together with three others for two counts of Conspiracy to Commit an Offence **c/s 384 of the Penal Code, Cap 16, RE 2019** and **Obtaining Good by false pretences c/s 302** of the same law. The first count did not stick for all four accused persons. The same for the second count save for the appellant who was the 1<sup>st</sup> accused at the trial. He was found guilty on the count for the offence of obtaining goods by false pretences.

Consequently, he was sentenced to serve four (4) years in prison and ordered to pay back PW1, the complainant Tshs. 1,000,000/-. It was alleged by prosecution that the Appellant on the 2<sup>nd</sup> day of May 2020 at Itiping Village within Mbarali District in Mbeya Region with intent to defraud obtained two cows valued at Tshs. 1,000,000/- the properties of Joseph Omary @ Ngohonzela.

The testimony of **PW1, Joseph Omar Nkonkonzela**, the victim gives a glimpse of the background of the matter. He testified that on 02.05.2020 while at home, 10 Masai boys including the appellant appeared and alleged that his children have assisted in the escape of the wife of the Appellant from him. They demanded Tshs. 1,000,000/- to assist them to find the wife of the Appellant. When PW1 told them that he had no money, the Appellant told him to sell his cows. PW1 sold his cows to PW3 for Tshs. 1,000,000/- and the money was given to PW1. They went to the Ten Cell Leader where the handing of the money to the Appellant was witnessed by **DW4, Mateso Swadick Lupenza**, a ten cell leader. **PW2, Riziki of Ngonzela**, child of PW1 testified that he saw the maasai men including the Appellant harassing his father asking him to pay Tshs. 1,000,000/-

because PW1's daughter has escaped with the Appellant's wife. The money was paid through DW4. **PW3**, was the Village Executive Officer who received a complaint against the Appellant for receiving Tshs. 1,000,000/- from PW1.

On his side, the Appellant denied to have been involved in stealing cattle.

Dissatisfied by the penalty metered by the trial court, the appellant lodged an appeal in this court raising five (5) grounds of appeal as follows:

1. That the charge was defective as the alleged stolen property was not cows.
2. Evidence of PW1 did not constitute the charged offence.
3. Amendment of the charge was not by the order of the court.
4. The trial court based its decision to convict the appellant on the weak evidence of PW1 without corroboration.
5. That there was a mutual agreement headed by the Ten Cell Leader which led other accused persons to be acquitted of the offence charged.

When the case was called for hearing, the Appellant appeared virtually in person while at Ruanda Prison. The Respondent was represented by Mr. Herbet Kihaka, learned Senior State Attorney.

The Appellant prayed for the Senior State Attorney to begin while reserving his right to re-join.

In his submission, Mr. Kihaka supported the appeal on the basis that the ingredients of the offence of obtaining goods by false pretences was not proved by prosecution. He submitted that **section 302 of the Penal Code, Cap 16 RE 2019** that establishes the offence calls for the proof of intent and fraud and that the goods have to be capable of being stolen. The Appellant was charged and convicted to have fraudulently received cows from Joseph Omary. Mr. Kahaka argued however that, going by the testimony of PW1, he has not stated the fraud that led him to sell his cows. He said, PW1 agreed to sell the cows to pay the money that they agreed upon and he did not state what was the fraud. He expounded further that even PW2 and PW3 testimonies do not support the testimony of PW1 on the fraud. He therefore decided not to submit on other grounds of appeal as they support the second ground of appeal.

The Appellant prayed for the assistance of the court and be set free.

The Appellant raised in his second ground of appeal that the evidence of PW1 did not constitute the offence charged.

**Section 302 of the Penal Code, Cap 16, RE 2019** that the Appellant stand charged with reads:

*"Any person who by **any false pretence** and **with intent to defraud**, obtains from any other person anything capable of being stolen or **induces any other person** to deliver to any person anything capable of being stolen, is guilty of an offence and is liable to imprisonment for seven years".*  
[emphasis is mine]

From the reading of the above provision of the law, it follows that to prove the offence under **section 302 of Cap 16**, the complainant must prove intent to defraud and inducement as well as the element that the good is capable of being stolen.

In the case of **Alhaji Amri Sadick v. Sofia Bashiru** (HC-Bukoba) Criminal Revision No.7/2010 (unreported), in considering the offence of obtaining goods by false pretence, this court referred to the case of **Edwin Udemeg Bunam Onwudiwe V. Federal Republic of Nigeria**, Suit No.SC 41 of 2003 where the Supreme Court of Nigeria held thus:-

*"For the offence of obtaining by false pretences to be committed the prosecution must prove that the accused had intention to defraud and that the thing is capable of being stolen."*

The Supreme Court of Nigeria went further and listed seven ingredients to be proved in constituting the offence of obtaining goods by false pretence which are: -

- i) That there is pretence.*
- ii) That the pretence emanated from the accused person.*
- iii) That it was false.*
- iv) That the accused person knew of its falsity or did not believe in its truth.*
- v) That there was an intention to defraud.*
- vi) That the thing is capable of being stolen.*
- vii) That the accused person induced the owner to transfer his whole interest in the property.*

In this case the Appellant was charged to have fraudulently obtained two cows valued Tshs. 1,000,000/-. Firstly, that is a defect in the charged sheet because according to the testimony of PW1, the Appellant obtained Tshs. 1,000,000/- after forcing him to sell his two cows to DW3. Secondly, the other elements namely inducement, intention to defraud and pretence do not exist because PW1 did not testify as to whether there was inducement

and that his children did not escape with the Appellant's wife. There was no testimony to that effect. More-so, PW1 negotiated and agreed to sell his cows to pay the negotiated amount in such a way that they even involved a ten cell leader. As to whether the arrangement was a fraud, there is no such piece of evidence in record.

Thus, I hasten to agree with the learned State Attorney that prosecution failed to prove the main elements of the offence that the Appellant was charged and convicted with.

That being said, I allow the appeal and find that prosecution case was not proved beyond reasonable doubt. I further order that the Appellant be released from prison forthwith unless otherwise lawfully held.

Accordingly ordered.



**Mbeya**

**08.10.2021**

A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

**R.A. Ebrahim**

**Judge**