

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 23 OF 2020

(Appeal from the Judgment of the Resident Magistrate Court of Tanga at Tanga (before Hon. E. M. Kassian, SRM) in RM. Criminal Case No. 69 of 2018)

JAFFARI HIZZA.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 04/08/2021

Date of Judgment: 01/10/2021

AGATHO, J.:

Brief Background is that the Appellant was arraigned on 06/06/2018 before the Resident Magistrate Court of Tanga in Criminal Case No. 69 of 2018 facing a charge of the offence of obtaining money by false pretence c/s 302 of the Penal Code [Cap 16 R.E. 2002].

The Appellant denied the charge and the prosecution brought the witnesses and tendered exhibit to the satisfaction of the trial Court that the charge was proved beyond reasonable doubt. The trial Court eventually convicted the Appellant and sentenced him to 3 years imprisonment. Dissatisfied with that conviction and sentence the

Appellant preferred an appeal to this Court outlining seven grounds of appeal as shown below:

1. That, the learned trial Magistrate erred in law and in fact by convicting the Appellant relied only on the mere say of the PW1 that she gave the Appellant TSHS. 25,000,000/= to purchase for her 32 herds of cattle and export the, to Comoro Islands, while she had not tendered any document to prove the allegation.
2. That the learned trial Magistrate erred in law and fact by failing to see the necessity of prosecution to summon PW1's son one Salehe Hussein who is alleged to travel to Morogoro with the appellant.
3. That the learned trial Magistrate erred in law and fact by convicting the Appellant basing on unreliable and incredible evidence of the prosecution witnesses.
4. That the learned trial Magistrate erred in law and fact by convicting the Appellant relying on exhibit P2 (print out of Tigo Pesa) while the prosecution failed to bring before the Court the person who prepared the said exhibit and the owner who registered in the name of Abuu Ngereza in order to prove the allegation.
5. That the learned trial Magistrate erred in law in fact by failing to consider that where the trial Court fails to take cognizance of an

alibi, it amounts to a mistrial and a consequential miscarriage of justice.

6. That the learned trial Magistrate was not scrupulous to notice the contradiction in the evidence of the prosecution witnesses and the facts for plea and preliminary hearing with regard to the place where the cattle were exported for sale.
7. That the learned trial Magistrate erred in law and in fact by failing to notice that the charge against the Appellant was not proved on the required standard.

On the date fixed for hearing the court directed the parties to argue the appeal by way of written submissions. They did abide to the schedule and filed his submissions timely.

This Court in determining the appeal while examining the seven grounds of appeal drew four issues. To answer the questions, I looked at the trial Court proceedings to see the evidence on record; the judgment itself to examine how the evidence was evaluated by the trial Court, and the submissions of the parties to this appeal.

To begin with the first ground of appeal, the Court asked itself whether tendering of document is necessary to prove that TSHS. 25,000,000/= was given to the Appellant. It is the law under Section 62 of the

Evidence Act [Cap 6 R.E 2019] that in evidence oral testimony can be admitted if it is relevant, and where it is found to be credible it may be used to convict the accused. As for documentary evidence provided for under Section 65 of the Evidence Act [Cap 6 R.E 2019], it is one among many types of evidence. Thus, if oral testimony of eyewitness proved the charge there is nothing wrong with not tendering documentary evidence. Under Section 62 of the Evidence Act [Cap 6 R.E. 2019], the best evidence is direct. It is the evidence of the person who say I saw it, I heard, I felt it. It is the evidence of the eyewitness as opposed to hearsay. The Appellant faulted that TSHS. 25,000, 000/= is a lot of money that cannot be given without some sort of documentation. I am afraid that is an opinion and not the legal requirement. In law even oral evidence suffice if it is reliable and credible.

Regarding the second ground the question is Whether summoning PW1's son one Salehe Hussein who was alleged to have travelled with Appellant to Morogoro was necessary to prove the charge. This ground of appeal was refuted by the Respondent counsel who submitted that the prosecution is at liberty to choose witnesses they want as long as they can prove the charge. Moreover, under Section 143 of the Evidence Act [Cap 6 R.E 2019] there is no specific number of witnesses that the prosecution is required to bring before the Court to prove the charge.

This was also stated in **Yohanis Msigwa v R [1990] TLR 148**. It means even a single witness can if s/he is credible prove the charge. The freedom of selection of witness that the prosecution enjoys does not permit a deliberate exclusion of a material witness because doing so may lead to injustice. Thus, if the prosecution deliberately fails to bring the material witness an adverse inference may be drawn. This was stated in the case of **Azizi Abdallah v R [1991] T.L.R 71**. Therefore, with due respect to the learned counsel for the respondent, and as will be shown later, in as far as corroboration of prosecution evidence is concerned, Salehe Hussein was material witness for two reasons: first he is an eyewitness, who saw the TSHS. 23,000, 000/= being given to the Appellant, and second, he is alleged to have travelled with the Appellant (DW1) to Morogoro to purchase the Cattle. Thus, if this testimony is true then he must have seen the alleged Cattle bought by the Appellant. Thus, Salehe Hussein's testimony could have corroborated the testimony of PW1 and PW2.

Turning to the third ground which is combine with the sixth ground of appeal we ask whether the prosecution witnesses' evidence was unreliable, contradictory, and incredible to convict the Appellant. Considering the evidence on record, this court is of the view that although the Respondent's counsel argued that the prosecution

witnesses were credible (as was held in **GoodLuck Kyando v R [2006] TLR 367** that witnesses are entitled to credence), in certain instances they were contradictory, which makes them incredible. A first contradiction is with regards to PW2 who testified that she and Salehe (PW1's son) witnessed TSHS. 25,000,000/= being given to the Appellant. This is shown on pages 26 - 27 of trial Court proceedings. It is also visible on page 32 of the trial Court proceedings that PW3 (taxi driver) testified that he was told by Mama Latifa (PW1) that the money given to the Appellant was TSHS. 25, 000,000/=. But according to PW1 evidence, the TSHS. 25,000,000/= was split into two: TSH 2,000,000/= which was sent via Tigo pesa to the Appellant, and TSHS. 23,000,000/= which was given in cash. Here there is contradiction between the testimonies of PW1 and PW2 regarding the amount of money given to DW1. It is also unclear whether TSHS. 2,000, 000/= claimed to be sent via Tigo pesa was indeed delivered to DW1's mobile money account (in his mobile phone). Another contradiction is that while PW1 said Salehe Hussein was in Morogoro, PW4 (the Police Detective) claimed that he is in South Africa and hence prayed to tender Salehe's written statement. It is on record that the PW1's son, one Salehe Hussein was not called to testify. Yet another contradiction was about the colour of the taxi used to transport the DW1 (the Appellant). While PW3 (the taxi driver who

alleged to have driven DW1 to Morogoro) said (on pages 30 - 33 of the trial Court proceedings) that the taxi was silver, PW2 testified that the taxi was white. In **Issa Hassan Uki v R, Criminal Appeal No. 129 of 2017 Court of Appeal of Tanzania at Mtwara pages 18-19 (unreported)**, and **Mohamed Said Matula v R [1995] TLR 3** the CAT had guided the Courts to determine whether the contradictions are minor or goes to the root of the matter.

I am of the view that the contradictions in the present case do not go to the root of the matter as the substance of evidence given was sufficient to prove the charge. As the CAT held in **Deogratius Deemay Gurtu v R, Criminal Appeal No. 553 of 2016 CAT at Arusha** (unreported) that in all trials normal contradictions or discrepancies are bound to occur in the testimonies of the witnesses due to normal errors of observations or errors in memory due to lapse of time, mental disposition, etc. In the present case, the testimonies of PW1 and PW2 were credible though had minor contradictions. Therefore, the third ground of appeal lacks substance.

Regarding the fourth ground of appeal, the issue raised is whether the trial Magistrate erred to convict the Appellant relying on exhibit P2 without summoning the person who prepared the said exhibit P2 (print out of the Tigo Pesa) and the owner of Tigo Pesa agency shop one Abuu

Ngereza. On this issue, it is my settled view that the trial Court was right not to require summoning of a person who prepared exhibit P2 because PW4 knew about it and had seen it and could tender and testify. He was competent witness to tender it. The Respondent's counsel was equally correct on this ground of appeal to have lacked merit. Further, summoning Abuu Ngereza was irrelevant and unnecessary because his employee (PW5 – Swadakati Ally: Tigo pesa agent) who did the TSHS. 2,000,000/= Tigo Pesa transaction to the Appellant Tigo pesa account was called as a prosecution witness to testify. This is seen on pages 66 – 67 of the trial Court proceedings.

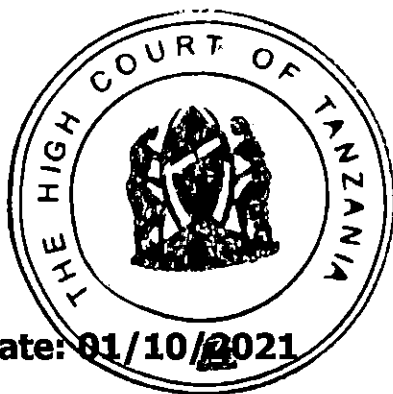
As for the fifth ground is whether the trial Court erred in not considering the Appellant's alibi. Notice must be given to the prosecution if one wishes to rely on alibi. This was not done. The aim of giving notice of alibi defence to the prosecution is to give them an opportunity to prepare themselves for countering that alibi. They should not be taken by surprise as that will vitiate the trial from being fair to unfair.

The question whether the prosecution did not prove their case beyond reasonable doubt relates to the seventh ground of appeal. Referring to this issue, whether the charge was proved beyond reasonable doubt, it is a trite law that the prosecution has a duty to prove the case beyond reasonable doubt. Under the Evidence Act Cap 6 R.E. 2019 Section 110

it provides that he who alleges must prove. And as provided for under Section 3(2)(a) of the Evidence Act Cap 6 R.E. 2019 the standard of proof in criminal trial is beyond reasonable doubt. Thus, in criminal proceedings, the burden of proof lies on the prosecution. The prosecution discharged the burden by bringing eyewitnesses (PW1, and PW2), their testimonies where corroborated by the evidence adduced by PW3, PW4 and PW5. Again, there was no motive established from the evidence on record that PW1 and PW2 that they falsely accused or prosecuted the Appellant. They had no history of quarrels with him (DW1). Again, failure to tender SMS that DW1 (the Appellant) received the money in his Tigo Pesa account does not mean that the money was not received. The evidence that the money was sent is that the said amount money was deducted from Tigo pesa agent's account and the number to which the money was sent was shown to be that of the Appellant. That is sufficient evidence.

For the foregoing reasons, this appeal is devoid of merits. I dismiss it because the prosecution proved the charge beyond reasonable doubt, and the lower Court's findings, conviction and sentence were proper.

DATED at TANGA this 01st Day of October, 2021.



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U. J. AGATHO
JUDGE
01/10/2021

Date: 01/10/2021

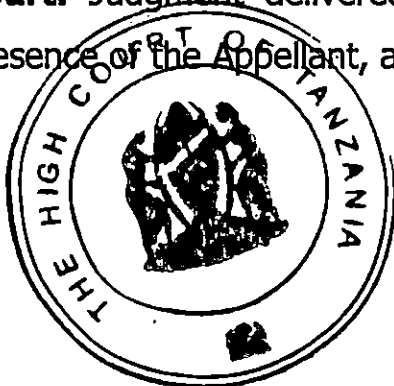
Coram: Hon. Agatho, J

Appellant: Present

Respondent: Mangowi State Attorney for the respondent

B/C: Alex

Court: Judgment delivered on this 1st day of October, 2021 in the presence of the Appellant, and Respondent's State Attorney.



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U. J. AGATHO
JUDGE
01/10/2021

Court: Right of Appeal fully explained.



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U. J. AGATHO
JUDGE
01/10/2021

