

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 14 OF 2022

(Arising from Kahama District Court Criminal Case no. 95/2020)

DIRECTOR OF PUBLIC PROSECUTION (DPP).....APPELLANT

VERSUS

MWAJUMA D/O GRANT NGOWELA.....RESPONDENT

JUDGMENT

28th July, 2022

MATUMA, J;

The respondent Mwakuma d/o Grant Ngowela stood charged in the District Court of Kahama for obtaining money by false pretences contrary to section 302 of the Penal Code, Cap. 16 R.E 2002.

She was alleged to have defrauded one Martha d/o Mwanzilwa Tshs. 9,600,000/= by falsely pretending to sell a house while knowing she was not the owner of the said house.

After a full trial, the trial Magistrate Hon. D.D. Msalilwa (RM) found that the prosecution case was not proved beyond any reasonable doubts. He thus acquitted the respondent, such acquittal aggrieved the appellant hence this appeal with two grounds;

- i) *That the trial Magistrate erred in law and facts to acquit the accused despite the fact that the case was proved by the prosecution beyond reasonable doubts.*

- ii) *That the trial Magistrate erred in law and facts to consider the defence of the accused that she borrowed the said money and not to sale her house without considering the fact that the accused didn't cross examine on the fact.*

Before dealing with the merits or otherwise of the afore grounds of appeal, down here is the brief facts of the matter.

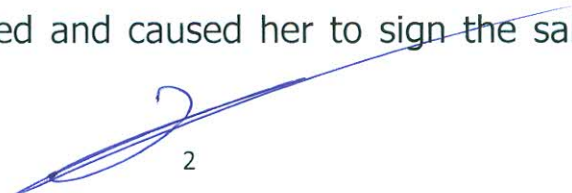
On the 30th April, 2019, the respondent entered into a sale agreement with the victim herein of a house on plot no. 184 Block "N" Nyahanga at Kahama town for Tshs. 9,600,000/=.

According to the sale agreement exhibit P4, the buyer gave the Respondent three months time to vacate from the purchased house. Subsequent to the sale agreement, the two executed the transfer documents, Land forms no. 29, 30 and 35.

Both the sale agreement and Land forms supra were executed in the office and presence of Angelina Kalenzi learned advocate. The three months expired without the respondent vacating which necessitated the victim to issue a seven days notice of vacant possession, exhibit P3. The Respondent did not vacate on the ground that she was not the owner of the house in question but one Frank Kachemba Silinde her deceased husband, and now a family property.

From the a foregoing facts, she was alleged to have obtained the sale price by false pretence hence this case.

During trial the respondent fended herself that she did not sale that house but merely mortgaged it for a loan of Tshs. 6,000,000/= only but they fraudulently prepared and caused her to sign the sale documents



2

without her knowledge. At the end, the trial court believed her and acquitted her for failure of the prosecution to prove the "**intent to defraud**" as one of the ingredient of the offence.

At the hearing of this appeal, M/S Edith Tuka learned State Attorney represented the Appellant while the respondent was present in person.

The learned State Attorney submitted in the first ground of appeal that, with the evidence of PW1, PW2 and PW3 the prosecution proved beyond reasonable doubt that the respondent obtained the money by false pretences as she defrauded the victim that she was the administratrix of the estate of her deceased husband and was selling the house in question under such capacity.

That, her representations was believed by PW1 and PW2 and she personally did not dispute to have obtained the money in question from the victim.

That, during the defence the respondent disputed to have ever been an administratrix of the estate, her earlier on representation was thus deceitful hence the intent to defraud proved.

The respondent on her side, did not properly address on this ground. She concentrated in reproducing her evidence she gave at the trial Court that she did not sale the house but mortgaged it to the victim.

On my side on this ground, I am of the firm view that the same is without any substance because neither the charge nor the sale documents exhibit P4 indicates that the respondent introduced herself as an administratrix of the estate in question. Had it been so the victim's advocate, a learned sister PW2 would have demanded the letters of

administration to satisfy herself before executing the transaction between the respondent and the victim.

Even during their respective testimonies PW1 and PW2 advocate Angelina Kalenzi did not state whether they asked the respondent about the letters of administration and what was her response.

Without evidence from the prosecution that they attempted anyhow to satisfy themselves on whether the respondent was really an administratrix of the estate leaves the defence of the respondent that she did not sale the house but mortgaged it unchallenged. If so the question of selling the house does not arise and that automatically do away the intent to defraud.

I agree with the trial Magistrate in his findings that the possibilities that the respondent might have signed the sale documents without understanding its contents as she did not know how to read cannot be ignored.

That fact is even corroborated with the fact on record at page 36 of the proceedings when she tendered exhibit D1 stating that it was a contract to show that she borrowed the money from PW1 the victim while the same was just an introduction letter to the victim for borrowing the money;

"I pray to tender the contract evidencing that PW1 had only lent me some money.....The contract shows I borrowed money from PW1."

Exhibit D1 is a letter which was written by DW3 Patrick Mayiga the Mtaa Executive Officer to introduce the respondent herein to the victim for the purposes of borrowing money at the request of the victim herself

being one of her requirements to land money. That was stated by DW3 at page 43 when he testified that he asked how PW1 runs her business of lending money and she replied that among others she requires a letter requesting for the loan. He thus wrote such letter whose original the victim took and went away on the pretext that she was going to withdraw the money from the bank.

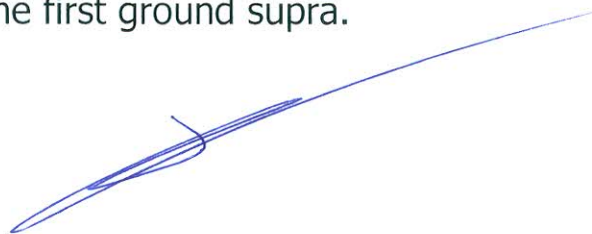
DW2 also treated exhibit D1 a copy of which he also tendered as exhibit D2 as a contract for borrowing Tshs. 9,600,000/= by the respondent from the victim.

Therefore the intent to defraud does not arise here as the business between the victim and the respondent was not a sale and purchase but borrowing and lending money.

It is unfortunate that it was PW1, PW2 and PW3 who had a conspiracy mind to defraud the accused now the respondent of her deceased husband's house. In other words those who would have been and actually were criminals were treated as victims and witnesses, and the respondent who was actually the victim was turned into being an accused person. The world is not fair.

The Criminals under the aid of the prosecutor a learned State Attorney, stood in the witness dock against the real victim who was put into the accused's dock. I therefore dismiss the first ground of appeal.

The second ground of appeal has to some extent been overtaken by the determination of the first ground supra.



It is the prosecution submission that the defence evidence that the respondent merely borrowed the money and not sold the house should have been disbelieved and ignored.

As I have said in the first ground of appeal it were the prosecution witnesses untrustful, incredible and unreliable rather than the defence witnesses.

The respondent testified that she was in need of money to attend her problems and therefore went to PW3 who in turn connected her with PW1 who used to lend money. She was in need of Tshs. 6,000,000/= but PW1 conditioned her that the contract shall show that she borrowed Tshs. 9,600,000/=. She agreed and they went to the Ward Executive's office where a contract that she was borrowing Tshs. 9,600,000/= was drawn by the Executive Officer.

Her evidence was corroborated by DW3 the Mtaa Executive Officer who prepared exhibit D1/D2 for the parties and the victim herein PW1 took up the original.

If it was not the question of borrowing money why was all this transaction at MEO's office. Why didn't PW1 disclose this fact in Court and atleast explain how the lending business which they executed at MEO's office turned into a selling and purchasing of the house.

DW3 was not cross examined on the fact that PW1 and the Respondent expressed before him their intent of lending and borrowing money. In that respect it were the prosecution witnesses lying in Court and the respondent spoke the truth of what happened between her and the victim PW1. She was as well corroborated by DW2 Recho Noah Mkuki

who was her guarantor to the loan. Unfortunately both did not discover the ill intent behind PW1 and her advocate PW2.

At the hearing of this appeal, the respondent even lamented that she could have not sold the house in question at Tshs. 9,600,000/= because its market value is Tshs. 70,000,000/=;

"My house if I decide to sale it I can easily sale it at Tshs. 70,000,000/= and therefore I could have not sold it at that cheaper price of Tshs. 9,600,000/="

I am aware that no evidence on record about the market price of the house in question but atleast PW1 was cross examined on the hugeness of the house and she replied at page 18 of the proceedings;

"The house has about six rooms"

With this fact on record, I have no reason to disbelieve the respondent that the market price of the house in question can't be Tshs. 9,600,000/=

The respondent whose demonour was credited by the trial Court argued the trial Court to allow her to repay the loan on instalments. She repeated the same at this appeal when she expressed her willingness to pay back the principal loan of Tshs. 6,000,000/= and the interest of Tshs. 3,600,000/= through instalments of Tshs. 200,000/=per month, and that she had in fact paid one instalment before the criminal allegations were framed against her but PW1 stopped her from continuing to deposit the instalments. Later on criminal charges were framed against her;

"I am ready to pay the victim her money Tshs. 9,600,000/= which includes an interest."



7

I pray to be allowed to pay her in instalments at Tshs. 200,000/= or Tshs. 300,000/= per month.

I had even started to repay the loan as she had given us her account number. I deposited Tshs. 200,000/= into her account which I don't recall. When I started to deposit the money into her account she stopped me without telling me why I should not repay the loan. Thereafter I faced these criminal charges."

These words I believe comes from an innocent mind which does not even know that the interest thereof is illegal interms of section 4 (1) & (2) of the Banking and Financial Institutions Act, Cap. 242 R.E 2002 read together with section 3 (1) (a) of the Business Licencing Act, Cap. 208 R.E. 2002 which prohibit any person to carry on business transactions without having a valid business licence.

In the circumstances and just as it was the trial Court, I find that the respondent gave credible evidence worth to be trusted as against that of the prosecution. The trial Court did not therefore error to believe her and thus the second ground is as well dismissed.

The evidence of the respondent being believed as explained herein above, I find it pertinent to determine father the fate of the money she borrowed from PW1 and the interest thereof.

PW1 who is a purported victim in this case entered in such illegal business knowingly and with intent to defraud the respondent of her residential home, a widow so to speak in accordance to the evidence on record. That is why the illegal business was camouflaged into a sale agreement and transfer documents.

PW1 was not a bank or a financial institution to carry out transactions of a business nature i.e. lending money on interest basis. She had no business licence either. She thus contravened the provisions of the Banking and Financial Institutions Act and the Business licencing Act supra.

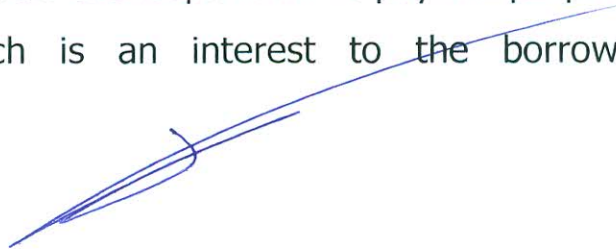
Such illegal transaction which the respondent is willing to execute as stated above is not in law executable or enforceable.

Section 23 (1) (a), (b), (c) of the law of Contract Act, Cap. 345 R.E 2019 forbids all considerations and objects which are forbidden by law, which are of a nature that if permitted it would defeat the provisions of any law, and which are fraudulent.

In this case the interest of Tshs. 3,600,000/= was illegal and if permitted would defeat the provisions of section 4 (1) & (2) of the Banking and Financial Institutions Act supra which restricts business in the nature of financial transactions to Banks and Financial Institutions subject to the application and grant of licence to that effect under section 6 of the Act.

Such interest if allowed would as well defeat the provisions of section 3 (1) (a) of the Business Licencing Act, Cap. 208 supra which prohibits any person from carrying any business without holding a valid business licence relating to such business.

I cannot therefore allow the respondent to pay the purported victim Tshs. 3,600,000/= which is an interest to the borrowed Tshs. 6,000,000/=.



In respect of the principal amount borrowed Tshs. 6,000,000/=, the law is very clear. Subsection 2 of section 23 of the Law of contract supra provides;

".....every agreement of which the object or consideration is unlawful is void and no suit shall be brought for the recovery of any money paid or thing delivered or for compensation for anything done, under any such agreement."

Under those clear words of the law the Tshs. 6,000,000/= advanced by the purported victim PW1 to the respondent in violation of the law, and the manner the violation was camouflaged to defeat the provisions of the laws supra at the instances of PW1 and her dishonest advocate, is not recoverable. In fact PW1 do not claim to have landed such money to the respondent.

She only claimed to have bought the house but failed to prove such purchase. As the purported purchase has not been established both at the trial court and in this appeal, the claims of the purported victim PW1 dies instantly and no further claims remains. She cannot even be directed to resort into Civil proceedings to recover her principal amount on the herein stated grounds that her business was illegal and unenforceable and she does not claim any Civil right against the respondent.

The respondent is thus under no any legal obligation to repay the purported victim PW1 any pen of money resulting from the business which was deceitful, fraudulent and illegal.

I would only remind the Director of Public Prosecutions and his staffs to stand by the law. Had they do so in this matter, it was PW1 to face a

trial for offending the provisions of section 4 (3) of the Banking and Financial Institutions Act supra which provides;

"Any person who contravenes the provisions of this section commits an offence and on conviction is liable to a fine of not less than one million shillings or to imprisonment for a term of not less than five years or to both such fine and imprisonment."

The law should be applied for its enactment purpose and should not be applied just to meet the interests of those who are powerful be it financially, politically or socially. Peace and harmony in the society depends on applications of the law faithfully, purposely, honestly and impartially.

With the herein observations and findings, this appeal stands dismissed in its entirety. Right of appeal is explained.

It is so ordered.



Order:

**A. MATUMA
JUDGE
28/07/2022**

Since PW1 Martha M. Lushanga on 12/08/2021 wrote to the trial court to have her exhibits tendered returned to her for her further actions, in which the trial Court endorsed; "apewe copy siyo original", it is hereby ordered that the original Sale Agreement, land forms no. 28, 30 and 35 should not be returned to her as they are illegal documents for having been fraudulently executed as adjudged herein above.

It is so ordered.