IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 92 OF 2022

Appeal from the decision in Criminal Case No. 176 of 2020 of the District Court of Bagamoyo at Bagamoyo (Mwaria, RM) dated 14th of March, 2022.)

YOHANA LUSINDE ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

1st, & 2nd August, 2022

ISMAIL, J.

Yohana Lusinde, the appellant herein, was charged with the offence of obtaining money by false pretense, contrary to the provisions of section 302 of the Penal Code, Cap. 16 R.E. 2019. It was alleged that on diverse dates in 2020, the appellant, masquerading as the owner of a ¼ of an acre-farm, situated at Kwakibosha area, Mapinga within Bagamoyo District, purported to sell it to a Mr. Omari Hassan, the complainant. In the process, the appellant is alleged to have received the sum of TZS. 5,000,000/-. This sum was part of the sum TZS. 6,000,000/- which was quoted as the purchase price for the said piece of land. The sum was paid in three instalments paid

between 25th April, 2020 and 3rd June, 2020. It was subsequently discovered that the piece of land allegedly disposed of to the complainant belonged to someone else.

This revelation triggered a complaint by the complainant, culminating into an investigation that led to his arraignment in court, and eventual conviction and sentence to imprisonment for four years. He was also ordered to refund of the sum fleeced from the complainant.

The appellant protested his innocence throughout the trial proceedings, but his defence did little to weaken the prosecution's case. He has now decided to challenge the trial court's decision through a petition of appeal that contains five grounds of appeal, reproduced as hereunder:

1. *That the trial magistrate erred in law and in fact to convict and sentence the appellant while the charge incurable and defenctive.*

2. *That the trial magistrate erred in law and in fact to convict and sentence the appellant on contradictory evidence adduced by prosecution side.*

3. *That the trial magistrate erred in law and in fact to convict without prosecution side proving his case beyond reasonable doubt in respect of charge that the appellant had intention to defraud and deceive the prosecution witness No. 1.*

4. *That the trial magistrate erred in law and in fact to convict and sentence the appellant without evaluating evidence adduced by defence side.*

5. *That the trial magistrate erred in law and in fact to convict and sentence the appellant without providing reason of the decision which is contrary to the law.*

Hearing of the appeal saw the appellant fend for himself, unrepresented, while Ms. Laura Kimario, learned State Attorney, represented the respondent. Ms. Kimario addressed the Court ahead of the appellant and she began by conceding to the appeal. She chose to argue ground one alone, believing that this ground is enough to dispose of the appeal.

She argued that section 302 of the Penal Code (supra), under which the appellant was charged, lays down ingredients of the charge of obtaining money by false pretense. Learned counsel submitted that intent to defraud must be clearly stated in the charge sheet. In the instant proceedings, Ms. Kimario argued, there is no expression that the appellant did which he is accused of with intent to defraud. It is not stated, either, that the plot of land was not his.

While maintaining that key elements of the offence were not stated, Ms. Kimario argued that such omission was contrary to section 132 of the CPA, which provides that particulars of the offence must contain reasonable

information to enable the accused prepare his defence. The gravity of the offence is such that the charge sheet is incurably defective. On this, Ms. Kimario cited the decision in ***Juma Charles @ Reuben & Another***, CAT-Criminal Appeal No.566 of 2017 (unreported).

Ms. Kimario urged the Court to allow the appeal and nullify the proceedings, and set aside the sentence.

The appellant did not have anything to submit on. He left everything to the Court. He, however, prayed that he be set free.

The crucial question for determination revolves around the competence of the charge sheet to found proceedings that bred the impugned judgment.

It is a cherished canon of evidence and criminal law, that the finding of guilt of the accused must be preceded by proof that the accused has played a culpable role in the commission of the offence with which he is charged. The standard of proof in such cases is beyond reasonable doubt, and this lies with the prosecution. The duty of proving the accused's culpable role begins with laying the proper foundation of the charges, and this is done by ensuring that the document that founds the charge i.e. the charge sheet, is drawn in the manner that conforms to the tenets set out in sections 132

and 135 of the CPA. The former instructs, in imperative terms, that a charge must disclose all ingredients of the offence charged. It states as follows:

> *"Every charge or information shall contain, and shall be sufficient if it contains,* ***a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged****."* [Emphasis supplied].

See also: ***Ally Ramadhan @Dogo v. Republic***, CAT-Criminal Appeal No. 45 of 2007; and ***Fred Nyenzi v. Republic***, CAT-Criminal Appeal No. 121 of 2016 (all unreported).

Too important is the requirement of disclosing ingredients of the charge sheet that countless judicial pronouncements have censured proceedings that were founded on discrepant charges. This includes the decision in ***Juma Charles @ Reuben & Another v. Republic*** (supra), cited by Ms. Kimario. In ***Abdalla Ally v. Republic***, CAT-Criminal Appeal No. 253 of 2013 (unreported), the Court of Appeal of Tanzania made the following finding:

> *"…. being found guilty on a defective charge based on wrong and /or non-existent provisions of the law, it cannot*

be said that the appellant was fairly tried in the courts below…."

A more elaborate guidance was given in the subsequent decision of the upper Bench in the case of ***Mnazi Philimon v. Republic***, CAT-Criminal Appeal No. 401 of 2015, wherein a deviation from the requirement of the law was abhorred. It was held as follows:

(1) *"It is now beyond controversy that one of the principles of fair trial in our system of criminal justice is that an accused person must know the nature of the case facing him, and this can only be achieved if the charge discloses the essential elements of the offence, and for that reason, it has been sounded that no charge should be put to an accused unless the court is satisfied that it discloses an offence known to law. A clear charge drawn in terms of s. 135 of the CPA, would give an accused person an opportunity to fully appreciate the nature of the allegations against him so as to have a proper opportunity to present his or her own case.*

(2) *"Being found guilty on a detective charge, based on wrong and/or non-existent provisions of the law, it cannot be said that the appellant was fairly tried."*

(3) *"We wish to remind the magistrate that it is a salutary rule that no charge be put to an accused before the magistrate is satisfied, inter alia, that it discloses an*

offence known to law. It intolerable that a person should be subjected to the rigours of a trial based on a charge which in law is no charge."

See also: ***Mussa Mwaikunda v. Republic*** [2006] T.L.R. 387; ***Oswald Mangila v. Republic,*** CAT-Criminal Appeal No. 153 of 1994; ***Kobelo Mwahu v. Republic***, CAT-Criminal Appeal No. 173 of 2008 (both unreported).

In the instant case, the key ingredient of the offence, which is an intent to defraud, was not stated in the particulars of the offence of the charge that the appellant was called upon to plead to. Missing in the charge sheet, as well, is what would be the statement of the offence. This is clearly discerned from the charge sheet whose substance is reproduced in part, with all its grammatical challenges, as follows:

CHARGE SHEET

PARTICULAR OF THE OFFENCE: Obtaining money by false pretence c/s 302 of the Penal Code 16RE: 2002

That YOHANA s/o LUSINDE @ NDAHANI charged on different date and time of 2020 at Kwakibosho area within Mapinga Ward, Bagamoyo District in Coastal Region did obtain cash money Tshs. 5,000,000/= from OMARY s/o HASSAN being payment of sale farm ¼ acre which is not belong to him.

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PUBLIC PROSECUTOR

STATION – BAGAMOYO

DATE 12TH June 2020

Nothing can be more defective. The charge is simply a congregation of words which do not convey any criminal intent, a key constituent of the offence of obtaining money by false pretense. I agree with Ms. Kimario that, on account of this colossal discrepancy, this is not a charge worth the name, and it was quite irregular that the trial magistrate distilled a conviction from this discrepant allegation. In law, this charge was no charge.

Consequently, I find and hold that the appeal is meritorious and I allow it. Accordingly, I order that the conviction entered and the sentence passed against the appellant by the trial Court be, respectively, quashed and set aside. It is ordered, in consequence, that the appellant be immediately set free unless he is held for other lawful reasons.

It is so ordered.

DATED at **DAR ES SALAAM** this 2nd day of August, 2022.

M.K. ISMAIL

JUDGE

02.08.2022