

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL APPEAL NO. 120 OF 2021**

*(Originating from the District Court of Kibaha in criminal case No. 120 of 2020,
dated 23/06/2021 before Hon F.L. Kibona- RM)*

LONGINO LAZARO @KASONTA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

28th March, 2022 & 22nd April, 2022

E.E. KAKOLAKI J.

Before this court the appellant Longino Lazaro @ Kasonta is challenging both conviction and sentence imposed on him by the District Court of Kibaha in Criminal Case No. 120 of 2020, in the judgment handed down on 23/06/2021. Before the trial court he was facing nine (9) counts of the same offence, which is of Obtaining Money by False Pretence; Contrary section 302 of the Penal Code, [Cap. 16 R.E 2002] now [Cap. 16 R. E 2019]. In the end he was convicted of four counts and sentence to one (1) year imprisonment on each count and sentence to run consecutively. And further ordered to compensate the victims of the money fraudulently obtained from

them. Parties in this appeal were heard viva voce as both were represented. The appellant hired services of Mr. George Mwiga and Mr. Philemon Mganga both learned advocates whereas the respondent enjoyed representation of Ms. Elizabeth Olomi, learned State Attorney.

Before going further unto merit of the appeal, I find it crucial to reproduce the prosecution's case against the appellant on counts number 1, 3, 6 and 7 which is the base of this appeal. It was prosecution case in those four (4) counts that, on diverse dates between 2012 and 2015 at Pangani area within Kibaha District in Coast Region by false pretence and with intent to defraud or deceive, at different times the appellant obtained money Tshs.3,800,000 from Solomoni Lufunda, Tshs.70,000 from Atwai Ramadhani, Tshs. 600,000 from Msafiri Kirumbi and Tshs. 400,000 from Joseph Madaji respectively, as consideration for the sale of land situated at Pangani area within Kibaha District in coast Region while knowing that the said piece of land does not belong to him.

When called to answer his charge, appellant flatly denied the accusations levelled against him thus necessitated prosecution to parade 11 witnesses and 4 exhibits in a bid to prove its case, while appellant fended himself and tendered 4 exhibits too. It appears that, the trial court did not believe his

defence instead was satisfied that, the prosecution case was proved to the hilt on the 1st, 3rd, 6th and 7th counts thus, proceed to convict and sentence him accordingly.

Dissatisfied with such decision the appellant lodged the present appeal equipped with seven (7) grounds of appeal seeking to assail the decision of Kibaha District Court. Before hearing of the appeal could take place Mr. Mwigira for appellant sought leave of the court to add one additional ground of appeal the prayer which was granted. Notably though the appellant had a total of 8 grounds, the 3rd and 5th grounds were dropped during hearing thus remaining ground of appeal, 1st, 2nd, 4th, 6th, 7th grounds and the additional one. The remaining grounds can be paraphrased as here under, ***One***, the case was not proved beyond reasonable doubt, ***two***, there was contradictions between the charge sheet and Preliminary hearing facts, ***three***, the trial court convicted and sentenced the appellant on a land case and not criminal case, ***four***, the trial court relied on contradictory evidence of prosecution witnesses to convict the appellant and ***five***, the trial court disregarded/failed to consider the evidence of the appellant which was watertight. The additional ground was on the legality of the sentence imposed to the appellant. On the strength of the above grounds, appellant

requested the court to allow the appeal by quashing the conviction and set aside the sentence against him.

Looking at the grounds of appeal submitted by the appellant, only two main issues can be raised therefrom namely, **one**, the legality or otherwise of sentence of the appellant, **second**, whether the case was proved beyond reasonable doubt. For smooth determination of this appeal I have chosen to start addressing the second issue as to whether the case against the appellant was proved beyond reasonable doubt.

I have taken time to peruse the trial court's records in response to the second issue, and in so doing it is my humble view that, appellant's claims have merits. The reasons I am so holding are not far-fetched, *firstly*, it should be noted that, the standard of proving criminal case is beyond reasonable doubt, and not on the balance of probability, *secondly*, accused is not acquitted basing on the strength of his evidence but on weakness of prosecution case. Thus, the assertion by Mr. Mwigira that, the appellant's evidence was heavier than that of the prosecution and that the accusations levelled against him were not proved to the required standards as stated in the case **DPP Vs. William Festo Makune**, Criminal Appeal No. 19 of 2020 (HC-unreported) at page 7-8, has to be scrutinized deeply. This court

therefore has to satisfy itself as to whether the elements of the offence were proved the hilt or not.

As alluded to above, Mr. Mwigia contended that, the ingredients of offence as stated in the case of **William Festo Makune** (supra) were not proved to the standard by prosecution in the present case. In his view, since there was no testimonies by the prosecution witnesses on the said ingredients to prove the case on the required standards, the trial court ought to have given the benefit of doubt to the appellant as it was held in the cases of **Daimu Daimu Rashid @ Double D Vs. R**, Criminal Appeal No 5 of 2018 CAT (unreported) at page 7 and **Setas Evarist Tarimo and 2 Others Vs. R**, (DC) Criminal Appeal No. 719 of 2019 (HC -unreported). It was his further submission that, the appellant's defence was somewhat in line with the testimony of PW3, PW5, PW8 PW9 and PW11 as the question of ownership of the disputed land which would have constituted civil claims or land cases and not claims of criminal nature. He added that, PW1 who claimed to own the land in disputed allegedly sold to the victims by the appellant never instituted a land case rather preferred criminal case against the appellant therefore in view of Mr. Mwigia, the trial court wrongly treated the victims' land claims as criminal case. Responding to this point, Ms. Olomi contended

that, the case was proved beyond reasonable doubt as provided for under section 110 of the Evidence Act. She referred this Court to the evidence of PW5 at page 30 of the proceedings, PW 9 at page 42-43, PW8 at page 38-39 and PW3 at page 24 of the proceedings which according to her proves beyond doubt that the appellant sold the land not belonging to him, and obtained the claimed amount of money by false pretence under the umbrella of being a chairman of Mtakuja Pangani street/ Village within Kibaha District between 2012 and 2015. She stressed that, appellant assured them that they will obtain certificates of title after survey, and since the appellant was the chairman, he easily gained their trust. She went on submitting that, the appellant sold the said land with full knowledge that it was not his and to prove the same, after he had sold the land to PW8, appellant resold the same to another person. Ms. Olomi added that, the victims disapproved the appellant's assertion that, was given the said land to distribute it to the residents as all of victims were not residents of that area for coming from Dar es Salaam. In concluding, Ms. Olomi argued that, since the appellant fraudulently obtained money as stated on the charge sheet, the case was proved against him beyond reasonable doubt. In a short rejoinder Mr. Mwig

contended that, there is no evidence on record stating that appellant induced the witness under the umbrella of being the area chairman.

It is true and I embrace Mr. Mwiga's proposition that, proof of criminal cases lies on the prosecution and the standard of proof is beyond reasonable doubt. The said principle is well provided for under section 3 (2) (a) and 110 (1) and (2) of the Evidence Act, [R.E 2019]. This well settled position of the law is also stated in the case of **Said Hemed Vs. R** [1987] T.L.R 117 where the Court held thus:

"...in criminal cases the standard of proof is beyond reasonable doubt, where the onus shifts, it is on a balance of probabilities."

In the present appeal, appellant was charged with the offence of obtaining money by false pretence contrary to section 302 of the Penal Code. The section states thus;

S. 302. 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.

From the above section it is apparent that, for the offence of obtaining money by false pretence to be established the following ingredients must be proved:

- (1) *There was false pretence or misrepresentation by words or conduct.*
- (2) *Intent to defraud or mislead the person to whom such false pretence or misrepresentation is made*
- (3) *Obtaining from the person or inducing him to deliver anything capable of being stolen*

This position of law was recently arrived at by this court in the case of **Cuthbert Napegwa Kishaluli and 2 Others Vs. R**, Consolidated Criminal Appeals No. 149 of 2020 and 15 of 2021 (HC-unreported). Similarly in the case of **D.P.P Vs. William Festo Makune** (supra) at page 7 to 8 this court stated that, for the prosecution (Republic) to prove the case of obtaining money by false pretence the following ingredients must be proved;

- (i) *That the accused person, now the respondent, made any representation, either by words, writing or conduct.*
- (ii) *That representation was on a matter of fact or intention*

- (iii) That the representation was false and a person making it knew it to be false or did not believe it to be true*
- (iv) That he did that with the intent to defraud*
- (v) That, by that representation and with that intent, he obtained from the victim PW1 anything capable of being stolen or induces Pw1 to deliver to any person anything capable of being stolen. In this case Tsh. 11,000,000/=*

Since Mr. Mwigwa contended that the ingredients were not proved, I had to peruse the trial court record to see if the counsel's allegations featured in or not. As alluded to earlier, the appellant was convicted on four (4) counts being 1st, 3rd, 6th and 7th counts. So, in the course of re-evaluating evidence in this appeal as the first appellate court I will be touching on each ingredient of the offence.

To start with the 1st ingredient on false pretence or misrepresentation either by words or conducts, there is prosecution evidence of PW9 at page 43, PW3 page 30, PW3 page 28 and PW8 at page 38 of the proceedings to the effect that, the appellant introduced himself to them (victims) as chairman of the area and the person responsible for selling land whose owner one Mr. Mohamed Sumar was abroad for treatment. As to whether the appellant was

entrusted with that land by Mr. Mohamed Sumar, it was prosecution case that PW1 (Mehboob Sumar) answered the question when stated that, the said land (farm) was entrusted to him to take care of by his father Mohamed Sumar through a power of attorney (exh.P1). According to Ms. Olomi this ingredient was positively proved as the appellant falsely pretended to be entrusted with the land for sale while knowing it was not true. As to the second ingredient on intent to defraud or mislead the person to whom the false pretence is made, it was submitted that, it is obvious the appellant's act of pretending to sale land for and on behalf of Mr. Mohamed Sumar which fact was not true, was meant to defraud the victim and obtain money from them for his own benefit after believing that the land was entrusted to him by Mr. Mohamed Sumar (owner). Appellant's fraudulence is exhibited by the evidence from both PW9, PW3, PW5 and PW8 when testified to the effect that after receiving money from them he issued them no receipt or proof of payments but rather listed their names in the note book while pleasing them that he was the chairman of the area, thus should not be worried. And the last ingredient is on whether the appellant obtained anything capable of being stolen (money). Again in this part there is prosecution evidence of PW9, PW5 and PW8 that in the year 2012 they paid Tshs. 3,800,000/-, Tshs.

70,000/- and Tshs. 400,000/- respectively to the appellant. As for PW3 says he paid Tshs. 600,000/- to the appellant in the year 2011.

Looking at the above prosecution evidence one can easily be convinced and therefore believe that, the three ingredients were proved by the prosecution beyond reasonable doubt. However in my humble opinion contrary is the truth for two reasons. **One**, it is not clear as to when exactly was the said offence committed by the appellant. While PW3 is saying it was in the year 2011 and not between 2012 and 2015 as stated in the charge sheet, the rest of the prosecution witnesses say it was the year 2012 without specifying even the month something which creates doubt as to the credibility of their evidence since the offence could not have been committed the whole year. In other words if not sure of the dates it was important for prosecution witness to atleast specify the months in which the said offence is alleged to have been committed something which they failed. **Secondly**, under normal circumstances it is shockingly sounding for someone to pay a huge amount of money to the person he has firstly known or introduced to without any proof of payment whatsoever, either through another witness or in writing leave alone receipts which the victims strangely claim could not be issued to them on the reason that were to be issued by the owner of the land

(Mohamed Sumar). Under normal circumstances it was expected of the village office to be involved in the transactions but in this case it was the opposite something which leaves this court with full doubts as whether the alleged money by victims was paid to the appellant as claimed. With all those doubts I am settled that the same must be resolved in favour of the appellant as stated in the case of **Daimu Daimu Rashid** (supra) and **Setas Evarist Tarimo and 2others** (supra). It is from those reasons I am convinced to shoulder up with appellant's counsels propositions that, the prosecution case was not proved beyond reasonable doubt hence the second issue is answered in affirmative. As this issue is sufficient to dispose of the appeal, I see no reasons to consider the remaining issue.

All that said, I find this appeal to be meritorious and the same is hereby allowed. Conviction of the appellant on the four counts convicted with is therefore quashed and sentence and compensation orders meted on him set aside. It is hereby ordered that he should be released from prison unless otherwise lawful held.

It is so ordered.

DATED at Dar es salaam this day of 22th Day of April, 2022



E. E. KAKOLAKI

JUDGE

22/04/2022.

The Judgment has been delivered at Dar es Salaam today on 22nd day of April, 2022 in the presence of Mr. Selemani Matauka advocate for the appellant, the appellant in person, Mr. Adolf Kisima, State Attorney for Respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

22/04/2022

