

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

(PC) CRIMINAL APPEAL NO. 28 OF 2020

(Originating from Criminal Case No. 18 of 2020 from Kashasha Primary Court and arising from Criminal Appeal No. 11 of 2020 from Muleba District Court)

NESTORY BALLYORUGURU.....APPELLANT

VERSUS

JOSEPH MAGEZI.....RESPONDENT

JUDGEMENT

1st July & 22nd July 2022

Kilekamajenga, J.

The appellant worked for Mbeya University of Science and Technology until his retirement in 2010. After receiving his retirement benefits, he decided to venture into cattle keeping. He approached the respondent to assist him buy sixteen cows in Muleba. As a result, he sent Tshs. 7,000,000/= to the respondent to buy sixteen cows. It is alleged that, the respondent bought the cows and the appellant went and witnessed them. The appellant went back to Mbeya before permanently relocating to Muleba. But when he requested for the cows from the respondent, he only got five cows. The respondent promised to hand over the remaining cows whenever needed as they were kept in another kraal.

Thereafter, the respondent changed his story and alleged that he only kept five cows for the appellant and nothing else. The appellant sued the respondent in Kashasha Primary Court for cheating contrary to **section 304 of the Penal**



Code, Cap. 16 RE 2019. The respondent was finally convicted and granted conditional discharge and ordered to pay a fine of Tshs. 50,000/=. The court further ordered the respondent to pay back the eleven (11) cows; each cow was quantified at the value of Tshs. 500,000/=. The respondent appealed to the District Court which reversed the decision of the Primary Court on the reason that, the appellant ought to file a civil case against the respondent.

The appellant appealed to this Honourable Court with four grounds challenging the decision of the District Court. Before this court, the appellant's petition contained the following grounds:

- 1. The District Court grossly erred in law and fact by overturning the sound judgment of the Primary Court without properly analysing the evidence on record in particular the documentary evidence tendered as Exh. A, B, C and D which were not at all considered by the District Court while indeed were the basis of the decision of the Primary Court judgment.*
- 2. The District Court failed to note that there was every element of criminality as found by the Primary Court in particular after finding that the Police loss report produced by the respondent was faked during the pendency of this case, hence rejected by the 1st trial court (sic). Removal of this exhibit from the records properly places this case into the criminal category and not otherwise.*
- 3. The District Court failed to note that the respondent admitted that he was in custody of the appellant's cows and 5 of them were returned to the appellant through his wife, and no explanation was given concerning the purchase of the 5 cows. This went to the root of the allegation by the appellant that he had given money to the respondent as evidenced in the letters exhibits A, B, C, and D supra.*

4. *The District Court did not view the evidence of SM 3 Peter Marius who witnessed the handing over of the 5 cows and the admission by the respondent to the effect that the remaining cows would be delivered to the appellant later on as they were not in his kraal at the material time. This piece of evidence was proof enough that the respondent had misappropriated the appellant's cows criminally contrary to section 304 of the Penal Code.*

In this court, the appellant, through the legal representation of the learned advocate, Mr. J.S Rweyemamu appeared to defend the appeal whereas the respondent appeared in person and without legal representation. Mr. Rweyemamu for the appellant informed the court that, during the trial, the appellant summoned three witnesses and tendered three exhibits which proved how the respondent bought cows on behalf of the appellant. He argued further that, the respondent showed the appellant the sixteen (16) cows which were bought by the respondent on his behalf. The appellant, thereafter, went back to Mbeya and upon his return, he did not find the sixteen cows in the kraal. Instead, the respondent only handed-over five cows out of sixteen cows. The five cows were handed-over to the appellant in the presence of PW2 and PW3. Also, in the presence of PW3, the respondent promised to hand-over the remaining cows whenever they were needed. In his defence, the respondent did not challenge the evidence of PW3 nor object the claim on the eleven cows. The appellant's evidence proves that the respondent defrauded the appellant. Furthermore, the respondent only summoned his wife in the defence. The

counsel insisted that, the District Court did not decide the appeal on merit as there was no sale agreement between the appellant and respondent to warrant the filing of a civil case. He urged this Court to allow the appeal and uphold the decision of the Primary Court.

In his oral submission before this Court, the respondent urged the court to consider his reply to the petition of appeal and uphold the decision of the District Court. He argued further that, he stayed with the five cows for six months; however, they did not bear any calves and the instant case was just fabricated against him.

When rejoining, Mr. Rweyemamu insisted that, the appellant claimed sixteen cows which were bought by the respondent on the behalf of the appellant.

In determining the instant appeal, I perused the records in the file and considered the grounds of appeal lodged by the appellant. The record shows that, the appellant was charged with the offence of cheating contrary to **section 304 of the Penal Code, Cap. 16 RE 2019**. For the purposes of quick reference and understanding, I wish to reproduce the section thus:

'304. Any person who by means of any fraudulent trick or device obtains from any other person anything capable of being stolen or any other person to or deliver to any person anything capable of being stolen or to pay or deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or

delivered but for such trick or device, is guilty of an offence and is liable to imprisonment for three years.'

According to the above provisions of the law, any person who employs some tricks or by fraudulent means obtains from another person anything capable of being stolen is guilty of the offence of cheating. This is purely a criminal act and cannot be termed, in any way, as a civil claim. The accusation at hand points towards the respondent who is alleged to have solicited Tshs. 7,000,000 from the appellant under the pretext of buying cows. If at all the respondent committed this act, he definitely contravened the penal law of the country.

On whether the appellant proved his case to the required standard, I was obliged to revisit the evidence adduced during the trial. The evidence shows that, the respondent solicited money from the appellant (PW1). It is alleged that, the respondent had just retired and secured his retirement benefits. The appellant's evidence was supported with the testimony of PW2 who confirmed to know both the appellant and respondent. He also witnessed the appellant receiving only five cows from the respondent. PW3, who also supported the evidence of PW1, testified that, the appellant only received five cows and the respondent promised to hand-over the remaining eleven cows later.

In his defence, the respondent who summoned his wife to support his testimony, alleged to have received five cows from the appellant for keeping in his (respondent) kraal. The appellant and respondent signed an agreement for

keeping of the five cows. Later, a person called Denis came and fetched the appellant's cows. Before fetching the cows, the respondent demanded back the agreement to confirm whether Denis was sent by the appellant. DW2 who was the appellant's wife testified that the appellant brought five cows for keeping in their kraal.

Based on the pieces of evidence adduced during the trial, it is evident that, the appellant had some communication with the respondent in respect of the cows. While the appellant alleged to have sent Tshs. 7,000,000/= to the respondent for the purchase of sixteen cows, there is no direct evidence to show that the respondent received that amount of money. However, the evidence circumstantially points towards the respondent having custody of five cows on behalf of the appellant. In his testimony, the respondent alleged to have received them from the appellant and there was a written evidence to that effect. When the cows were taken by Denis, the respondent demanded the written document as evidence that the appellant was taking away the five cows that he kept in the respondent's kraal. However, in his evidence, the respondent failed to tender evidence to shed doubts to the appellant's case.

Furthermore, while PW2 and PW3 confirmed that the respondent only gave five cows to the appellant, PW3 went further stating that the respondent promised to hand over the eleven cows later. In our law, there is no required number of witnesses to prove a fact; even the testimony of one person if given with a

witness with credence may be sufficient to prove a fact. See, **section 143 of the Evidence Act, Cap. 16 RE 2019**. Moreover, the record shows that, in 2010 and early 2011, the respondent purchased cows from several persons. For instance, on 4th November 2010, the respondent purchased cows from Reverian. On 14th January 2011, the respondent made another purchase of cows from Mohamed Hussein. Therefore, the direct evidence of PW1 and PW3 confirmed that the respondent promised to hand-over the eleven cows to the appellant whenever needed. Also, there is clear circumstantial evidence suggesting that the respondent transacted with the respondent for the purchase of cows.

In conclusion, I have no hesitation to believe that, the respondent, by tricks solicited money from the appellant for the purchase of cows. There is no doubt further that, the respondent only hand-over five cows to the appellant. The handing-over of the cows was done in the presence of PW2 and PW3. The evidence of PW3 clearly shows that, the respondent promised to hand-over the eleven cows whenever needed. Also, the circumstances of the case do not leave any doubt that the respondent defrauded the appellant by not handing over the eleven cows which he purchased on the appellant's behalf. I therefore find merit in the appeal and allow it. I set aside the decision of the District Court and uphold the decision of the Primary Court. It is so ordered.

Dated at Bukoba this 22nd Day of July 2022.




Ntemi N. Kilekamajenga.
JUDGE
22/07/2022

Court:

Judgement delivered this 22nd July 2022 in the presence of the counsel for the appellant, Mr. J.S Rweyemamu and the respondent present in person. Right of appeal explained to the parties.




Ntemi N. Kilekamajenga.
JUDGE
22/07/2022

