

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

CRIMINAL APPEAL NO. 67 OF 2021

(Originating from Criminal Case No. 76 of 2017 of the Shinyanga District Court)

THE REPUBLIC APPELLANT

VERSUS

JULIUS KAGYA.....RESPONDENT

JUDGMENT

30th May & 15th July 2022

MKWIZU, J:

This is an appeal by the Director of Public Prosecution against the decision of the Shinyanga District court in Criminal Case No. 76 of 2017 acquitting the respondent, Julius Kagya for Obtaining Money by False Presence contrary to sections 301 and 302 of the Penal Code, (Cap 16 RE 2002).

The account of the matter gathered from the record uncovers the following: Respondent, Justus s/o Kagya was a registered member of MWIGANWA SACCOS. In 2014, the respondent did secure a 6,000,000/= loan from the SAVCOS repayable with 12 % interest payable in two years period from June 2014 to June 2016 in a monthly installment rate of 280,000/=. In that process a house Located on Plot No. 27 Block NN Ndala, Motorcycle Mark TUS Star with Reg. T 133 BGZ and the Motor vehicle with Reg. No. T 898

CGB belonging to the respondent was pledged as security. As part of the SACCOS member's agreement, the security was to be pledged without surrendering the documents of ownership. And this is what the respondent did.

Respondent is said to have defaulted payment. He observed the three installments only in the months of June, July, and August 2014. In reinforcing the mortgage deed, it was realized that the House in Plot No. 27 Block NN Ndala, part of the securities of the loan, was also mortgaged to Tanzania Post Bank and sold after the respondent has defaulted on payment. Police were informed, and the respondent was arrested and charged with the offence as per the charge sheet.

In his sworn evidence, the respondent did not dispute taking the loan or the pledging of the house, motor vehicle, and motorcycle as security. He also admitted the alleged default, but he was elaborative that he duly repaid Tsh. 1,930,000/= and the remaining sum later. He completely denied the commission of a criminal offence.

The trial court found in favour of the respondent. It was at the end of the trial satisfied that the prosecution has failed to prove the case beyond reasonable doubt and proceeded to acquit the respondent. Appellant, the DPP is not happy. He filed the present appeal on three grounds of appeal.

- 1. The Trial Court erred in law and facts for concluding that there were no false pretense on the party of the accused person.*

2. *The Trial court erred in law and fact for holding that there were variance between the charge and evidence adduced by the prosecution.*
3. *The Trial court erred in law and in facts for holding that Prosecution failed to prove the case beyond a reasonable doubt.*

At the hearing, the Republic had the services of Ms Shani learned State Attorney whilst Respondent was represented by Mr. Ijan Augustine learned Advocate.

The learned State Attorney chose to argue the appeal generally. Her point was that the prosecution managed to prove the offence beyond reasonable doubts. She was of the view that the respondent knew that the security he pledged was to compensate the Saccos in case of failure to pay the loan and therefore were supposed to be free from any encumbrances until the loan is fully repaid. That respondent's ill intention is demonstrated by his failure to repay the loan and surrender the security he himself pledged as security, which he used to secure loans in Bank institutions. She lastly urged the court to allow the appeal and reverse the acquittal.

In reply, Mr. Ijan Advocate contended that the respondent had followed all the procedures for obtaining the requested loan facility from the SACCOs and this was confirmed by PW1 one of the Mwigana Saccos's leaders on page 11 of the trial proceedings. He said, the ill intention described by the State Attorney is an afterthought. The accusation of obtaining money by

false pretence preferred against the respondent remained unproved as nothing was shown to prove false pretence at the time of obtaining the loan and the assertion that respondent securities were pledged to Tanzania Post Bank was not proved. Though there was a letter tendered by PW6, indicating that the respondent was advanced a loan by the Bank, that letter had nothing to do with the securities in respect of the Mwigwana SACCOS. The respondent, on the other hand, managed to tender the loan agreement he had with the Postal Bank in which securities pledged were disclosed and the said document was admitted as exhibit D1 with no objection from the prosecution.

In addition to the above, Mr. Ijan said, the prosecution evidence and the charge sheet were at variance. Elaborating on this, Mr. Ijan said, the charge sheet has no detail pointing to Plot No 127 Block NN Ndala as one of the securities pledged by the respondent and there was no mention of the Postal Bank but PW6 and PW7 evidence pointed to the facts which were not disclosed in the charge sheet. They both accused the respondent of mortgaging one house in two financial Institutions a fact which was not disclosed in the charge sheet. He lastly prayed for the dismissal of the appeal.

In rejoinder, Ms. Shani insisted that though the procedures for obtaining the loan were followed, the respondent failed to surrender the properties pledged as security.

Having carefully gone through the trial court records, grounds of appeal together with both parties' submissions, the determinable issue here is only whether the appeal is meritorious or not. I will, like the parties herein, to determine the appeal generally and this is so because the complaint on all three grounds centers on whether the prosecution's case was proved or not.

This is a criminal case, where the prosecution is duty-bound to establish its case beyond a reasonable doubt. This is a legal principle expressly provided for under section 3 of the Evidence Act and intensified in an infinite number of cases one of them being **Joseph John Makune v. Republic** [1986] TLR 44, it was held:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence. There are few well-known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ..."

In this case, the appellant was indicted for obtaining money by false pretence contrary to sections 301 and 302 of the penal Code Cap 16 RE 2002. The sections read:

"301- Any representation made by words, writing or conduct of a matter of fact or of intention, which representation is false act and the person making it knows it to be false or does not believe it to be true, is false pretence"

*"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.**"(Emphasis added)*

Literally, "**false pretenses**" happens by making an intentional statement with the intent to defraud the victim to obtain title to the personal property of the victim. It is a false statement either of past or present, made by words, writing, or conduct, and which the maker knows its falsehood or does not believe to be true.

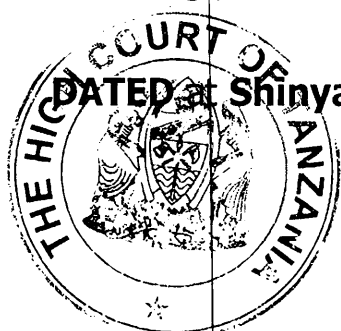
My meticulous assessment of the prosecution evidence discloses that the respondent, a valid member of Mwiganwa SACCOS applied for and was advanced a 6000,000/= loan payable in two years with 12% interest at a monthly installment amount of 280,000/=. This fact was established by PW1, PW2, and PW3, and admitted by the respondent. And in this process, the respondent is said to have followed all the procedures.

The falsehood of the respondent in obtaining the loan is only associated with his nonpayment of the loan facility and failure to surrender the securities alleged to have been illegally mortgaged to the Tanzania Postal Bank. I think the charges here were wrongly preferred against the respondent. Failure by the respondent to pay the loan is not anyhow related to false pretence in obtaining the same, and even the use of the same security in two financial

institutions alone doesn't amount to deception prescribed in sections 301 and 302 of the penal code.

The following are essential in establishing intent to defraud or deceit in a charge of obtaining money by false pretences. (i) That the accused made a false representation as to an existing fact; (ii) That the accused was aware of the falsity of the representation; (iii) That the accused's false representation was intended to deceive the victim; and (iv) That victim relied on the false representation to her/his detriment. See the case of **Jumapili Masanja V Republic**, Criminal Appeal No 204 of 2020, (High Court Unreported). There is no such evidence in this case, and this remains intact even if we are to believe the evidence by PW6, PW7, and exhibit P3 relied upon by the prosecution. The trial court was, in my view, right in observing that, defaulting payment under the circumstances of this case, amounted to a breach of contract and therefore a civil wrong. Not of a criminal nature.

The appeal is thus, devoid of merit. It is dismissed in its entirety. Order accordingly.



DATED at Shinyanga this 15th day of July 2022.


E.Y MKWIZU
JUDGE
15/07/2022

COURT: Right of appeal explained.


E.Y MKWIZU
JUDGE
15/07/2022