IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

(PC) CRIMINAL APPEAL No. 10 OF 2022

{Arising from the District Court of Musoma at Musoma in Criminal Appeal Case No. 47 of2021; originating from Kukirango Primary Court in Criminal Case No. 159 of2021)

1. MANDERA JOHN

2. PENDO MWITA .....APPELLANTS

Versus

MAHESI MAORI..... RESPONDENT

JUDGMENT

30.08.2022 & 31.08.2022

Mtulya, J.:

The first appellant, Mr. Mandera John (the appellant) was aggrieved by the judgment of **Kukirango Primary Court** (the primary court) in **Criminal Case No. 159 of 2021** (the case) which was upheld by the decision of the **District Court of Musoma at Musoma** (the district court) in **Criminal Appeal Case No. 47 of 2021** (the appeal).

The primary court in the case had found Pendo Mwita to have no case to reply hence discharged her for want of the evidence to call her to produce evidence in defense. However, the primary court had found the appellant guilty of the offence

of cheating contrary to section 304 of the **Penal Code** [Cap. 16 R.E. 2019] (the Code), which provides that:

> *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.*

(Emphasis supplied).

According to the appellant, he had never invited, seduced or fraudulently tricked Mama Mahesi Maori (the respondent) to join **Imani Vicoba Mkiringo Group** (the group) or pay contributions of any monies to the group, but it was from her own volitions, wishes and expectations. In order to make the matter well understood in legal terms, the appellant had hired legal services of Mr. Emmanuel Baraka Werema, learned counsel to draft and argue five (5) reasons of appeal in this court. Yesterday, when

the appeal was scheduled for hearing Mr. Werema appeared for the appellant, whereas the respondent appeared herself without any legal representation. During his submission, Mr. Werema decided to drop two (2) grounds of appeal and argued (3) three, which, in brief, shows that: first, the lower courts erred to hold the appellant responsible for the offence of cheating while there is no sufficient evidence on record to prove fraudulent trick; second, burden of proof in criminal cases lies on the prosecution side; and finally, the appellant was convicted of two (2) distinct offences in a single charge of cheating.

In the first ground of appeal, Mr. Werema submitted that there is no sufficient evidence on record to show fraudulent trick as per requirement of section 304 of the Code as the respondent joined the group at her own wishes and volition without any inducement from the appellant. According to Mr. Werema, the respondent joined and contributed to the group and not an individual person hence the appellant as an individual person cannot be responsible for actions of the group.

On the same ground, Mr. Werema contended that the record shows that the monies complained to have been taken by fraudulent trick, as per charge sheet, alleged to have been

withdrawn on 13th December 2020 amounting 450,000/= Tshs. whereas the record shows that the appellant and Manyama S. Manyama withdrew 900,000/Tshs. on 21st December 2020. In his opinion, Mr. Werema, thinks that the offence was not established as per requirement of the law.

Regarding the second ground, Mr. Werema cited page 6 in the decision of the district court in the appeal arguing that the district court shifted the burden of proof from the prosecution to the appellant which is contrary to the directives of the Court of Appeal (the Court) in the decision of **Robert Mneney v. Republic,** Criminal Appeal No. 341 of 2015.

Finally, Mr. Werema submitted that the appellant was charged and convicted for the offence of cheating contrary to section 304 of the Code, but during drafting of the judgment the primary court held the appellant responsible for forgery and during sentencing it ordered the appellant to pay the respondent the stolen amount of money amounting to 450,000/=Tshs. According to Mr. Werema, the primary court has been producing its own offences and holding the appellant responsible and without any record of replies to the charge or mitigations.

Replying the complaints of the appellant, the respondent submitted that the group declined to pay her monies despite several calls hence she decided to sue Secretary of the Group, the appellant and had reported the appellant to police station in struggling to have her contributions back. According to the respondent, she arrested the appellant as from the Audit Report of the group prepared by Pendo Mwita pointing fingers at the appellant. On the second reason of appeal, the respondent submitted that the evidences produced in the primary court show that the appellant withdrew the monies fraudulently as it was stated by the Chairman of the group Mzee Wambura Itende hence the case was proved beyond reasonable doubt.

In ending her submission, the respondent submitted that the confusions in the facts, evidences and production of variety of offences in the primary court was caused by the primary court and it has to be responsible for the mistakes. In rejoining the submissions of the respondent, Mr. Werema maintained his previous position that there is no sufficient evidence to establish the offence of cheating and even the evidence of Mzee Wambura Itende is just hearsay which cannot be relied by this court. Finally, Mr. Werema contended that the respondent admitted without any reservations that the primary court wrongly

produced other offences in variance of the charge sheet hence he concedes with the appeal.

I have glanced the record of the present appeal and found that the respondent sued the appellant at the primary court in the case complaining of monies amounting to a total of Tanzanian Shillings Four Hundred Fifty Thousand Shillings (450,000/=Tshs). During production of relevant materials, the respondent, as prosecution witness number one, testified, in brief, on 26th November 2021, as reflected at page 10-11 of the typed proceedings, that:

> *...baadae wanakikundi wote wakajumuika na kusema kwa nini nimetoa hizo fedha wakati Katibu amevunja kikundi na hajatoa fedha na watu tuiigawana na Mhazini. Mshtakiwa pamoja wanachama wote tukafika ofisini. Ndio wakatoa samansi kwenda kupelekwa kwa Katibu... Mwenyekiti wa Kikundi na Mwenyekiti wa Kijiji waiikuja kutoa ushahidi kwamba Katibu a/inikuta Benki kutoa fedha na kugawia baadhi ya wanachama waiiokuwa na mkopo...Mkuu wa Kituo akasema Mhazini aende kuangaiia fedha Benki. Kweii akakuta*

fedha zimechukuliwa Tshs. 900,000/=...Madai yangu

ni 450,000/=... Naomba nyaraka zangu zipoketewe...

After registration of the materials, the respondent prayed to tender several documents, including Tanzania Postal Bank Deposit Account Statement admitted in Exhibit AQ collectively, which shows that the appellant and Manyama S. Manyama withdrew 900,000/=Tshs. However, there was no any record admitted in evidence showing the withdrawal of Tanzanian Shillings Four Hundred Fifty Thousand Tanzanian Shillings on 13th December 2020 as per charge sheet. Similarly, no testimonies of Treasurer Pendo Mwita or Chairman of the Group Mzee Wambura Itende in the record of the case.

In his defense as reflected at page 15 of the typed proceedings of the primary court in the case conducted on 26th November 2021, the appellant had a very brief reply to the allegations that: *kulingana na shauri Hlilopo na ushahidi wa mdai, anapaswa kudai wana kikundi. Sio nidaiwe mimi. Yangu ni hayo tu.*

Following the testimonies and exhibits registered by the appellant and considering the defense case, the primary court found the appellant guilty of the offence of cheating as charged and at page 5 of the judgment ordered that:

1. *Shitaka dhidi ya mshtakiwa iimethibitika;*

2. *Mshtakiwa atumikie kifungo cha nje miezi mitatu (3) sambamba na kufanya kazi za kijamii kwa kadri atakavyopangiwa; na*

3. *Mshtakiwa amiipe miaiamikaji kiasi cha Tshs. 450,000/= kama jumia ya fedha aiiyomuibia.*

However, the record is silent on antecedents and mitigations in assisting the court at arriving proper sentence after the conviction of the appellant. Similarly, there were no materials on record on either stealing or forgery registered by either the appellant or the respondent. Nevertheless, the primary court reasoned at page 4 of its judgment that:

Mahakama hii baada ya kupitia ushahidi uiiotoiewa na
SMI ambao uiiungwa mkono na kieieiezo
AQ...,imeridhika kuwa mshtakiwa aiiiba kwa kuaminiwa fedha ya miaiamikaji, pamoja na wanachama wengine waiiokuwa na hisa zao kwenye kikundi, akiwa kama Katibu wa Kikundi. Hii ikiwa ni

baada ya kughushi saini za viongozi wengine na kutoa kiasicha Tshs. 900,000/=.

The appellant was not satisfied with the decision and reasoning of the primary court hence lodged the appeal in the district court complaining on three (3) reasons to fault the decision of the primary court in the case. After full hearing of the appeal, the district court upheld the decision of the primary court in the case and stated at page 6 and 7 of the judgment that:

... the trial court record and exhibits reveal clearly that amount of money of Tshs. 900,000/= was withdrawn from TPB Bank on 21st December 2020 by the appellant..in the trial court it was asserted that the money was deposited and stored in the TPB Bank owned by the members in Imani Vicoba jointly... from the face of trial court, nothing has been proved to show voluntary consent and agreement by the members of Imani Vicoba to such withdrawal of the alleged money...in the present appeal, the appellant was required to prove that the document used for withdrawal was not forged and he was authorized by the members of Imani Vicoba Group.

Regarding legal personality of the group and representative suit of the parties or evidences of other members of the group, including the Treasurer and Chairman of the group, the district court, at page 7 observed that:

> *...despite of the respondent not being the member of Imani Vicoba Mikiringo, but her claims are purely against the appellant. As [she] faithfully handled [her] money to Imani Vicoba, [she] is entitled to claim back her money. Since Imani Vicoba does not have legal personality to sue, [appellant] is a proper person to be sued as the leader and treasurer of the group, and on top of that he was the person [who] withdrew their money fraudulently.*

Following this reasoning, the appellant approached this court for proper interpretation of the law in section 304 of the Code. It is fortunate that this court has already resolved the matter in the precedent of **Blasius Ndambarilo v. Republic** (1973) LRT 55 and interpreted the section in the following text, that:

> *...every cheating situation there is involved a false pretence, for in order to succeed. The trick, device or*

stratagem must be accompanied by false description of it...

This thinking has received support in a bunch of precedents of this court and has remained undisturbed since 1967 (see: **Paulo Mwanjiti v. Republic** (1967) HCD 187) and has been followed in a multiple decisions of this court and the Court (see: **Alli Simba v. Republic** (1968) HCD 240 and **Nathaniel Mputi v. Republic,** Criminal Appeal No. 182 of 1975).

From the writings of Chipeta, B.D, in **A Handbook for Public Prosecutors, Third Edition (2009), Mkuki & Nyota,** at page 138 & 139 of the book, the ingredients of the offence of cheating are exemplified in the following text:

> *In a charge of cheating, the prosecution must prove: first, the accused used a fraudulent trick or device; and second, that as a result of that trick or device, he obtained something capable of being stolen from someone...it is not enough to prove that by a fraudulent trick or device the accused deceived the complainant. It must be further proved that as a result of that trick or device, the complainant parted with something capable of being stolen.*

In the present appeal, the charge levelled against the appellant alleges that the appellant had obtained a total of Tanzanian Shillings Four Hundred Fifty Thousand Shillings (450,000/=Tshs.) from the respondent by cheating contrary to section 304 of the Code on 13th December 2020. However, the materials registered by the respondent (PW1) in the primary court shows that the appellant and Manyama S. Manyama withdrew Tanzanian Nine Hundred Thousand (900,000/Tshs.) on 21st December 2020.

The record shows further that the monies were withdrawn from the group deposit account and not from the respondent. Similarly, there are no record to show that the complained amount of 450,000/= is part of the monies withdrawn on 21st December 2020. The record shows further that it was the respondent, at her own volition, who approached and joined the group, without any fraudulent intent or trick from the appellant.

The discrepancies in the charge sheet and materials registered in one hand and absence of the important of element of fraudulent in the record on the other hand, create doubts in the present appeal. The law requires that: *every cheating situation there must be element of false pretence or false*

description or trick for the prosecution to succeed in its case. In the present case, it is obvious that the appellant did not trick the respondent. Further, the date and amount reflected in the charge sheet, which is claimed to have been fraudulently taken on the cited date is contrary to the materials registered by the respondent. The law requires that the particulars of offence in the charge to have sufficient materials on particularity. If it is not, the resulting conviction runs the risk of being quashed on appeal (see: **Mahindi V. Republic** (1967) HCD 220; **Alli Mohamed v. Republic** (1968) HCD 277; **Msafiri Kulindwa v. Republic** (1984) TLR 276).

In the instant appeal the variance of the particulars in the charge sheet and materials on record prejudiced the appellant hence cannot be said the offence of cheating was established beyond reasonable doubt as per requirement of the law in section 3 (2) (a) of the **Evidence Act** [Cap. 6 R.E. 2019] and precedents in **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic,** Criminal Appeal No. 50 of 2005.

In any case, the testimony of the appellant in mentioning the Treasurer and Chairman of the group, Pendo Mwita and

Mzee Wambura Itende, respectively, is just a mere hearsay evidence, which have less value in our courts. Again, there are no explanations registered in the case to show why the two (2) key witnesses in the case were not summoned. I am quietly aware that no particular number of witnesses is required for proof of any fact in criminal cases as per interpretation of section 143 of the **Evidence Act** [Cap. 6 R.E. 2022] and from the precedents in **Selemani Makumba v. Republic** [2006] TLR 376 and **Yohana Msigwa v. Republic** [1990] TLR 148. What is important is the weight of materials and evidences tendered in court to substantiate the prosecution case. However, in the circumstances of the present case, evidences of Pendo Mwita and Mzee Wambura Itende were material to the case, but the dual were not summoned to testify. This situation increases shadow of doubts in prosecution case.

On the law and principles regulating the burden of proof in criminal cases and statement of the district court in an appeal at page 7 of the judgment on requiring the appellant to prove his defence, the law is very certain and settled in section 3 (2) (a) of the Evidence Act and precedents in **Jonas Nkize v. Republic** [1992] TLR 213 and **Robert Mneney v. Republic** (supra). I am aware the district court at the cited page of the judgment reasoned that:

...in the present appeal, the appellant was required to prove that the document used for withdrawal was not forged and he was authorized by the members of Imani Vicoba Group...

Whereas the directives of this court in **Jonas Nkize v. Republic** (supra) is that:

...the burden of proving the charge against the accused is on the prosecution, so that the trial Magistrate, to say he cannot depend on the prosecution evidence, is to read upside down the authorities, and if it is by design, then it is strange and unjudicial behavior... the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking.

This directive has been received well with the Court in the decision of full court of the Court of Appeal in the cited precedent in **Robert Mneney v. Republic** (supra) where the Court, at page 9, stated that:

It is trite law that the burden of proof in a criminal case is always on [the prosecution] and it never shifts (section 3(2) (a) of the Evidence Act [Cap. 6 R.E. 2002]

I am aware that the primary court in its order at page 5 of its judgment ordered the appellant to pay the respondent the *stolen amount of money* amounting to 450,000/=Tshs without any charge or materials on stealing or forgery as displayed in the record. This complaint will not detain this court, as in the first place the charge itself was not proved beyond doubt by the prosecution as per requirement of the Law of Evidence and cited precedents.

Similarly, there are several other unanswered issues in this appeal, such as: whether absence of mitigations and antecedents invalidates the sentence imposed to the appellant; whether the appellant can sue an individual person in the group; whether it was proper to sue appellant without Manyama S. Manyama; whether the amount of 450,000/= was part of the withdrawn 900,000/=; whether there was forgery in the case and so forth. However, this court cannot schedule its precious time for academic purposes. It has been held that the offence of

cheating in which the appellant was charged with was not proved beyond reasonable doubt.

For the reasons stated hereinabove, and considering the offence of stealing was not established by the prosecution, this court is hereby moved to set aside proceedings and quash judgments and any orders of the trial court, primary court and first appellate court, the district court in favour of the proper interpretation of the law in section 304 of the Code.

It is so ordered.

F. H. Mtulya

Judge

31.08.2022

This Judgment was delivered in chambers under the seal of this court in the presence of the appellant, Mr. Mandera John and in the presence of the respondent, Mahesi Maori.

F. H. Mtulya

Judge

31.08.2022