

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 130 OF 2021

(Arising from CC 202 of 2020 in the District Court of Tarime at Tarime)

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

VERSUS

MTEMI NGIRI DAMO @ MALEGI RESPONDENT

JUDGMENT

2nd & 29th August, 2022

F. H. MAHIMBALI, J.

The respondent in this case was acquitted by the trial court on a charge of obtaining goods by false pretence contrary to section 301 and 302 of the Penal Code, Cap 16 R.E 2019.

It was alleged by the prosecution at the trial court that on 11th day of November, 2019 at Kebwe Village within Tarime District in Mara Region by false pretence and with intent to defraud obtained fifty cows worth TZS 55,000,000/= from John Kemoge Mwita by pretending that he was going to pay cash TZS. 55,000,000 the fact he knew was false.

The respondent denied the allegations levelled against him. In efforts to establish the charge, the prosecution summoned a total of four witnesses. It was the testimony of PW1 that on 11th day of November, 2019 at Kebwe Village within Tarime District in Mara Region, he had given the respondent fifty cows worth TZS 55,000,000/= as purchaser and that he would be paid his money at Sirali. He did so in the presence of Chacha Marwa (PW2) and Mathayo Mniko. That when they arrived at Sirali, the respondent didn't pay him. He kept on escaping him until when he mounted the prosecution of this case in July 2020.

Mr. Chacha Marwa (PW2) testified that he witnessed the respondent selecting 50 herds of cow from the cowshed of the respondent there at Kebwe village at the sale price of TZS: 1,100,000/= per cow and that himself and Mathayo Mniko had entered into terms with the respondent of leading the said cows to Buhemba Silari at a price of 200000/=. On his part, Pw3 (Edward Kambarage), testified how on that day of 11th November, 2019 while at Silari he was called by PW1 that he was selling his cattle to the respondent. He went to the point and saw the PW1, respondent and two men who were leading the said 50 cattle. That while there, he witnessed the respondent promising to

effect payment on 15th November, 2019. After six months, the respondent had not effected the said payment. Pw4 on his part testified that he just investigated the case from June 2020 when he was assigned the case file for investigation. In his interrogation with the respondent and the complainant (PW1), he established that the duo were in business relationship.

The respondent on his part, testified to have known PW1 as his friend and that he needed him for cattle business. That the respondent was given a total of 30,000,000/= on agreement that he would be paying 2, 500,000/= weekly. He effected payment for sometime but later failed to discharge it and in June 2020 was arrested and prosecuted for this charge. In effect, he agrees that he had been in cattle business with PW1 for a long time. But in 2019, says he was just given cash money 30,000,000/= and not cattle worth 50,000,000/= as alleged.

Upon the digest of the evidence of the case, the trial court considered the case as more civil than criminal and thus acquitted the respondent. This aggrieved the Republic thus the basis of this current appeal based on one ground of appeal that, the trial magistrate grossly

erred in law and facts by holding that the evidence adduced by the prosecution constituted more civil claim than a criminal charge.

During the hearing of the appeal, the appellant - Republic was represented by Mr. Frank Nchanila, learned state attorney, whereas the respondent fended for himself.

In arguing the appeal, Mr. Nchanilla learned state attorney submitted that the republic is aggrieved by the decision of the trial court on the finding that the appellant's evidence established civil claim and not Criminal Case. According to the facts of the case, the appellant was involved in the offence of obtaining goods by false pretence contrary to section 301 and 302 of the penal code, Cap 16 R. E. 2019. As per section 301, the statute defines what is "false pretence". With the prosecution's list of witnesses (PW1, PW2, PW3 and PW4) he boasted that much evidence is relied on the testimony of PW1 – PW3 on how the ingredients of the offence of obtaining money by false pretence have been established. PW1 said all on that. The incidence was witnessed by PW2 and PW3. PW2 was hired by the respondent to sort out the said 50 herds of cattle. Considering the definition of false pretence, the respondent squarely tricked the PW1. He assured him that he would

give that money but did not. That is equivalent to false act. With false representation, PW2 played a very important role in establishing the said charge. As the said herds of cow really moved from PW1's cow shed on the pretence of the respondent to Silari, the testimony of PW1, PW2 and PW3, is clear that the charge of obtaining goods by false pretence has been established.

Weighing with the evidence of DW1, Mr. Nchanilla insisted that it is clear that the appellant intended to defraud the PW1. As per testimony of PW1 at page 8 and his response on how he was cross examined by the appellant, what the appellant testified in court was mainly a total reverse. On this he concluded his submission by urging the court that court's proceedings should not be taken to cover the culprits.

On his part, the respondent argued that there is no any solid believable evidence implicating him with the charged offence. He challenged the evidence that he had taken the PW1's herds of cattle/cows and that he had defrauded him. How could he have allowed his 50 cows to be taken without any payment. He contended that PW1 had several attempts of implicating him with numerous Criminal Cases such

as Criminal Case No 144 of 2022 at Tarime urban in which he was acquitted. He wondered how was it possible that while this Criminal Case No 202 of 2020 was decided on 11/6/2021 (at the trial court), yet in December 2021 the same complainant (PW1) claimed to have given him 20,000,000/= for the purchase of the same business (cow). This is very astonishing. There is no any element of truth in it. He considered what the trial magistrate had ruled was proper as per law.

It is trite law that for a criminal charge to mount conviction against an accused person, it must be proved beyond reasonable doubt that there is an offence committed and that none but that accused person committed the said offence. The facts in this case suggest the commission of an offence of obtaining goods by false pretence. However, in a further digest of the evidence of the case it is suggestive that there was more business relationship between the two. However, it is astonishing that all this said by PW1 and PW2 were done without any documentary proof. How could one entrust the other person to take such much cows (50) without there being proof of the said transaction? If what PW3 stated was true that the appellant had failed effect to payment on that transaction by 11th November and promised to settle it by **15th November, 2019** why didn't he put that in record if he failed

to pay it at the taking of the said cattle at the cowshed or at Silari? There is no any due diligence done by the PW1 to safeguard the transaction for it to be worth of value in the eyes of the third party. Worse of the story is the delay of reporting the said offence (false pretence). It took him seven months (from November 2019 to June 2020) to report the said criminal act. Why did it take all that time? It is the settled law that earliest reporting of any criminal act by the victim makes assurance of what is being complained of. In this matter, it is unjustifiable that for the November 2019 incidence to be reported in June 2020 and yet one considers it as false pretence. It is hardly believable in the circumstances of this case.

Furthermore, considering the post conducts of the victim himself before the respondent, it is astonishing if the same victim (PW1) could be further tricked by the same person had the November 2019 incident been true and that the money remained unpaid todate, yet in December 2021 and after the acquittal of the appellant from this charge (June 2021), he enters into another similar agreement with the same conman worth 30,000,000/= (see **Criminal Case No 144 of 2022 at Tarime Urban Primary Court**). If that is bewitching, then the respondent's witchcraft must be of high level and that PW1 is a deadly fool.

That said, the appeal fails. The decision of the first appellate court is hereby confirmed. The PW1 if minded may pursue a claim in a civil suit on evidence to be established.

DATED at MUSOMA this 29th day of August, 2022.




F.H. Mahimbali

Judge

Court: Judgment delivered this 29th day of August, 2022 in the presence of the respondent and Mr. Frank Nchanila, state attorney for the appellant.


F.H. Mahimbali

Judge