

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)
AT DAR ES SALAAM**

PC. CRIMINAL APPEAL NO. 14 OF 2021

(Arising from the decision of the District Court of Bagamoyo at Bagamoyo, in Criminal Appeal No. 36 of 2020, by Hon. Mbafu-RM dated 05th day of February, 2021)

RUKIA ALLY @ MBWANA.....APPELLANT

VERSUS

NASIBU SHABANI.....RESPONDENT

JUDGMENT

09th February & 2nd September, 2022

ITEMBA, J:

The appeal is against judgment of the District Court of Bagamoyo dated 05/02/2021 with respect to the charges of obtaining money by false pretense. The Statement of the Offence showed the offence is contrary to **Section 302 (a) and 305 A of the Penal Code Cap 16 [R.E. 2002]**.

The matter is originating from the decision of the Primary Court of Bagamoyo in Criminal Case No. 344 of 2019 where the appellant namely, Rukia Shabani @ Mbwana was charged of the offence of obtaining the TZS. 1,570,000/= from the respondent by false pretense. A brief background of

this case relevant to the appeal goes as:- the respondent sold part of the land to the appellant for the sum of TZS. 600,000/= the piece of land sold measured 19 by 18 footsteps. It was alleged that the appellant not only ploughed his purchased land but also the plot of the respondent. The respondent asked her (the appellant) why she did so but she claimed to have purchased the whole plot. The respondent reported the matter to the hamlet chairman and as requested, the respondent paid TZS. 1,570,000/= to the appellant so that she could vacate from the said plot. In controversy, the appellant despite receiving such amount, she did neither vacate nor return the money back to the respondent. The respondent reported her and she was then arraigned and charged with the offence of obtaining money by false pretence.

At the trial Court, upon conclusion of hearing, it was deliberated that the case was not proved beyond reasonable doubt since it was a land dispute and then, the appellant was acquitted. Aggrieved, the respondent successfully appealed before the District Court of Bagamoyo, hence, this appeal. The 1st appellate Court had decided that it was not a land dispute and the key ingredients of the offence were proved, thus, the case was proved beyond reasonable doubt against the appellant.

Disgruntled with the decision, the appellant has lodged an appeal which contains five (5) grounds of complaint. However, for reasons to be apparent in due course I shall not reproduce the grounds of complaint.

At the hearing of the Appeal, the appellant was represented by Mr. Peter Madaha, learned advocate whilst the respondent was fending for himself. It was agreed that the appeal to be disposed by way of written submissions, in which the parties had complied to the schedule.

At the time of composing a judgment, I had noticed some fascinating aspects which drives both courtesy and caution of this court as to the legality of the decision of the lower Courts basing on the foundation of the allegations.

I wanted to satisfy myself on **whether the appellant was properly charged**. I thus invited the parties to address me on the matter. Submitting for the appellant Salum Mkilli on his part accentuated that he finds that the evidence does not reflect the particulars of the charge. That it is not shown how the accused intended to defraud. He added that the charge refers to section 305 of the Penal Code but according to the 1st schedule to the Magistrate Court Act, the trial court, which was Mwambao Primary Court did

not have jurisdiction to try offences under the said section. The respondent did not appear.

On my part, having examined the records and considered the submissions made by the parties, I wish to make the enlightenments as follows;

The records show that the appellant was charged with obtaining money by false pretense contrary to section 302 (a) and 305 A of Cap 16. The Chargesheet is written in Kiswahili language, for ease of reference, I reproduce it as hereunder: -

"KOSA NA KIFUNGU CHA SHERIA: KUJIPATIA PESA KWA NJIA YA UDANGANYIFU KINYUME K/F 302 (a) na 305 A CHA K/A SURA 16

MAELEZO YA KOSA:

Wewe RUKIA s/o ALLY @ MBWANA unashtakiwa kuwa mnamo tarehe 03/01/2016 majira ya 09:30 HRS huko maeneo ya Stendi ya Kongowe Kata ya Magomeni wilaya ya Bagamoyo na mkoa wa Pwani kwa maksudi na bila halali ulijipatia pesa Tshs. 1,570,000/= kutoka kwa NASIBU s/o SHABAN kama fidia ya kiwanja alichokuwa amekuuzia, lakini baadae uliamua kukijenga kiwanja hicho Huku ukijua kufanya hivyo ni kosa na kinyume cha sheria za nchi."

I have scrutinized the above extract of the charge sheet and I have noted that; **one**, the provision under which the appellant was charged was

a wrong provision of the law. An offence of false pretense is charged under the provisions of the Penal Code (*supra*), under section 302 which provides as follows;

"Any person who by false pretence, and with intent to defraud, obtaining from any other person anything capable of being stolen is guilty of a misdemeanour (an offence), and is liable to imprisonment for seven years."

The above provision has neither paragraphs nor sub paragraphs unlikely how the appellant was charged. **Two**, the appellant was also charged under the provision of section 305 A of the Penal Code under which the trial Court had no jurisdiction to adjudicate the same. It is a trite law that the Primary courts have jurisdiction to try offences embodied under the Penal Code, but it can only invoke the same to the offences mentioned under the *First Schedule to the Magistrates Courts Act*, [Cap 11 R.E: 2019]. It is very unfortunate that section 305 A of Cap 16 isn't among them. It follows therefore, in adjudication over the matter, the trial Court had acted *ultra vires*.

Three, it is obvious that from the contents of section 302 of the penal Code as far as the charged offence of obtaining money by false pretense is concerned, it is so vital to indicate the element of "**with intent to defraud**" in the charge sheet. Thus, to constitute the offence of obtaining money by

false pretense the phrase "...with intent to defraud..." should feature in the particulars of the offence. Nevertheless, from the above extract of the charge sheet, the particulars of the offence did not inform the appellant that she obtained money from the respondent with intent to defraud. Therefore, it is my respectful view that the charge sheet did not infer all the elements of the offence so charged.

The important role of the charge sheet is to inform the accused person of the important elements of the offence he is facing was discussed by the Court in **Magesa Chacha Nyakibali and Yohana Josia Manumbu vs. R.**, Criminal Appeal No. 307 of 2013 (unreported) where the particulars of offence of armed robbery contrary to section 287A of the Penal Code did not show out the important element of use of threat and to whom that threat was directed at. The Apex Court stated:-

*"...As it is, this was a defective charge because important elements of the offence were not disclosed in order to allow the Appellants the opportunity to meaningfully understand it and to be able to prepare their defences. At this juncture, it is instructive to observe that in **Mussa Mwaikunda v Republic [2006] TLR 387** this Court observed that the principle has always been that an accused person must know the nature of the case facing him and that this can be achieved if the charge discloses the essential elements of an offence. Restating the same principle*

of law in **Isidori Patrice v Republic, Criminal Appeal No. 224 of 2007 (unreported)** this Court stated:-

'...It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused committed the actus reus of the offence with the necessary mens rea. Accordingly, the particulars in order to give the accused a fair trial in enabling him to prepare his defence must allege the essential facts of the offence and any intent specifically required by law.'

As alluded above, in our case at hand, it was not enough for the particulars of the charge sheet to show that the complainants' money was obtained by the appellant. The charge was to disclose all the particulars of the offence in inclusion of the "intent to deprive." My learned Sister, Hon. A.Z. MGEYEKWA J, in **Hussein Ramadhan vs. Michael Ladslaus**, Criminal Appeal No. 12 of 2021, HC at Mwanza (Unreported) when confronted with similar circumstances of this case, she had this to say which I am accord to:-

"...It was worth noting that the particulars of the offence informs the appellant that he obtained the money from the respondent with intent to default, these are the key elements that constitute the offence of obtaining money by false pretense. However, in the instant charge sheet the words "with intent to defraud" were lacking.....this Court finds that the particulars

of offence of obtaining the money by false pretense facing the appellant did not enable the appellant to appreciate the seriousness of the offence facing him thus the same did not eliminate all possible prejudices...”

It is now prudent to state *inter alia* that, the defects discovered under the charge sheet have occasioned injustice to the appellant as she could not appreciate the nature of the offence against her, so that she could properly marshal her defence. It is clear therefore, that the appellant pleaded to a fatally defective charge, hence did not get a fair trial rendering the whole trial a nullity.

In the event, the appeal proceedings before the District Court of Bagamoyo lacked legs upon which to stand as they originated from null proceedings. I therefore nullify the proceedings of the two courts below, quash the conviction and set aside the sentence and orders imposed on the appellant.

The effect of a conviction based on a defective charge was also stated in the case of **Mayala Njigailele v. The Republic**, Criminal Appeal No. 490 pf 2015 (unreported). Where the Court had this to say:

"Normally an order of retrial is granted, in criminal cases, when the basis of the case namely, the charge sheet is proper and is in existence. Since in this case the charge sheet is incurably defective, meaning it is not in existence, the question of retrial does not arise".

See also ***Meshaki s/o Malongo @ Kitachangwa vs Republic (Criminal Appeal 302 of 2016) [2018] TZCA 301 (2018).***

Therefore, as the chargesheet was defective, I will not order a retrial because retrial is normally ordered on assumption that the charge is properly before the court.


On that basis, if the appellant had I order immediate release of the appellant from prison unless he is otherwise lawfully held.

It is so ordered.

Rights of the parties have been explained.

DATED at **DAR ES SALAAM** this 2nd of September 2022.




L.J. ITEMBA,
JUDGE