

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

DC. CRIMINAL APPEAL CASE NO. 33 OF 2021

Originating from Urambo District Court in Criminal Case

No. 271 of 2017)

OMARY ATHUMAN @ MWIHAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date: 27/6/2022 & 02/09/2022

BAHATI SALEMA,J.:

OMARY ATHUMAN @ MWIHA has filed the present appeal against the decision of the Urambo District Court. The appellant was convicted and sentenced to serve two years imprisonment after it found him guilty of obtaining money by false pretence contrary to section 302 of the Penal Code, Cap 16 [R.E 2019].

Aggrieved, the appellant was armed with four grounds of appeal;

1. *That the trial magistrate erred in law by not giving weight to the defence raised by the appellant.*
2. *That the trial magistrate misinterpreted the judgment/decision of the ward tribunal with regard to the plot numbers in conflict because the appellant sold plots 304 and 306 which belong to him.*
3. *That the trial Magistrate erred in law and facts by saying that the appellant lost the case before the Ward Tribunal while in reality, the case reached the District land and Housing Tribunal and the appellant won.*
4. *That, the prosecution failed to prove the case against the appellant beyond reasonable doubt.*

The appellant prays for the appeal to be allowed, conviction to be quashed, sentence and order to be set aside.

The brief facts of the case can be summarized as follows: on the 1st of August 2017, during the daytime at Mabatini village within Urambo village in Tabora region, the accused person by false pretence and with intent to defraud obtained cash from TZS 2,000,000/= one Zawadi Salum after selling her a plot of land located at Mabatini area while knowing that the plot doesn't belong to him.

When the matter was called on for hearing, the appellant appeared in person. On the other hand, the respondent was represented by Mr. Rwegira Deusdedit, learned State Attorney.

Submitting on the first ground of appeal, Mr. Rwegira for the respondent supported the appeal. He submitted that the court evaluated the evidence given by PW1, Zawadi Salum, who entered into the contract which was witnessed by PW3. He stated that there is sufficient evidence that he sold the plot, knowing it was not his and he received two million.

As to the second and third grounds of appeal, he submitted that the ward Tribunal found that the plot was not his. In that conflict, there was no supporting evidence that he won the case, as no appeal has been shown. He never challenged and did not show if he won at the District Land and Housing Tribunal.

On the fourth ground of appeal, he stated that the case was proved since he received money from PW1 while PW3 witnessed. Also, PW2 was the one who introduced him to PW1. He reiterated his submission that the appellant sold the plots which did not belong to him and he received the money hence he had a duty to refund two million shillings to the victim.

Retorting, the appellant submitted that plots No.304 and 306 belonged to him and the sale of plots was witnessed by the village chairman in his agreement and also by GMAX. He prayed his appeal be allowed.

Having heard the submissions of both sides, I should state at the outset that in the course of determining these grounds, I will be guided by the canon of criminal cases that the onus of proof in criminal cases lies with the prosecution to prove that the defendant committed the offence for which he is charged with. In this case at hand, *the issue is whether the prosecution case was proved beyond reasonable doubt.*

I will deal with the first and fourth grounds of appeal, and later on, the second and third grounds will be discussed collectively since they are intertwined.

As to the first and fourth grounds of appeal. The appellant was convicted and sentenced to serve two years imprisonment after the car found him guilty of obtaining money by false pretence contrary to section 302 of the Penal Code, Cap 16 [R.E 2022].

After, having traversed through the court records, I have observed that PW1, Zawadi Salum in her evidence, testified clearly that she entered into the sale agreement of the two plots with the appellant, and the

contract was witnessed by PW2, Shija Joseph and Jackson Mbagi the arm-string leader of Mabatini. They signed the sale agreement. The accused person knew that those plots do not belong to him. The exhibit of the sale agreement was admitted in court. Also, from the record, the appellant agreed that he received the said amount while knowing that those two plots did not belong to him but rather to another person, namely, Nassoro Mwiha.

The law is clear under Section 302 of the Penal Code, Cap.16 [R.E 2022] that:

"Any person who by false pretence and with intent to defraud, obtaining from any person anything capable of being stolen is guilty of a misdemeanor, is guilty of a misdemeanour."

Similarly, false pretence has also been defined under section 301 to mean;

"Any representation by words, writing of conducts o a matter of fact or of intention, which representation is false and the person making it knows to be false or doesn't believe to be true".

Therefore, as noted from the evidence of DW1, he sold and received the money from the PW1, knowing and believing that the said plots

belonged to him and were legally owned by him, the acts which were proved contrary by the prosecution. At the time the appellant sold those plots to the victim, he knew that there had been disputes on the plots with his brother Nassoro Mwiha and the third person, Robert Mtasha. I find no merit on this ground.

The second and third grounds of appeal are that the trial court misinterpreted the decision of the Ward Tribunal in respect of plots nos. 304 and 306 which belong to him.

It is settled that, "*He who alleges a fact has the duty to prove it.*" This was held in the case of **Lamshore Limited and J. S. Kinyanjui v Bazanje K. U. D. K** [1999] TLR 330. Borrowing a leaf from the authority above, I find that the appellant is the one who alleged that the two plots belonged to him; therefore he had a duty to prove his claims with oral evidence and documentary evidence.

Having traversed through the court records, I observed that, according to the evidence, the appellant filed a case in the Ward Tribunal of Urambo against Robert Mtasha on the land in dispute, but the appellant lost the case and never appealed to the District Land and Housing Tribunal.

As noted from the evidence of PW4, the investigator, DC Ramadhani, the exhibits of the decision of the Ward Tribunal of Urambo proved that the plots do not belong to the appellant as there had been a third person, Robert Mtasha who showed up to claim the ownership of those plots. Also, the list of names and number of plot owners were submitted by GMAX Company, by which the alleged plots were read by the names of Nasoro Mwiha and not of the appellant, and the exhibit was admitted and marked as "P2" respectively.

It is my finding that the prosecution's evidence proved beyond reasonable doubt their claims through oral evidence and documentary evidence and considered the evidence of the appellant, which was not watertight.

Therefore, in that balance, I have not seen any evidence suggesting the appellant was the owner of the said plots. I had expected there to be clear and cogent evidence of the recognition as alleged. Though I am aware that the witnesses must be given credit for what they testify in court, the authority must lead to the establishment of the alleged facts in dispute. In deciding all cases, the court must confine itself to the facts which are proved in the case. A court must not take into account any facts relating to the case that it hears out of

court except facts learned in the presence of the parties during a proper hearing.

For the reasons stated herein above, the appeal is without merit, and it is hereby dismissed in its entirety.

Order accordingly.



A. BAHATI SALEMA

JUDGE

02/09/2022



Date: 02/09/2022

Coram: Hon. G.P. Ngaeje, Ag DR

Appellant: Absent

Respondent: Present.

B/C Omari Mkongo, RMA

Court: The case comes for judgment.

Court: Judgment delivered this 02/09/2022 in presence of the Respondent in absence of the appellant in the open court, via virtual court.

G.P. NGAEJE

Ag. DEPUTY REGISTRAR

02/09/2022

Court: Right of appeal fully explained.

G.P. NGAEJE

Ag. DEPUTY REGISTRAR

02/09/2022

