

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA**

CRIMINAL APPEAL NO.79 OF 2022

(Originated from Criminal Case No.56 of 2020 from Sengerema District Court)

MWITA S/O MARWA.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

Sept.29th & Oct. 6th, 2022

Morris, J.

Mwita s/o Marwa, aggrieved by the decision of Sengerema District Court, which convicted and sentenced him, invites this court to allow his appeal on the basis of five grounds paraphrased here. One, that no document to prove transfer of interest in land was tendered. Two, it is the complainant (PW1) who had not discharged the contract between parties. Three, that the trial court was malicious and biased in proceeding with the case *ex parte* without issuing summons to him. Four, the caution statement was wrongly obtained and admitted. Five and last, the prosecution failed to prove the case beyond reasonable doubt.

Briefly, facts of this matter are somewhat straightforward. Between September, 2018 and February, 2020; the appellant and PW1 had

exchanged money (Tshs. 46.3m/-) in a bid of the latter purchasing from the appellant Plot No. 634 Block 'K', Mbezi Beach - Dar es Salaam (elsewhere, 'the property'). Payment of the purchase price thereof was to be in instalments. After the first instalment was paid, PW1 allegedly found out that the property had been transferred to another person's name. Consequently, the appellant was arrested and arraigned in court. His charge was under section 305 (a) of the **Penal Code**, Cap.16 R.E. 2019. However, due to his repeated non-appearance the case proceeded on *ex parte* basis. He was later arrested and procured in court for judgement and sentencing.

In pursuit of this appeal, the appellant was unrepresented. The respondent enjoyed the legal services of Ms. Naila Chamba, learned State Attorney. Submitting in support of the grounds of appeal seriatim, the appellant was very brief. The respondent controverted each of such submissions respectively. I undertake to summarize the submissions herein.

Regarding 1st ground, the appellant submitted that the interest in property is still registered in his name to date. That is, up to the time of trial the title still bore his name. He argued that no transfer would have been effectuated before full payment from PW1. Accordingly, he faults the trial court to had ignored this truth as no document was tendered to

the contrary. The respondent, however, submitted that this is incorrect because it was testified by PW1 that he had made due diligence only to discover that the property had already been transferred to someone else.

Submitting on the 2nd ground, the appellant stated that it is PW1 who failed to pay the purchase price according to contract. Out of Tshs 150/-million the buyer paid Tshs 46,300,000/= only. He submitted further that the payment was done after PW1 had done due diligence and the contract was drafted and attested by his lawyers. However, PW1 tried to fraudulently transfer the property but was unsuccessful because the land authorities liaised with the appellant first. Hence, the appellant argued that transfer would not continue in favour of the PW1. The learned State Attorney, reiterated that as the appellant had transferred the property to another name, PW1 was unable to continue paying.

The 3rd ground was argued on the basis that the District Court heard the case in the appellant's absence as an illegitimate plot from the prosecution. He presented that his absence was occasioned because I was given a wrong hearing date. To the contrary, the respondent fiercely contested such assertion. She submitted that the accused-appellant jumped bail and *ex-parte* order was prayed for and obtained after several adjournments in about four consecutive months. Hence, the State

Attorney submitted that allegations of the appellant about bias is misplaced, has merit and should be dismissed.

The appellant also faulted the caution statement under the 4th ground. He argued that the same was obtained and admitted wrongly because he had objected to be recorded at Sengerema police station for the offence which was allegedly committed at Dar es Salaam. The respondent quickly dismissed this ground because no caution statement was tendered, and admitted or used by the court to arrive at conviction.

Regarding the 5th ground, the appellant insisted that the prosecution never proved the case on the required standard - beyond reasonable doubt. To him, the respondent failed in this connection because she did not even know where the plot is situated and thus based on weak hearsay averments. Finally, he prayed each ground to be merited, appeal be allowed, conviction be quashed and the sentence be set aside.

The respondent resisted this ground. She submitted that the prosecution discharged the onus in respect of the charge herein. It was maintained that all elements of the offence were fully proved. According to Ms. Chamba, such elements are: accused oral or written or conduct misrepresentation; internationally made; being false or the maker knowing or ought to know it was false; aimed is to defraud; and obtaining

from someone something capable of being stolen. She submitted that all such elements were met (referred the court at p.14 of proceedings).

That is, the accused- appellant promised to sell property to PW1 (p.15); intentionally gave PW1 a copy of letter of offer (exhibit P2); he knew the representation were false (p.15); he failed to furnish the court with original copy of the offer; the appellant was intentionally avoiding PW1 (p.34); accused admitted that he had sold the plot to another person (pp.36-37); he absconded during trial hence indicating his *mens rea*; in March, 2021 he reimbursed Tshs 6m/= to PW1; and lastly, the money (Tshs 46.3m/-) is anything capable of being stolen [exhibits P1(bank pay-in slip); P3 & P4 (bank statements)]. The learned State Attorney concluded that the prosecution proved the case beyond reasonable doubt such that both conviction and sentence were justified. She prayed for dismissal of thus appeal.

In view of the above parties' rivalry submissions, I am of the opinion that, this court should determine the appeal by answering one basic question. That is, whether or not the trial District Court justly arrived at conviction of the appellant. In order to be precise and coherent in this approach, I will first deal with the first and 5th grounds of appeal. The reasons for such exclusive selection will be given as I go along discussing the two grounds.

From the outset, the Court agrees with the respondent counsel's submissions regarding elements of the offence. Such elements are according to the section under which the appellant was charged [S.305(a) of Cap.16 R.E. 2019]. The said provision partly reads:

305. 'Any person who-

(a) by any false pretences or any other means of fraud, with intent to defraud, obtains in his account or any other mode of account credits or causes his or any other person's account to be credited or to credit the account of another person... is guilty of an offence and is liable to imprisonment for five years.'

From the foregoing excerpt, for the prosecution to secure conviction thereof, they must endeavor to and actually do prove that the accused misrepresented state of affairs to another orally or in writing or by conduct; such misrepresentation must be internationally done; the misrepresentation must be false and the maker should be able to know or is considered that he ought to know it was false; misrepresentation should be made with the aim of defrauding the other person through obtain credit in his account or someone else's at his instance.

While the prosecution produced evidence to prove each and every element above, this court observes, with due respect, that one of such

items left significant doubt on the prosecution's scheme. Going through the records, it is not disputed that the appellant and PW1 agreed to engage in the transaction of disposition of land. It is not disputed further that the former undertook due diligence prior to starting disbursement of funds to the appellant. Further, payment stopped after the buyer (PW1) allegedly discovered that the appellant had transferred to another person the property subject of sale. This discovery, is in my view the yolk of one of the critical elements of the offence – the *mens-rea*. There are various reasons in this connection. First, before such discovery one could not establish misrepresentation. Second, discovery would reveal the starting of misrepresentation: is it from the beginning or mid-transaction. Third, it will cement the concept of fraud (guilty mind). Thus, if the prosecution tendered the copy of the letter of offer (exhibit P2) to prove that the appellant used it to convince the buyer PW1 of the existence of the property; it was necessary for them to prove that the property no longer existed. Hence, the prosecution may have considered to tender the official search report from the Ministry for Lands to that effect. This report would have established, among other things, the new owner; from whom was the title acquired; when he acquired the title; the nature of disposition (is it sale, gift, transmission by operation of law, etc.) The logic here is not

difficult to lay. The prosecution had a duty to prove that the offence was indeed committed; and more so, by the accused-appellant.

In the important to underscore, at this moment, that fact that PW1 said the appellant-accused admitted to had transferred the property to someone else, the court was justified to base on such utterance to convict him. In law, when the onus of proving a certain fact is cast on one party, it is not legally correct to shift it to the opposite counterpart. Hence, it was improper for the prosecution to rely on the allegations that the appellant-accused admitted to had sold the property to someone else. Two aspects call for this court's attention in this connection.

One, the standard of proof in criminal cases is beyond reasonable doubt. It would have made a great difference if the appellant's side of the facts/proof/evidence corroborated the prosecution's evidence. Two, the cardinal principle in this regard is that the alleging party should not shift the burden to the opposite side. See for instance, **Barelia Karangirangi v Ateria Nyakwambwa**, Civ. Appeal No. 237 of 2007, CAT- Mwanza (unreported); **AG & Others v Eligi Edward Massawe & Others**, Civ. Appeal No. 86 of 2002, CAT (unreported); and **Ikizu Secondary School v Sarawe Village Council**, Civ. Appeal No. 163 of 2016 CAT (unreported). In **Habiba Ahmadi Nangulukuta and 2 Others v.**

Hassaniausi Mchopa and Another, CAT (Mtwara) Civil Appeal No. 10

of 2022(unreported) (*supra*), the Court of Appeal is categorical thus:

'It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, [Cap. 6 R.E. 2019]. It is equally elementary that the standard of proof, in cases of this nature, is on balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/hers and the said burden is not diluted on account of the weakness of the opposite party's case.'

So, the respondent's submissions which tend to drag the appellant into having 'established a criminal case against himself' is a total misapprehension of principles of criminal justice – or justice in its general kernel.

The foregoing discussion and reasoning land us to one solid conclusion. That is, grounds number 1 and number 5 of the appeal are successful. This conclusion notwithstanding, there are still other factors which would also cast doubt on the prosecution side in this regard. I have in mind, for example, anomaly associated with probative value of CRDB Bank Statements (exhibits P3 and P4). This particular evidence was

tendered by G.5052 DC Shadrack (PW2), but no officer from the bank who was conversant with the bank transactions connected to the offence and who could be cross examined on such exhibit for necessary details, if need be, was called as witness. Further, the way a photocopy of the Letter of Offer (exhibit P2) was admitted without first laying the necessary foundation required prior to admissibility of secondary evidence leaves a lot to be desired.

In the upshot, the 1st and 5th grounds of appeal are allowed. As the two suffice to determine this appeal, I will not deal with other grounds of appeal. Consequently, the Sengerema District Court's conviction is hereby quashed and sentence thereof set aside. I order immediate release of the appellant (where applicable) unless otherwise lawfully held.

Right of appeal explained.

It so ordered.

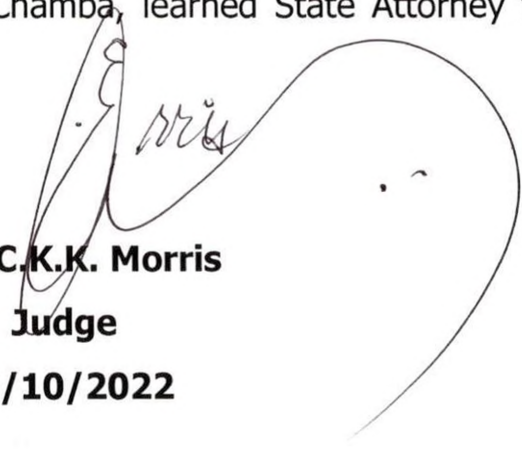


Sgd. C.K.K. Morris

Judge

06/10/2022

Judgement delivered today in the presence of the appellant (online via 0758 469 537) and Ms. Naila Chamba, learned State Attorney for the respondent.


Sgd. C.K.K. Morris
Judge

06/10/2022

