**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM SUB DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**PC. CRIMINAL APPEAL NO. 06 OF 2022**

(Arising from Criminal Appeal No. 27 of 2021 from Ilala District Court at Kinyerezi before Hon Nkwera G. (SRM), Original Criminal Case No. 404 of 2021 at Buguruni Primary Court)

**FADINA RASHID..... APPELLANT**

**VERSUS**

**ZAHIRI HUSSEIN MUSTAFA.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 5th September, 2022.*

*Date of Ruling: 7th October, 2022.*

## E.E. KAKOLAKI J.

Before the primary Court of Buguruni at Ilala, the respondent herein was charged of the offence of Theft; Contrary to sections 258 and 265 of the Penal Code, Chapter 16. It was alleged by the appellant that, on 11th August 2020 at 7:00 pm at Buguruni within Ilala District Dar es Salaam region, the respondent stole Tsh. 3,000,000/= the property of Fadina Rashid (appellant). After full trial the primary court was of the opinion that, the adduced evidence did not prove the offence of theft rather proved the offence of Cheating; Contrary to section 304 of the Penal Code, thus convicted the respondent of that offence and sentenced her to 6 months

conditional discharge. Subsequently ordered the respondent to pay back T.sh. 3,000,000 to the appellant.

Respondent felt aggrieved by that decision. She successful challenged the same at the District Court of Ilala at Kinyerezi vide Criminal Appeal No. 27 of 2021. Substantially, the District Court reversed the trial court decision on the reasons that, the offence of cheating was not proved against respondent. The district court went on to quash the decision of the primary court and its consequential orders. The district court decision did not please the appellant. Undaunted, she came to this court premising her grievances on four (4) grounds of appeal going thus:

1. That the first appellate court erred in law and in fact by concluding that the case was not proved beyond reasonable doubt
2. That the first appellate magistrate has misdirected herself by concluding that there is no any element of the offence of cheating which was established in this matter.
3. That, the first appellate court erred in law and fact by failure to critically analyze the evidence adduced during hearing of the matter at the trial.
4. That, the first appellate magistrate erred in law and in fact by failure to avail herself to the elements of the offence enshrined under section 304(1) of the Penal code, Cap 16 R.E 2019.

At the hearing of the appeal, the appellant appeared unrepresented though she enjoyed the legal aid from TAWLA for documents drafting only, whereas Mr. Daudi Melkiades and Mr. James Minja, both learned counsels represented the respondent. The appeal was disposed of in writing. As alluded to earlier on, the appellant filed four (4) grounds of appeal which upon scrutiny on all of them, the same revolve around on the issue as to whether the first appellate court was right to conclude that, the offence of cheating was not proved beyond reasonable doubt.

It was the appellant submission that, she proved the offence beyond reasonable doubt that is why the trial court was satisfied to decide the matter in her favour. She agrued, the appellant had proven all the allegations and brought before the court all necessary evidences needed. She submitted further that, there was probable reasons to believe that the respondent indeed fraudulently stole the money using the appellant's name and never gave her the money that was to be handed to her. She lamented the appellate court magistrate did not put into proper consideration the evidence adduced by the appellant herein, which pointed out all points of the fraud committed by the respondent herein.

The appellant contended that, the magistrate failed to evaluate all adduced evidence on fraud as all elements were clearly and openly establish as described under section 304 (1) of the Penal. She finally requests the court to uphold the trial court's decision and set aside the impugned decision.

In response Mr. Melkiades started by citing the provisions of section 110 of TEA and the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph** (2006) TLR 420, all stressing on the duty of the one who alleges to prove existence of those allegations. In this case he submitted, appellant had a duty to prove her case beyond reasonable doubt of which duty she failed to discharge. He argued that, the first appellate court magistrate was correct to conclude that, the case was not proved by the appellant beyond reasonable doubts on the offence of cheating, as its ingredients were not proved. He said for the offence of Cheating to exist under section 304 of the Penal Code, there must be fraudulent trick made by a person, the main ingredient which according to him was not proved against the respondent. He referred the court to pages 2 and 3 of the trial court judgment and submitted that, there is nowhere in the said judgment, the appellant testified that there was fraudulent trick on the part of the respondent as alleged, rather her evidence show that there was oral

agreement between the appellant, her sister and the respondent for the latter to organize fund mobilization for the appellant to by a tricycle though its terms were not clearly specified, in which later on the appellant changed her mind and preferred the criminal charges against the respondent.

According to him, after the first appellate court discovered that there was oral agreement between the parties, and not cheating as claimed, it went on to hold that the offence of cheating was not proved. He referred the court to pages 7 and 8 of the first appellate court's judgment to fortify his argument. Mr. Melkiades also cited the case of **Ali Simba Vs. R** (1968) HCD 240 which emphasized on proof of fraudulent trick in offence of cheating to the effect that, the complainant parted with something capable of being stolen. He maintained that, the findings of the first appellate magistrate court was correct to hold that, the case was not proved beyond reasonable doubt.

With regard to the allegations that, the first appellate court misdirected herself on the finding that, the elements of the offence were not proved, Mr. Melkiades contended that, the evidence of appellant in the trial court proved nothing on the offence of cheating against the respondent herein. Regarding the assertion that, the first appellate court did not analyze the evidence

adduced by the appellant at the trial court Mr. Melkiades termed the assertion as baseless one aimed at wasting of time of this Court as the first appellate court at page 6,7 and 8 of the impugned judgment well analyzed the evidence adduced at the trial court visa vis the submission made during the hearing of appeal. He rested his submission by praying the court to dismiss the appeal and uphold the decision of the District Court of Ilala at Kinyerezi.

I have thoroughly scrutinized the submissions by the parties on the ground challenging the decision of the first appellate court. I have also perused the records of appeal availed before me. Notably, the law is very settled on the principles regulating the burden of proof in criminal cases in the primary courts, as provided under the provisions of Rules 1(1) and 5(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations GN. Nos. 22 of 1964 and 66 of 1972. The law provides that, unless the accused person admits the charge, the onus of proving the charge against the him/her beyond reasonable doubt lies on the complainant/prosecution. The corresponding section in the Evidence Act [Cap. 6 R.E 2019] is section 3(2)(a). In deed this is part of our law, and forgetting or ignoring it is unexcusable, thus, it is a peril not worth taking. See also the cases of **Said**

**Hemed Vs. R** [1987] T.L.R 117 and **Robert Mneney Vs. R**, Criminal Appeal No. 341 of 2015.

Reverting to the merit of appeal, it is uncontroverted fact that, at the Primary Court of Buguruni, the respondent was charged of the offence of theft contrary to section 265 of the Penal Code (supra) but convicted with the offence of cheating, contrary to section 304 of the Penal Code the decision which was later on quashed by the first appellate court. Section 304 of the Penal Code 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.*

The wordings of the said section are coached in a very clear, precise and unambiguous terms in that, for the offence of Cheating to exist one has to establish to the hilt that, **One**, there was fraudulent trick applied by the accused, **secondly** that, by applying such fraudulent trick the accused

parted away with something capable of being stolen. In this matter, for the appellant to prove the offence of Cheating had to establish that, respondent fraudulently designed to obtain and indeed executed his fraudulent intention by obtaining the said Tshs. 3,000,000/ or fraudulently induced her to hand over the said amount of money in such a way that if not tricked she would not have handed the same to her.

This position was also well explained by Chipeta, B.D, in his book **A Handbook for Public Prosecutors**, Third Edition (2009), Mkuki & Nyota, at page 138 & 139, the book which was quoted with approval in the case of **Mandera John & Another Vs. Mahesi Maori,** PC Criminal Appeal No. 10 of 2022 (HC-unreported) where the offence of *cheating* was 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.*

Further to that in the case of **Blasius Ndambalilo Vs. R,** (1973) LRT 55, section 304 of the Penal Code was interpreted in the following context:

> *"...in 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 which therefore is a false statement, leading to the offence of obtaining whatever is obtained by false pretenses...*

In the instant appeal, appellant alleges that, the offence was proved beyond reasonable doubts before the trial court that is why respondent was convicted, thus the first appellate court was not justified to hold otherwise, while respondent is of the contrary view that, the offence was not proved to the required standard. To disentangle the parties' heat arguments, I think two questions have to be answered. **One**, whether there was false pretence by the respondent to the appellant and **second**, if yes, whether it is that false pretence, deceit or trick which led the respondent obtained Tsh.3,000,000 from the appellant. To answer these two question I fill obliged to make reference to the appellant's evidence during the trial court as quoted from page 3 of the typed proceedings:

> *Mshtakiwa ni mwandishi wa habari, nilitambulishwa na mama Fatuma mimi nilikuwa na shida ya baiskeli ya kutembelea*

*(baiskeli za walemavu) bahati nzuri mama Fatum alimpigia Simu mshtakiwa… Mama Fatuma alinikutanisha na mshtakiwa… baada ya mahojiano niliwapa namba yangu ya simu pamoja na ya dada Tatu shamu Ally.*

*Wasamaria walitia pesa kupitia simu yangu na dada. Kuna dada mmoja alijitolea kutuma pesa ya kununulia baiskeli Ts. 500, 000/=*

*Mwezi wa nane mwishoni alikuja mshtakiwa nyumbani aliniuliza vipi siku hizi nilimjibu watu walituma pesa ila kwa sasa sababu ya corona watu wamepungua kutuma pesa. Mshtakiwa alikuja na kusema leteni pesa sasa tuhesabu, tulienda chumba kimoja cha saluni tulifanya mahesabu tukiwa wote, mimi, Tatu na mshtakiwa, tulipata pesa jumla ya Tsh.8,400,000/= alianza kuzigawanya mshtakiwa Tsh. 5,000,000/=, Tsh. 3,000,000/= kaweka pembeni, Tsh. 4,000,000/=kasema matumizi ya nyumbani, dada alichukua Tsh. 5,000,000/= kati ya hizo Tsh. 2,000,000 walinunulia kiwanja ikabaki 3,000,000/=.* ***Mshatakiwa alichukua Tsh. 3,000,000 na kuondoka nazo, dada alihoji kwanini unaondoka nazo, alimjibu dada kwamba ni ya vyombo vyao vya kampuni yao kama waandishi wa Habari…***

From the above excerpt, it is apparent to me that, the respondent presented herself to the appellant as the journalist aiming at assisting her to raise fund from the public for the purposes of purchasing tricycle so as to make easy

her movement. There is no contrary evidence adduced by the appellant before the trial court stating otherwise on the presentation of the respondent as the journalist, hence lacking of the element of false pretence of the respondent or use of fraudulent trick. On the second element, there is no evidence to exhibit that, the said Tshs. 3,000,000/ was handed to the respondent by the appellant acting on any false presentation or trick by her to appellant as it appears to me the giving of said money was consented by both the appellant and her sister, hence the complaint that she was conned is an afterthought. I so view as, even the appellant's evidence is at variance with the charge placed before the respondent as drawn by Primary Court of Buguruni. Glancing at the charge sheet, it is alleged the said offence was committed on 11/08/2020 at 01.00 Pm while in her evidence as quoted above the appellant claimed to be at the end of August of the unknown year. It is the law where there is variance and uncertainty of dates between the charge sheet and evidence adduced and the charge is not amended to support the evidence adduced, then the charge remains unproved. See the cases of **Masikiti Vs. R**, Criminal Appeal No. 24 of 2015 and **Justine Mtelule Vs. R,** Criminal Appeal No. 482 of 2016 (CAT-unreported). In the case of **Justine Mtelule** (supra) when considering the effect of variance

between the charge and the evidence adduced, the Court of Appeal had the following to say:

> *"…as also found by the learned first appellate judgement, the variance is in the dates of the incidence of commission of an offence between what is in the charge sheet and the evidence on record by witnesses and not the time when the offence was committed. Thus if the* ***High Court judge would have critically considered this in light of the existing decisions of this Court on the issue, she would not have reached the conclusion she did but found that, the variance in the dates of the incidence between the charge sheet and the evidence on record, makes the anomaly fatal and not curable****." (Emphasis added)*

Guided by the above cited authorities, with the variance of dates noted in this matter in which the offence is alleged to have been committed visa vis the adduced evidence, I am satisfied that the offence of Cheating in which the respondent was convicted with by the trial court was not proved beyond reasonable doubt by the appellant. I therefore have no even slightest hesitation in endorsing Mr. Melkiades' submission that, the first appellate court was justified to hold that, the offence of Cheating was not proved beyond reasonable doubt.

In the event, I find no need to interfere with the findings of the first appellate court, as the entire appeal is devoid of merit and the same is hereby dismissed.

It is so ordered

Dated at Dar es salaam this 07th day of October, 2022.

E. E. KAKOLAKI

**JUDGE**

07/10/2022.

The Judgment has been delivered at Dar es Salaam today 07th day of October, 2022 in the presence of the appellant in person, Mr. Daudi Malkiades, advocate for the respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

**JUDGE**

07/10/2022.