

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF MUSOMA**  
**AT MUSOMA**  
**(PC) CRIMINAL APPEAL NO. 20 OF 2022**

*(From the decision of the District Court of Tarime at Tarime in Criminal  
Appeal No. 08 of 2022. Original Primary Court Criminal Case No. 1134 of 2021)*

**MARY CHARLES THOMAS .....APPELLANT**

**VERSUS**

**JOSEPH KASAWA BENSON ..... RESPONDENT**

**JUDGEMENT**

*2<sup>nd</sup> & 18<sup>th</sup> November, 2022*

**M. L. KOMBA, J.:**

This is the second appeal. Appellant successfully sued the respondent in the Tarime Urban Primary Court in criminal case No. 1134 of 2021 (the trial court). The respondent was found guilty and convicted of the offence of obtaining goods by false pretence contrary to section 302 of Penal Code. He was sentenced to 1-year conditional discharge and ordered to compensate the appellant to the tune of Tshs. 7,000,000/= In appeal to Tarime District Court (Criminal Appeal No.08 of 2022) the appellant herein lost on the ground that the nature of the intended business is civil in nature and she can recover her money on civil case. Dissatisfied by that justification and decision of the District Court she preferred this appeal.

Briefly, the facts relevant to this appeal can be summarized that, the appellant and the respondent met in sometimes at Bugando Hospital in Mwanza region, where in exchange of ideas the respondent informed the appellant that he is a pharmacist working in Bugando and introduced to the appellant business opportunity of selling human medicine in retail. He promised to assist her by supplying human medicine in whole sale and she, the appellant can sale in retail. Relying on respondent experience and promises, appellant gave respondent Tsh.7,000,000/ as capital to buy human medicine in Zanzibar so that the appellant can sale in retail in her locality. The promise which was not fulfilled by the respondent and appellant took the matter to court. After she lost in the 1<sup>st</sup> appellate court, the appellant filed four grounds of appeal in this court as follows;

- 1. That the appellate court erred in law and facts for failure to consider that the respondent pretended to the appellant as pharmacist of Bugando Hospital and the whole seller of medicine, the fact which influenced the appellant to enter into business partnership with the respondent of selling medicine.*
- 2. That, the appellate court erred in law and facts for upholding that the appellant to file civil case against the respondent while the facts constitute the criminal case.*

3. *That, the appellate court erred in law and facts for failure to consider the evidence of the appellant and her witnesses (sic) that she gave respondent Tshs. seven million.*
4. *That, the appellate court erred in law and facts for failure to consider that the appellant had proof her case beyond reasonable doubts.*

When the appeal was called on for hearing both parties appeared in person, unrepresented. Appellant in her submission informed this court that the trial court erred by not recognize that the respondent pretended to be a pharmacist at Bugando hospital and he is a businessman doing a whole sale business of human medicine. She submitted that she relied in that assertion to believe in him and inter into business partnership where they agreed that the respondent will be going to Zanzibar to collect some medicine imported from India and he will supply some medicine to the appellant, and in return the appellant will be supplying to big pharmacies in Tarime but he didn't.

On the 2<sup>nd</sup> ground Ms. Thomas submitted that the respondent explanation is clear on his pretense to be a pharmacist while not. She vehemently submitted that the respondent pretended so in order to receive some money and his pretense constitute crime. While arguing in the 3<sup>rd</sup> ground the appellant complained that the first appellate court did not consider her testimonies and of her witnesses who testified the day appellant paid Tsh. 5,000,000/= to the respondent at Bugando referral hospital when he claimed

to be employed as a pharmacist at Bugando referral hospital. She argued further that she managed to prove her case beyond reasonable doubt and prayed this court to allow her appeal, to set aside decision of the 1<sup>st</sup> appellate court and to grant any other reliefs which deem fit in this appeal.

In protesting the appeal, Respondent informed the court that it was February last year (2021) the where appellant rendered him Tsh. 2,000,000/= which was received in three installments through CRDB bank account and M-pesa. He presented further that it was their (appellant and Respondent) habit of rendering money each other and that even the respondent had once rendered money to the appellant. He revealed that this time he delayed to repay the money to appellant and the appellant charged him interest which he did not accept.

The respondent submitted further that the problem between him and the appellant is the amount of money which the appellant lending to the respondent. According to the respondent, he borrowed Tsh. 2,000,000/ only and he alleged that the appellant failed to prove extra Tsh 5 million. It was his submission that the amount which the appellant is claiming is interest and not principle. He finally prayed this court to uphold trial court decision.

In rejoining, the appellate submitted that the other amount which is Tsh. 5,000,000/= was given to the respondent in cash while they (appellant and respondent) were at Bugando Hospital where the respondent pretended to be a pharmacist. She further insisted in her submission that cash money was given in the presence of her witnesses. She reminded her prayer to this court that the appeal be allowed.

The issue for determination before this court is whether the appeal is meritorious.

This being a second appeal, this court in a very exception circumstances to interfere the finding of the lower courts when it is clearly shown that there was misapprehension of the evidence, miscarriage of justice or violation of some principles of law or procedure by the courts below **(see, Joseph Safari Massay vs Republic**, Criminal Appeal No. 125 of 2012, **and Felix s/o Kichele & Another vs Republic**, Criminal Appeal No 159 of 2005 and **Julius Josephat vs Republic**, Criminal Appeal No, 03 of 2007 **(all unreported)**).

It is from record that appellant send money to respondent via M-pesa and CRDB account No. 0152263246700 bearing the name of Joseph Kasawa the

amount transacted in total was Tsh. 2,000,000/ and this amount together with the mode used to transact are not disputed.

It is from the same record that the appellant claim to give the respondent Tsh. 5,000,000/ in cash while they were at Bugando Hospital. Respondent in his submission denied to receive the said amount claiming to be interest from the Tsh. 2,000,000/ which he was lent by the appellant. It was the evidence of SM3 that when they (appellant and respondent and herself) were at Bugando Hospital, within the hospital, CRDB area she saw the appellant counted and give the respondent Tsh. 5,000,000/. Even during cross examination this witness explain the whole process from counting money and handing over to the respondent. SM3 is an eye witness. The testimony of SM3 is credible as provided under s. 62 of the Evidence Act, Cap 6 and is enough to convict the respondent as it was in the case of **Simon Shauri Awaki @ Dawi vs R**. Criminal Appeal No. 62 of 2020. CAT at Arusha at page 26 where the court observed that;

*'Oral evidence can prove the case in the absence of documentary evidence provided that said oral evidence is credible and sufficient to prove the case concerted'.*

The Evidence Act provides that;



*62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say- (a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;*

This court is satisfied that the amount which the appellant gave the respondent is Tsh. 7,000,000/in total and therefore ground number 3 is worth to be maintained.

The second issue to be entertained is whether the action between the appellant and the respondent constitute a criminal offence. It was the submission of the appellant that the respondent introduced himself as a pharmacist in Bugando and a whole seller of human medicine. That assertion influenced the appellant to partner with the respondent in doing business, whole sale of human medicine.

Appellant wanted to confirm the status of the respondent and the respondent's wife confirmed her husband is a pharmacist working in Bugando. Relying in that information of respondent and his wife, the respondent was given Tsh. 5,000,000/ so that he supply the appellant with human medicine for her to sale in retail. That being not enough, from the record, the respondent called the appellant and induced her to add capital so that she can have many items in the first consignment. It is from his

influence over the phone call where the appellant sent for Tsh. 2,000,000/ more to the respondent paid in three instalments.

When the business failed as planned, the appellant requested SM2 to look for the respondent from pharmacy department within Bugando hospital believing he is working in that department. It was revealed that the respondent was not known in Bugando hospital and Pharmacy department as was testified by SM2.

For the purpose of analyzing this matter, let me reproduce the position of the law. Section 304 of Penal Code, Cap 16 provides;

*S. 302. Any person who by any **false pretence** and with intent to defraud, **obtains from any other person** anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen, is guilty of an offence and is liable to imprisonment for seven years.*

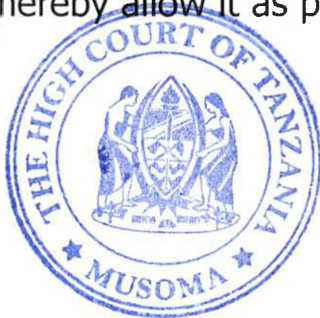
Underscore words from the excerpt is "*false pretence*" "*obtains from other person*". In the appeal at hand, the respondent posed to the appellant that he was a pharmacist at Bugando referral Hospital and induced the appellant to be business partners (of selling human medicine) as he has experience. The appellant believed that the respondent is a pharmacist working in Bugando and decide to partner with the respondent in business by giving him money expecting to receive human medicine. Failure to deliver human



medicine and the fact that he is not a pharmacist qualifies the respondent to criminal offence as quoted above and therefore ground number 1 and 2 are meritorious.

The appellant paraded 2 witnesses, apart from herself, SM3 testified that they witnessed the respondent receiving Tsh. 5,000,000/ from the appellant and that the appellant was making a follow up of her money in vain and the fact that the respondent is not working in Bugando, prove the offence under section 304 of Cap 16 and therefore the 4th ground is proved in affirmation.

From the circumstance of this case, I find the appellant appeal is meritorious and I hereby allow it as prayed.



  
**M. L. KOMBA**

**Judge**

**18<sup>th</sup> November, 2022**

Judgement Delivered on 18<sup>th</sup> November, 2022 in chamber in the presence of both parties who appeared in person.

  
**M. L. KOMBA**

**Judge**

**18<sup>th</sup> November, 2022**