

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CRIMINAL APPEAL NO. 1 OF 2022**

*(Originating from the decision of Kimara Primary Court in Criminal Case No. 1737 of 2021 and  
arising from the decision of District Court of Kinondoni in Criminal Appeal No. 22 of 2021)*

**ZAWADI SEMBE ..... APPELLANT**

**VERSUS**

**JOSEPH MLAWA ..... RESPONDENT**

**J U D G M E N T**

*28<sup>th</sup> October & 4<sup>th</sup> November, 2022*

**MWANGA, J.**

This is a second appeal. The appellant was charged and convicted by the Primary Court of Kimara, at Kinondoni of obtaining money by false Pretence contrary to Section 304 of the Penal Code, Cap. 16 R.E 2019. The court inflicted a sentence of six months imprisonment or payment of fines to the tune of Tshs. 60,000/and ordered repayment of Tshs. 1,260,000/ to the respondent.

The appellant appealed to the District Court of Kinondoni and the court confirmed decision of the trial court, hence this second appeal with five grounds.

1. That the trial and 1<sup>st</sup> appellate court erred both in law and fact by admitting and entertaining the matter as a criminal case while the same was arising from a contractual money rendering agreement mutually agreed between the respondent and one Alex Ngindo.
2. The trial and 1<sup>st</sup> appellate court erred both in law and fact having found guilty the appellant while the respondent failed to prove his case beyond reasonable doubts.
3. The trial and 1<sup>st</sup> appellate court erred both in law and fact having failed to analyse the evidence and exhibits provided, henceforth convicted the appellant of obtaining money by false pretences while the tendered exhibit say, "Exhibits A" demonstrates on a complaint and a commitment and agreement therein between the respondent and one Alex Ngindo and not the appellant.
4. The appellate court erred in law by maintaining that a judgment by the trial court contain reasons therein without pointing out such reasons contrary to the requirement of the laws.
5. That the 1<sup>st</sup> appellate Court failed to analyse the guiding grounds of the appeal lodged by the appellant, hence

misdirected itself by discussing issues which were not pertinent to the Appeal.

The facts giving rise to this appeal are that during the year 2018, the appellant did obtain Tshs. 1,260,000/= from the respondent on promise to purchasing for him a piece of land. The appellant failed to procure the said piece of land.

Upon persistent failure to meet his obligation, the respondent complained the same to the local government authorities' offices at Upendo with a view to resolve the matter amicably. The appellant's husband one Alex Ngindo admitted the claims by the respondent and promised that the appellant who is his wife shall repay the respondent.

The respondent in Exhibit 'A' raised a complaint before the local government authority's offices that;

***'Alex Ngindo ninamdai 1,650,000/=. Aliahaidi kunipa kiwanja lakini sasa amegoma kunipa kiwanja wala fedha zangu'.***

The above recorded version can be unofficially translated that Alex Ngindo indebted by the respondent some of Tshs. 1,650,000/= and that he refused to deliver a piece of land that she had promised him for the money given.

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On the other hand, the local government authorities mediated the matter and it was decided that;

***'Wameitwa ofisini, Alex amesema kuwa mke wake ndiye anayedaiwa kwa kuwa ndiye aliyekuwa anapokea kidogokidogo. Mke naye amekiri kuwa pesa alizonazo ni 1,260,000/= watamlipa kidogokidogo . Atalipa kwa awamu 4 kuanzia mwezi wa 10'.***

The above unofficial translation is that one Alex Ngindo (husband of the appellant) made commitment on behalf of the appellant (his wife) to repay the respondent on four instalments from October. He clarified his stance that, it was the appellant who obtained money from the respondent to the tune of 1,260,000/=. The document was signed by respondent and one Alex Ngindo.

The commitment to repay was not honoured by neither the appellant nor Alex Ngindo, hence charge of obtaining money by false pretence was preferred against the appellant.

In her written submission, the appellant abandoned fourth ground of appeal. He then proceeded to submit on the 1<sup>st</sup> , 2<sup>nd</sup> ,3<sup>rd</sup> and 5<sup>th</sup> grounds of appeal.

With reference to the 1<sup>st</sup> ground of appeal, the appellant argued that courts below were wrong to entertain the matter as a criminal case. She submitted that, the matter arose from a contractual money lending agreement mutually agreed between the respondent and one Alex Ngindo, therefore the case is purely based on breach of contract between the Respondent and Alex Ngindo. She musingly stated further that, the case ought to be treated as a civil matter and not a criminal one. According to the appellant, the respondent's claim was founded on agreement by her husband at the local government authority offices at Upendo to refund Tshs.1,650,000/= to the respondent and not her.

Referring to the 2<sup>nd</sup> ground of appeal, it was her argument that the respondent failed to prove his case beyond reasonable doubts. She aligned her submission with cardinal principle of the law that he who alleges must prove. On analysing the material facts and documentary evidence presented before the trial court, she stated that the same do not reveal any involvement of the appellant with the offence she was prosecuted for. She cited Section 112 of the Evidence Act, Cap. 6 to the effect that;

***'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.'***

While rationalizing on the above provision of the law plus the testimonies and documentary evidence presented by the respondent, she reiterated that it is evidentially that the respondent had failed to implicate the appellant with the crime she was prosecuted for, as when he went to local government office, he made it clear through documentation that he was complaining against one Alex Ngindo and not the appellant.

On the 3<sup>rd</sup> ground of appeal, the appellant stated that the lower courts convicted the appellant on obtaining money by false pretences on the basis of failure to analyse evidence. She again referred **"Exhibit A"** that it demonstrated a complaint and commitment and an agreement therein between the respondent and one Alex Ngindo and not the appellant. On pouncing verdict of the lower courts, the appellant submitted that exhibit so referred do not show that, the appellant had entered into any kind of contract with the respondent; it is the respondent himself without undue influence complained to the local government authorities that he had handed over the purchase

price to one Alex Ngindo. She asserted further that, the criminal charges against her are unfounded and that she might have been victimised because of her gender because women are treated as weak people to carry out the wrong doing of their male partners, a sin which can never be tolerated in a civilized country like ours.

She revamped up her fifth ground of appeal to the effect that, the 1<sup>st</sup> appellate court misdirected itself by discussing issues which were not pertinent to the appeal. She supported her argument that, grounds of appeal that were filed in the District Court of Kinondoni were very specific and obvious and it needed the 1<sup>st</sup> appellate court to dig into and come out with fair and just decision which would originate from the grounds of appeal presented before it; but on the contrary, the 1<sup>st</sup> appellate court created its own inference and decided the appeal by way of opinion. She emphasized that, when one go back to the court records, there was a sort of agreement between the Respondent and one Alex Ngindo of which the agreement pointed at Alex Ngindo to repay the respondent the due sum of Tshs 1,260,000 on instalments but Alex Ngindo did not comply with the said repayment schedule.

To this end, she concluded her submission the it was unsound to prosecute appellant for commitment made by her husband, therefore



this honourable court to should allow the appeal and award costs to the appellant.

In difference to the arguments of the appellant, the respondent submitted that, all prerequisites' conditions for the offence of obtaining money by false pretence were met, hence the charge was proved beyond reasonable doubts.

On the question whether the matter was contractual or not, he argued that the appellant used an ideal of an agreement as a veil to obtain money by false pretence.

When the matter was being determined by the first appellate court, the Resident Magistrate held that;

***'The trial court magistrate was correct to entertain the matter as a criminal case and not civil. Generally, what determines the offence, is the ingredients of offence, how it was committed and its effect... the appellant took the money from the respondent by fraudulent tricks, pretending to own a plot of land while knowing that she has no such plot to sell'.***

I have careful gone at length through submission by the parties, and proceedings available and came up with the issue whether the case against the appellant was a criminal case or civil case. If the

answer is in the affirmative, other grounds of appeal shall be held to rest.

Before going to the details, a civil case is a suit brought by a private citizen to protect a private or civil right or to seek a civil remedy as opposed to criminal action. It deals with private arrangements between parties as opposed to criminal ones which concerned with crimes and the punishment of individuals who commit crimes. In **Rashid Mohammed Selungwi V. R**, Criminal Appeal No. 5 of 2021 HC Mtwara, which is persuasive to me, the Judge observed that, the matter was a criminal case in the sense that once the ingredients of the offence are established it becomes a criminal case and if not, it may be a civil case.

Now, coming to section 304 of the Penal Code, Cap 16 R. E 2019, a person commits an offence of obtaining money by false pretence if there is proof of; misrepresentation or any inducement, lies, deception, tricks, false promises and at least in part, caused a person to give up his money or property.

According to section 301 of the Penal Code, false pretence means any representation made by words, writing or conduct of a matter of fact or of intention, and the person making it knows to be false or

does not believe to be true. In ***Jones [1898] 1QB119*** it was stated that to constitute deceptions, there must be some deceptions spoken, written or acted to constitute a false pretence. In ***Re London and Globe Finance Corp Ltd [1903] 1Ch 728 at 723, [1900-3] ALLER***, it was held that to deceive is, to apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the deception knows or believes to be false.

The issue now is whether there was any act done by the appellant in the nature of a false pretences. The appellant submitted that the claims by the respondent was civil in nature and not criminal one. Exhibit '**A**' had been the focus of the contention by the appellant that she was not part of the agreement between her and the respondent; but rather an agreement between respondent and her husband one Alex Ngindo.

By looking at the typed proceedings of the trial court at page 8 and Exhibit 'A,' there were two set of arrangements involving the respondent. **One**, exhibit 'A' connotes the arrangement between the respondent and one Alex Ngindo, the husband of the appellant. In this arrangement, as signed by the parties, the respondent lodged claim at the local government authority's offices at Upendo that one Alex Ngindo, husband of the appellant owes him Tshs. 1,650,000/= but,

both parties reached consensus that the appellant and her husband shall repay Tshs. 1,260,000/= to the respondent. However, Alex Ngindo shifted the burden of repay the money to the appellant on the basis that she was the one who obtained money from the respondent. At page 5 of the typed proceedings the respondent stated that while at the local government authorities the appellant agreed to have obtained from the respondent.

**Two**, presence of the arrangement between the respondent and appellant herself. On this arrangement, the appellant admitted that she owes the respondent Tshs. 1,260,000/= only that she failed to repay the money due to pandemic COVID-19 and further that, the respondent named her a thief. shown in page 8 of the typed proceedings of the trial court that at one time she was summoned to the local government offices and acknowledged to have obtained amount of money to the tune of Tshs. 1,260,000/= to be refunded to the respondent.

As I have pointed out earlier, the proof of charge of obtaining money by false pretence requires misrepresentation or any inducement, lies, deception, tricks, false promises and at least in part, caused a person to give up his money or property. The 1<sup>st</sup> appellate court ruled that; the appellant took money from the respondent by

fraudulent tricks, pretending to own a plot of land while knowing that she has no such plot to sell. In fact, nowhere in the evidence presented showing that the appellant pretended that she owns a plot of land. It was the respondent contention that the appellant told him to give her money in order to buy a piece of land for the respondent. There was no connotation that the appellant would sell land to the respondent. This presupposes that, the land could be either be bought from any other person than the appellant herself. This negates existence of an important element of use of fraudulent tricks.

Again, by looking at Exhibit 'A', the respondent claimed Tshs. 1,650,000/= from one Alex Ngindo and at the same time, he agreed to be repaid Tshs. 1. 260,000/=. Again, at page 5 he presented that the appellant induced him and obtained Tshs. 1, 600,000/=. It is not known as to why such amount claimed kept on deferring from one point to another. This is sick evidence which do not meet the standard set by law in proving criminal cases, which is beyond reasonable doubts. It was really confusing as to who owes the appellant; was it the appellant her husband one Alex Ngindo.

For the foregoing and under circumstances pertaining to the claims by the respondent, it is not possible to establish that the appellant acted dishonestly and deceived the respondent. I take their

transactions as a private arrangement between the appellant, her husband and the respondent, so to say.

I hasten to say further that, deliberate conduct or recklessness of the appellant remaining defiant to repay the money to date or deliver the promised piece of land is not sufficient to constitute ill motive or intention to defraud. As long as the appellant agrees to have obtained money from the respondent and even set repayment schedule, the offence of obtaining money by false pretence was not proved due to lack of necessary and requisite elements of the offence.

Since this court hold the 1<sup>st</sup> ground of appeal in the affirmative, and it hold that there was no crime committed, I find it irrelevant to consume the precious time available to dispose of the other grounds of appeal as they hold no more values.

Therefore, the Appeal is allowed. Judgement and proceedings of the lower courts are hereby quashed and set aside. The appellant be redressed with the paid fines of Tshs. 60,000/=.

It is so ordered.



  
**H.R MWANGA**  
**JUDGE**  
**04/11/2022**