IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

CRIMINAL APPEAL NO 166 OF 2021

(Arising from Criminal Case No. 146 of 2020, the District Court of Ilemela at Mwanza)

ARSEN SAMSON .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 17.02.2022
Date of Judgement: 23.02.2022

M. MNYUKWA, J.

In the District Court of Ilemela, the appellant, Arsen Samson was charged with the offence of obtaining goods by false pretence contrary to sections 302 of the Penal Code, [Cap. 16 R. E. 2019). The appellant was convicted and sentenced to three years imprisonment term. He was also ordered to compensate the victim of the crime, Pili d/o Mtera Chacha (PW1) Tsh 20,000,000 which is the value of cassava flour commonly known as *udaga* obtained by him falsely from her.

The appellant was aggrieved by the conviction and sentence. He appealed to this Court.

The background facts of the case can be briefly stated as follows;

On the 5th day of March 2019, PW1, Pili d/o Mtera Chacha made delivery of 33 tons of cassava commonly known as *udaga* worth Tsh 20,000,000/= to the appellant. When the appellant was asked to make payment, he replied that it was impossible to do the transaction on that day because it was late as it was in the evening. The appellant promised to deposit the money into the PW1's bank account the following day.

On the following day, PW1 made follow up to the appellant who informed her that his son had passed away and therefore he was supposed to sort out funeral issues. Despite several follow up done by PW1 through telephone conversations, the appellant made several excuses and did not honour his promise and it reached a point, he was not picking up calls from PW1.

Sometimes in October 2019, PW1 went to India for medical treatment and came back in December 2019. During the whole period, PW1 was looking the appellant but ended up in vain. Nevertheless, sometimes in March 2020 the appellant made a call to PW1 and told her that he had seen that she had recovered from sickness. PW1 tricked the

appellant that she had recovered after getting treatment from the traditional healer. When the appellant asked to be availed with the traditional helder's mobile number, PW1 promised to avail to him when they met physically.

The appellant made a promise to meet PW1 on 05/03/2020 and fortunately on that date the appellant showed up. When PW1 took her mobile phone to call the authority, the appellant started to run away of which the militiaman and some students ran after him and he was arrested and sent to the ward executive officer of Buswelu where PW1 had reported the incident before.

When he was in the ward executive officer, the appellant admitted by writing a commitment letter that he had taken cassava flour commonly known as *udaga* and promised to process the loan and made payment to PW1. The appellant was later on sent to the police station, he was kept into custody and his statement was taken.

On 23/11/2020 the appellant was before the trial court for the offence of obtaining goods by false pretence. He pleaded not guilty to the charge. During trial, the prosecution side brought five witnesses to prove its case. They have also tendered the commitment letter of the appellant

which was admitted as exhibit P1 and the witness statement that was also admitted.

On the other hand, the appellant fended himself without any exhibit. After a full trial, the appellant was found guilty as charged and sentenced to three years imprisonment and ordered to compensate the victim Tsh 20,000,000/=. Being aggrieved, the appellant lodged this appeal with four grounds of appeal as follows:

1. *That, the Hon. Trial Magistrate not being a senior Resident Magistrate had no jurisdiction to impose a sentence of 3 years imprisonment*
2. *That the Hon. trial Magistrate erred in both law and fact in convicting and sentencing the appellant of the offence not proved to the standard required by the law*
3. *That, the Hon. trial Magistrate erred in both law and fact for failing to critically and correctly evaluate the evidence on record and thus reaching into a wrong finding.*
4. *That, the Hon. trial Magistrate erred in both law and fact in convicting and sentencing the appellant against the weight of the evidence on record.*

During the hearing, the appellant Mr. Arsen s/o Samson, was represented by the learned counsel Mr. Elias Hezron while Ms. Magreth Mwaseba, learned State Attorney appeared for the Republic, the respondent.

The appellant was the first to kick the ball rolling. He prayed to argue the appeal in two sets. He preferred arguing separate the first ground and then argued jointly the second, third and fourth ground.

Submitting on the jointly grounds of appeal, the appellant averred that the offence which the accused was charged with was not proved in the required standard. He went on by submitting that the trial court's proceedings show that the appellant and the complainants agreed to do a business of cassava flour commonly known as *udaga*. That the two agreed to transact business by loan and that the appellant was ready to pay the amount loaned but he failed to pay the same since after delivery of *udaga* to the buyer he was not paid.

The counsel for the appellant went on to state that, the evidence of the appellant in the trial court shows that, after the failure of the appellant to pay the loan, they have agreed with PW1 that he should make payment by instalment. He added that since the appellant had the intention of paying the debts by instalment, it can not be said he had an intent to defraud.

He further stated that, going through the record, it is quite clear that the appellant at different occasions was attending his sick relative who later on died and that fact was admitted by the complainant. He

insisted that the evidence suggests that the appellant had no intent to defraud as per section 302 of the Penal Code, Cap 16 R.E 2019. Therefore, the trial magistrate failed to take into consideration and analyze the evidence adduced by the parties before him.

On the first ground, the counsel for the appellant submitted that the law requires a magistrate who is not of a rank of a senior resident magistrate and above to impose a sentence that exceeds twelve months as it is provided for under section 170(2)(a)(ii) of the Criminal Procedure Act, Cap 20. RE. 2019. He averred that, the record is clear that the trial magistrate who heard and determined the case was not of the rank of senior resident magistrate and therefore he imposed the sentence beyond his power and consequently the sentence was not valid.

He retires and prays the appeal to be allowed and the appellant be set free.

Responding on the jointly grounds of appeal, Ms. Magreth Mwaseba submitted that, the Republic supports the conviction and not the sentence passed by the trial court. She averred that the prosecution side proved the offence charged beyond a reasonable doubt based on the evidence tendered before the court by the prosecution witnesses and that of DW1 who admitted to have obtained property by false pretence.

She went on to state that, the evidence of PW1 as reflected on page 13 of the trial court's proceedings, shows that the appellant promised to pay the money by depositing into PW1's bank account, but he did not do so despite PW1's efforts to call him and yet he was not giving any cooperation.

The learned state attorney submitted that the evidence was properly evaluated and the trial court was satisfied that there was an intention to defraud on the part of the appellant. She added that, for the offence under section 302 of the Penal Code, Cap 16 RE: 2019 to be proved, there should be a property that has been taken and it should be taken with the intent to defraud and all these have been proved through the evidence of the parties including the appellant. She, therefore, prayed the court to uphold the decision of the trial court on the conviction of the appellant.

On the first ground of appeal, Ms. Mwaseba admitted that the honourable magistrate who determined the matter lacked jurisdiction to impose a sentence of three years' imprisonment. She went on that, as per section 170(2)(a)(ii) of the Criminal Procedure Act, Cap 20 RE: 2019, the trial magistrate who decided the matter lacked jurisdiction to impose a sentence of three years' imprisonment. She, therefore, prays the Court to

impose the appropriate sentence as per section 388(1) of the Criminal Procedure Act, Cap 20 R.E 2019.

In rejoinder, the appellant reiterated what he had submitted in chief and insisted that page 44 of the trial court's proceedings revealed that the appellant informed PW1 about the collapse of his business which resulted to his failure to pay the debts. That evidence was not cross-examined by the appellant which shows that the said fact was accepted by PW1. He added that failure to cross-examine the important material fact means the acceptance of the truth on that fact. For that reason, it was not established if the appellant had the intention to defraud hence the offence was not proved in the required standard.

On the issue of sentence, the counsel for the appellant submitted that section 388 (1) of the Criminal Procedure Act, Cap 20 [R. E 2019] can not be used to cure the error committed by the trial magistrate who imposed the sentence while lacking jurisdiction to impose three years imprisonment. He retires his submission insisting that, this Court does not have power to substitute illegal sentence by imposing the appropriate and legal sentence. He therefore, prays the appeal to be allowed.

In the light of what has been submitted by both parties, and having carefully gone through the available records, I noted that the appellant's

grounds of appeal centred on two issues; whether the prosecution side proved the case on the required standard and whether this Court has power to impose appropriate sentence if the sentence imposed by the trial court was not legal.

For the purpose of convenience, I wish to start by disposing the jointly second, third and fourth grounds of appeal which form one ground of appeal. Later on, I will dispose the first ground of appeal.

It is a settled principle of law that in criminal cases, the standard of proof is beyond a reasonable doubt. See the case of **Said Hemed v Republic** [1987] TLR 117.

Thus, it is the duty of the prosecution side to prove the offence in which the accused is charged and convicted with to the required standard of proof in the criminal cases. In our present case, the offence which the appellant was charged and convicted with as per the charge sheet is provided for under section 302 of the Penal Code, Cap 16 R.E 2019. The section reads as hereunder:

> *S. 302" Any person who by any false pretence and with intent to defraud obtain 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"*

The phrase false pretence is also defined under section 301 of the Penal Code, Cap 16 R.E 2019 to mean:

> S. 301 *"Any representation made by words, writing or conduct of a matter of fact or of intention, in which representation is false act and the person making it knows it to be false or does not believe it to be true, is false pretence."*

Thus, it is discernible from the foregoing extract that for an offence of false pretence to be established, the prosecution needs to prove the essential ingredients of the offence which are: -

1. *There should be a representation in any of the following ways either by words, writing or conduct.*
2. *The representation should be made as a serious statement of fact or intention, and*
3. *The representation made is either false or the maker of it does not believe it to be true.*

Coming to our case at hand, after careful scrutiny of the record of the trial court, I am satisfied that the appellant was correctly charged as the charge sheet which initiate the criminal proceedings, its particulars of offence clearly indicated that the appellant is alleged to have committed the offence of obtaining goods by false pretence with intent to defraud. In other words, the appellant was properly informed about his accusation.

(See the case of **Rebeka Rashid Samboya vs R,** Criminal Appeal No 18 of 2015, CAT at Mbeya, (unreported)).

Having gone through the available record, I am now considering whether the prosecution proved the offence in the required standard. The available evidence shows that, the prosecution proved the offence to the standard required through the evidence of the key witnesses who testified before the trial court. I say so, after analyzing the evidence on record for it is clear that the appellant took tones of cassava flour commonly known as *udaga* and made a representation to PW1 to the effect that, since it was late evening hours, he could not make payment and instead he promised to make payments into PW1's bank account the following day. This is reflected on page 13 of the trial court' proceedings.

For ease of reference, let me take trouble to quote part of the evidence of PW1 as testified at the trial court which reads out as follows:

> *"On 05/03/2019 one Arsen Samson came to my milling store at Buswelu and he ordered cassava, I went with him to my home and showed him the stock of cassava that I had, we agreed that I will sell to him one kilogram at Tsh 600/=. We weighted and loaded it to three trucks, I asked him for money, but Arsen said it was already late. It was evening hours as such he asked me for my account number promising to pay me the next morning. The next morning, I called*

Arsen, he picked and told me that his son died at Kigoma so he asked me to give time to resolve the funeral issues then thereafter he will pay me..."

The above evidence suggests that PW1 believed the appellant's statement as a serious statement of fact although that was not the case on the part of the appellant. The evidence of PWI shows that the appellant was making different excuses when he was asked to honour his promise. At first, he stated that his son died at Kigoma and therefore he was supposed to attend funeral issues. When he was reminded after one week, he stated that he will make payment when he comes back from Kigoma, and later on he was not picking the calls from PW1. It is from there when PW1 made a trap that enabled to arrest the appellant.

The available records speaks louder that the appellant made a false representation and had an intent to defraud because from 5th March 2019 when he was entrusted with the tones of *udaga* up to 05th March 2020 when he was arrested, almost one year had elapsed without honouring his promise taking into consideration that he promised to pay the following day.

The series of events show that the appellant knew very well that he made representation to PW1 believing it to be a false statement. This is due to the fact that, when going through the evidence of the appellant

(DW1) in the trial court, apart from DW1 admitting that he took the tones of *udaga* from PW1 as reflected on page 44 of the trial court's proceedings. The evidence further shows that his means of payment was after selling that *udaga* to the third party who he alleged that he had deceived him for that person did not pay as they have agreed. The evidence of DW1 as reflected on page 44 reads as follows:

> *"...I took the cargo to a client who managed to deceive me and fraudulently I lost the cargo without being paid...."*

The above averment is contrary to what DWI made PW1 to believe when she was delivering the cargo to him as the promise was to pay the following day and not after being paid by the third party. All these show that the appellant made false statement and had the intention to defraud.

The argument of the appellant's counsel that PW1 and DW1 were doing business on loan and therefore the offence of obtaining property by false prefence can not be proved as there was no intention to defraud, I see this argument being misplaced because it is not shown anywhere in the trial court's record that the duo transacted business on loan terms. Therefore, this argument is an after thought.

When I proceeded to examine further the evidence on record, I am convinced that the prosecution proved its case on the required standard. In brief, the evidence of PW2 who was a casual labour shows that the

tones of *udaga* were loaded on the truck commonly known as *Fuso* after being instructed by PW1 to do so which was later on taken by the appellant. The evidence of PW5 who tendered the statement of the ward executive officer of Buswelu shows that the appellant took the tones of *udaga* and DW1 wrote a commitment letter signifying that he is bound to pay.

For the aforesaid reasons, it is quite clear that things capable of being stolen were obtained on the strength of the false statement uttered by the appellant and therefore, the offence was proved beyond a reasonable doubt. I, therefore, dismiss the second, third and fourth ground of appeal.

On the first ground of appeal, the appellant's counsel contended that the trial magistrate not being a senior Resident Magistate, had no jurisdiction to impose a sentence of three years without being confirmed. He submitted that section 170(2)(a)(ii) of the Criminal Procedure Act, Cap 20 R.E 2019 requires a magistrate who is not of a rank or grade of a senior resident magistrate to impose a sentence that does not exceed twelve months. He went on that the record shows that the trial magistrate who decided the matter was not a senior resident magistrate and yet imposed a sentence of three years imprisonment without being confirmed by the High Court. He added that the sentence was not valid as per the

requirement of the law. He prayed the appeal to be allowed and the appellant be set free.

On her part, the learned state attorney conceded to the appellant's counsel argument that the trial magistrate imposed the sentence that was not confirmed by the High Court. She, therefore, prayed the Court to impose the appropriate sentence as per section 388(1) of the Criminal Procedure Act, Cap 20 R.E 2019.

After going through the parties' submissions, I think this issue should not detain me much. It is without doubt that the sentence that can be passed by a resident magistrate court or a district court are provided for under section 170 of the Criminal Procedure Act, Cap 20 R.E 2019.

The law requires a sentence of imprisonment for a scheduled offence that exceeds the minimum term of imprisonment prescribed for it by the Minimum Sentence Act and for any other offence which exceeds twelve months, the same must be confirmed by the High Court if the trial magistrate who imposes it is not of a rank of a senior resident magistrate. (*See section 170(2) of the Criminal Procedure Act, Cap 20 R.E 2019).* Since the record shows that the trial magistrate who passed a sentence of three years' imprisonment was not a senior resident magistrate, the same can not be carried into effect or executed without being confirmed

by the High Court. The Court of Appeal of Tanzania in the case of **Yeremia s/o @Jonas Tehani vs R,** Criminal Appeal No 100 of 2017, CAT at Dar es Salaam stated that:

> *"...We remind magistrates to consider the prescribed statutory limits in the sentencing of accused persons convicted of unscheduled offences so as to avoid meting out illegal sentences. Whenever a trial magistrate imposes the sentence which is beyond the prescribed limit, the matter must be referred to the High Court for confirmation or else the sentence will not be executed on account of illegality...."*

Again, in the case of **Joshua Mulindwa vs The Republic,** Criminal appeal No. 478 of 2015, the Court of Appeal was faced with the same situation and in the process, the Court under the power conferred to it by the Appelate Jurisdiction Act, Cap 141 held that: -

> *"the trial magistrate passed a sentence that he was not by law empowered to pass. The High court ought not to have upheld those sentences. In the exercise of powers conferred on the Court by virtue of section 4(2) of the AJA we hereby set aslde the sentences of 6 years and 7 years imposed for the violation of section 296(a) and 265 respectively of the penal code and substitute thereof sentences of five years imprisonment on each count..."*

Indeed, in this case the trial magistrate had powers to impose a sentence of three years hence the sentence imposed is not illegal.

However, the same was to be confirmed by the Judge since the trial magistrate was not of a rank of a Seniour Resident Magistrate. In the circumstances, I hereby interms of section 373 (1) (a) of the Criminal Procedure Act, Cap. 20 RE. 2019 confirm the sentence of three years imprisonment passed by the resident magistrate effective from 14/07/2021 when the appellant began to serve the original sentence. In the final result, save as indicated above, the appeal is dismissed.

It so ordered.

M. MNYUKWA

JUDGE

23/02/2022

Court: Right of appeal to the Court of Appeal is fully explained to the parties.

M. MNYUKWA
JUDGE
23/02/2022

Judgement delivered in the presence of the parties' counsel

M. MNYUKWA
JUDGE
23/02/2022