

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA**

DC CRIMINAL APPEAL NO. 106 OF 2019

(Originating from Criminal Case No. 14 Of 2018 of Kondoa District Court)

HAMIDA NUHU.....1ST APPELLANT

RAMADHAN ABDALLAH.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

30/11/2021 & 22/03/2022

KAGOMBA, J

HAMIDA NUHU and RAMADHAN ABDALLAH, being the 1st and 2nd appellant respectively, were convicted by the District Court of Kondoa ("trial Court") for the offence of conspiracy to defraud C/S 306 of the Penal Code, [Cap 16 R. E 2002] (hereinafter "the Penal Code") and obtaining money by false pretence C/S 302 of the Penal Code.

It was alleged in trial Court that sometimes in December 2016 at Miningani Street within Kondoa District in Dodoma Region with intent to defraud the appellants who are husband and wife, conspired to commit an offence of obtaining money by false pretence by selling a house of the second appellant situated on Plot No. 91 Block EE, Miningani Street while knowing that the said house was encumbered by CRDB Bank. There

particulars of the offence were in respect to the offence of conspiracy to defraud.

On the second offence of obtaining money by false pretences, it was alleged that between 01st January, and 30th May 2017 at Miningani Street in Kondo District by false pretences and with intent to defraud the appellants did obtain cash money Tshs. 21,000,000/= from on Ramadhani Ally by pretending that they would sell him a house on Plot No. 91 Block EE, Miningani Street knowingly that the said house was in a conflict with CRDB Bank.

The testimonies of Adam Idd Kimolo – PW1; Hija Bakari Suru (PW2); WP P4242 D/SSGT Magreth (PW3); the buyer Ramadhani Ally Mataka (PW4) and Anord Mlokozi Mombeki (PW5) was enough for the trial Court to find both the Appellants guilty of the two offences they were charged with and ended up sentencing them to serve a conditional discharged for six month with a condition that each of them shall not commit any offence in term of the provision of section 38(1) of the Penal Code. The Court further ordered the appellants to return the Tsh. 21,000,000/= as compensation to PW4 Ramadhani Ally Mataka.

Having been aggrieved, the appellants filed their petition of appeal challenging the whole decision of the trial Court on the following grounds:

1. That, the honourable District Court erred in law and in fact for convicting the Appellants while the case was not proved beyond reasonable doubt.

2. That, the honourable District Court erred in law and in fact for convicting the Appellants while ignoring the facts that were not disputed by the prosecution side.
3. That, the honorable District Court erred in Law and fact for convicting the appellants while the case was typically a Civil Case.

Mr. Meshack Lyabonga, learned State Attorney appeared for the Respondents, while Mr. Paschal Msafiri, learned advocate appeared for the appellants. And during hearing of the appeal, Mr. Msafiri prayed to drop the second ground of appeal. He proceeded to argue on the first and third grounds only.

On the first ground of appeal, Mr. Msafiri submitted that the case was not proved by prosecution beyond reasonable doubts. He justified his submission based on the following reasons;

One; There were contradictions in the testimonies of prosecution witnesses. That while the transaction was fully done and a title to the house was handled over, PW2 Hija Bakari Suru testified, on page 19 of the proceedings to the effect that the money was given as a loan with a house a collateral until the money is repaid.

Two; the testimony of PW3 on page 24 of the proceedings show that the complainant told the second accused person to surrender the title deed "of that house" and he did surrender the title deed of house on Plot 188 Block DD Miningani Street, and not title deed of Plot No. 91 which he thought

he was buying. The learned advocate submitted in this respect that the business was done after the complainant was given that title deed.

Three; the testimony on purchase of a house on Plot No. 188 Block EE is corroborated by PW1 on page 15 of the proceedings where PW1 told the Court that upon inquiry they were told that the house on sale had no encumbrances and belonged to Hamida Manajimba. He added that the same type of testimony was adduced by DW1 on page 42 of the proceedings that she agreed to sell a house on Plot No. 188 Block DD for Tsh. 30,000,000/= and Ramadhani Ally paid Tsh. 21,000,000/= and was given a title deed for that house on Plot No. 188 Block DD Manyoni Street.

The learned advocate also referred to the testimony of DW2-Ramadhani Abdallah Mikina on page 46 of the proceedings that they were selling a house on Plot No. 188 Block DD Miningani. He argued further that the evidence on record shows that the buyer was given a title deed for that house on plot No. Block DD bearing the name of Hamida Nuhu Mwanajimba as they had agreed. The buyer also made payment to the account of Hamida Nuhu Mwanajimba whom they were trading with.

Mr. Msafiri wound up his submission on the first ground by arguing that the business was done in broad day light and the complaint has shown that he is not illiterate hence his complaints are of bad intention which led to wrong conviction of the appellants.

On the third ground, which is now the second and final ground of appeals Mr. Msafiri submitted that the case is of civil nature and not criminal.

He argued that both parties have confessed to have entered into a sale agreement for a house, as per testimony of PW1 on page 15 of the proceedings. That the agreement was to the effect that the consideration would be paid to the account of the 1st appellant at CRDB Bank. He says, such testimony is further corroborated by the testimony of PW3, WP 4242 S/SGT Magreth on page 24 of the proceedings where she said;

"thereafter the complainant told him to surrender the title deed of that house".

and

"The first accused surrendered the title deed of Plot No. 188 Block DD Miningani Street here at Kondo town."

Mr. Msafiri argued that until he was handed over the title deed as aforesaid, the complainant knew he was buying a house of Hamida Nuhu Mwanajimba located on the stated Plot number. He argued that, for the circumstances explained above, the case which is based on a sale agreement was supposed to be a Civil case and not a criminal case.

Mr. Msafiri argued that if there was any loss or misconception on part of the buyer/complainant the remedies should not be availed to him through criminal case but a civil case based on agreement entered between them. He cited the case of **MOHANA S/o BUSANDA V. R**, Dc Criminal appeal No. 213 of 2015 (unreported) High Court, Tabora. He prayed the Court to allow the appeal quash the conviction and set the appellants free.

On his side, Mr. Lyabonga learned state attorney supported the convictions and the sentence passed by the trial Court. He gave reasons based on the ground of appeal as submitted by Mr. Msafiri.

On the first ground Mr. Lyagonga argued that prosecution proved the case beyond reasonable doubts. Because all the ingredients of the offences were proved. He submitted that there should be false pretence, and the same be done with intent to defraud and that the appellant should have been able to obtain anything capable of being stolen.

It was Mr. Lyabonga's submission that false pretence existed when the appellant did a business of selling a house on Plot No. 91 block EE as proved by the testimonies of PW1 on page 15 of the proceedings. The appellants said they were selling a house on Plot No. 91 Block EE. Also, testimony of PW2 on page 18 who repeated that they were selling house on plot NO. 91 block EE, PW4's testimony on page 31; PW5 the Land officer on page 36 of the proceedings went to verify a house on Plot No. 91 Block EE Miningani. Mr. Lyabonga said, based on all these testimonies the first ingredient of the offence was duly proved.

To show that the appellants had intention to defraud, they gave a title deed of a different house to the buyer instead of the house they sold to him. He said PW1 said having been given the tittle he did not read the plot number but he read the name of the owner. Mr. Lyabonga added that the applicant had not denied receiving the amount to the Tsh. 21, 000,000/= as part of the purchase price, and Hamida Nuhu Mwanajimba acknowledged on page 42 t ohave received the money form Ramadhan Ally. Mr. Lyabonga submitted

that, by such acknowledgment the second ingredient of the offence was proved.

On the 1st ingredient of obtaining something capable of being stolen he adopted his argument that the amount of the Tsh. 21,000,000/= was capable of being stolen, and that the appellants acquired the money by selling a plot that was under bank mortgage. For all these reasons, it was Mr. Lyabonga's conclusion that prosecution proved the case beyond reasonable doubts and that it's the appellants who committed the offences.

On the second and last ground of appeal Mr. Lyabonga submitted that the matter was a Criminal case, which is proved by the ingredients of the offence. He said, once the ingredients of the offence are established it becomes a criminal offence and if not them it may be a civil case. He referred to the case of **RASHID MOHAMED SELUNGWI V. R**, Criminal appeal No. 5 f 2021, High Court, Mtwara on the ingredients of the offence and prayed the Court to be persuaded by that decision of the Court.

Mr. Lyabonga further submitted that the case of MOHANA S/O BUSANDA (supra) is distinguishable in that it talks about the offence of stealing by agent and there were no ingredient of the offence.

Mr. Msafiri rejoined by conceding that each criminal case is proved by its ingredients, but said the same should be proved beyond reasonable doubts.

Mr. Msafiri further rejoined that PW1 confessed that the house sold is of Hamida Nuhu Mwanajimba, on the same plot 188 block DD, same street as

the plot sold. He argued that there is no any evidence adduced in in Court to show that Hamida Nuhu Mwanajimba has another house apart from the one sold and whose title deed was handled over to the complainant.

On the argument that the complainant received to title without reading the plot number in a big transaction like purchase of a house gives further doubts that the case is framed up against the appellants.

Mr. Msafiri challenged the testimony of Land Officer, by arguing that there is no valuation Report tendered in Court to show that he valued House on Plot No. 91 and not on Plot No. 188.

Mr. Msafiri further submitted that the receipt of money amounting to Tshs. 21,000,000/= by Hamida Nuhu Mwanajimba is not denied, but he added, the money was part of consideration for the sale of a house on Plot No. 188 Block DD Miningani. For this reason, he added, there was no false pretence on part of Hamida Nuhu Mwanajimba.

Mr. Msafiri wound up his rejoinder by submitting that there has been no clear explanation as to why the complaint received the tittle deed for a house he did not intend to buy. He finalized by asserting that if the complainant was not satisfied, he should have followed procedure under civil law and not criminal one.

Having heard the submissions by both sides there are two issued to be resolved by the Court.

One; Whether prosecution proved the case against the appellants beyond reasonable doubts.

Two; Whether the matter in dispute falls under civil and not criminal law.

The Court, being the first appellate Court has a duty to re-examine the evidence adduced in trial Court in determining the issues at hand. It is clear from the judgment of the trial Court that the appellants were convicted for the second offence of obtaining money by false pretences. Mr. Lyabonga correctly explained in his submission that the offence the appellants were charged with shall be proved once all the ingredients thereof are duly proved. These are; 1. intent to defraud, 2. False pretence and 3. Obtaining something capable of being stolen.

Starting with the third ingredient it is common ground that Hamida Nuhu Mwanajimba obtained Tshs. 21,000,000/= from the complainant as part of consideration for sale of a house. This ingredient has been duly proved. However, since the money was sent to the account of Hamida Nuhu Mwanajimba, the first appellant, it was necessary for prosecution to show how the second appellant, Ramadhani Abdallah comes in. A proof of common intention to carry out the offence is certainly needed. This has not been argued by the parties.

Upon examination of evidence on records, it is apparent that the testimony of PW1, PW2 and PW4 satisfactory prove that the appellants were not only spouses but had one and same intention of obtaining money through selling of a house. As such if all the ingredients of the offence are

proved to exist, the second appellant will be deemed to have committed the offence by virtue of section 23 of the Penal Code, which provides:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose and offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence"

As stated earlier, whether or not the common purpose of obtaining money was lawful or otherwise shall be determined upon examination of evidence to prove existence of other ingredients of the offence.

Did the appellant make a false pretence? It was Mr. Lyabonga's submission that in deed the appellants made a false pretense. He submits that false pretence existed when the appellants did a business of selling a house on Plot No. 91 Block EE Miningani Street but ended up giving a title of a different Plot. Mr. Msafiri has a different view, he argued that by Hamida Nuhu Mwanjimba selling her own house and receiving money into her own bank account as per agreement with the buyer, there no false pretence.

The Court has read the testimonies of PW1, PW2, PW4 and PW5. I am of settled mind that what the appellant offered to sell is the house on Plot No. 91 Block EE Miningani Street and not the other house on Plot No. 188 Block DD Miningani Street. All the testimonies are coherently clear on which house they were shown. It is also clear that the first appellant was all the time in that house opening the doors of the would-be buyers to view the house. Her behaviour of being there, showing the visitors around as testified

by PW1 on page 14 of the typed proceedings, further confirms existence of false pretence. She was known to be the wife of Ramadhani Abdallah Mkina who told PW1 that the house being sold is at Miningani Street "near Mr. Kinde". they found Hamida Nuru Mwanajimba living in that house. Even the second time the buyer's team went to the house, with the second appellant they found the first appellant there and as usual she opened the doors for them. Such gesture implied existence of false pretense.

In the case of **LONGIMUS KOMBA V. R**, [1973] LRT No. 39 it was held that in certain circumstances silent conduct may amount to false representation. In the case at hand there were two crucial facts for the seller to state.

One, that they as couple owned two houses at Miningani street, being house on Plot No. 91 Block EE and house on Plot No. 188 Block DD.

Two; that one of the houses is encumbered by a bank mortgage. None of this two critical information was mentioned. The appellant, though had no legal duty to speak them out, their silence implied a false representing.

To say the least, the testimonies of PW1, PW2 PW3 and PW5 all points to the fact that the house they were shown is the one on Plot 91 Block EE which turned out to be encumbered. I am of settled view that false pretense was proved and so was the intent to defraud.

On the second issue as to whether the matter should have been governed by civil procedure and not through criminal law remedied, I agree with Mr.

Lyabonga's submission that once all the ingredients of the offence are proved, the matter falls under criminal law. I also appreciate the submission by Mr. Msafiri that the offence should be proved beyond reasonable doubts. Mr. Msafiri has laboured on what he calls contradictions in prosecution testimonies, as well as lapses and lack of due diligence on part of the buyers. He has capitalized on the fact that the buyer paid upon being given a title on plot no. 188 block DD as the house which the parties had agreed.

I have perused the entire evidence in this case. I have two observations to make. One, it is true there are lapses in the testimonies of prosecution evidence. One wonders how a person buying a house would even pay a sum without there being a signed contract with clear terms and conditions. Surely the buyer did not complete his duty of carrying out a due diligence. However, I think we should not push the burden of proof further than what it is. The duty of prosecution is to prove the case beyond reasonable doubts. Not beyond any doubts. All the doubts raised by the appellants are, in my view, not reasonable doubt, as far as the ingredients of the offence are concerned.

One can blame the buyer for paying money without a contract, but that would not impeach the fact that the sellers obtained money and in so doing made false pretences and had intent to defraud. For this reason, the appeal lacks merits and it is dismissed accordingly.




ABDI S. KAGOMBA

JUDGE

21/03/2021