

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

(PC) CRIMINAL APPEAL CASE No. 11 OF 2021

(Arising from the District Court of Bunda at Bunda in Criminal Appeal Case

No. 6 of 2021 & Originating from Kenkombyo Primary Court in Criminal

Case No. 104 of 2021)

GATAWA MAGAJI APPELLANT

Versus

MWANDWI SHIMBA RESPONDENT

JUDGMENT

18.05.2022 & 26.05.2022

F.H. Mtulya, J.:

Sometimes in September 2020, Mr. Mwandwi Shimba (the respondent) and Mr. Wilson Thomas had approached Mr. Gatawi Magaji (the appellant) for maize preservation agreement, in which the appellant offered them a room to reserve one hundred and fifty (150) sacks of maize, of which fifty (50) belonged to the respondent.

The record of appeal shows that the respondent alleged that sometimes in October 2020, he had travelled to Bariadi District and was cell-phoned from Bunda District by the appellant on a request of Mr. Mwalimu to buy fifteen (15) sacks and 58 amboni of maize costing Tanzanian Shillings One Million One Ninety Nine Thousand Three Hundred Only (1,199,300/=).

According to the record, the complaint registered before the **Kenkombyo Primary Court** (the primary court) in **Criminal Case No. 104 of 2021** (the case) displays the appellant had sold the said maize to Mr. Mwalimu at the stated price without the permission of the respondent, but declined to forward the same to the respondent save for Tanzanian Shillings Two Hundred Eighty Thousand Only (280,000/=Tshs.) which was wired through telephone money transfer.

The offence under which the appellant was prosecuted was coined in criminal case as fraudulent obtaining of maize by trick commonly known as cheating under section 304 of the **Penal Code** [Cap. 16 R.E. 2019] (the Code). Under the provision, any person who found guilty of the offence can cherish a liability of three (3) years imprisonment. After full hearing of the case, the primary court found the appellant guilty of the offence and stated that:

...mahakama hii inampa mshtakiwa adhabu ya kulipa faini ya Tshs. 50,000/= au kifungo cha gerezani kwa kipindi cha miezi mitatu (3) ili iwe fundisho kwa wengine wenye tabia kama hiyo.

Finally, the primary court ordered the appellant to pay the respondent the claimed remaining some of money in Tanzanian Shillings Eighty Hundred Nineteen Thousand Three Hundred

(819,300/=) from a total of Tanzanian Shillings One Million One Ninety Nine Thousand Three Hundred (1,199,300/=) as a value of money equivalent to the fifteen (15) sacks and Fifty Eight (58) amboni of maize. The decision of the primary court aggrieved the appellant hence preferred an appeal at the **District Court of Bunda at Bunda** (the district court) in **Criminal Appeal Case No. 6 of 2021** (the appeal), complaining on six (6) issues to be resolved by the district court. The district court heard the appeal and finally decided in favour of the respondent and held that: *the trial magistrate rightly considered all evidence adduced and rightly reached her final decision*. The reasoning of the district court was based on the respondent evidence on part payment exhibited by M-PESA transaction in SM-A.

The appellant was not satisfied with the determination of the appeal at the district court hence approached this court complaining of two (2) issues, drafted in brief as: first, there is no proof of agreement between the appellant and respondent; and second, no proof of link of payment between the appellant and the respondent. When the parties were summoned on 18th May 2022 to register materials for and against the reasons of appeal, they appeared in person without any legal representation.

The appellant on his part briefly submitted that there was no agreement which was tendered in court to substantiate the offence and in any case the facts of the case shows that the respondent had already sold his fifteen (15) sacks and fifty eight (58) amboni of maize. To his opinion, even if it is assumed that the fifty eight (58) amboni remained after the sale of fifteen (15) sacks of maize, the amount of money equivalent to the remaining amboni maize would not be Tanzanian Shillings Eighty Hundred Nineteen Thousand Three Hundred Only (819,000/=Tshs.).

With regard to the nexus of M-PESA transaction of Tanzanian Shillings Two Hundred Eighty Thousand Only (280,000/=Tshs.) between the appellant and respondent, the appellant contended that he had sent the M-PESA to Mwasi Susani Notti of mobile number +255 769 479 047, and not the respondent. In replying the submissions of the appellant, the respondent briefly stated that the appellant took without permission fifteen (15) sacks and fifty eight (58) amboni of maize for Mwalimu and must be responsible for the remaining some of unpaid monies. With regard to the name Mwasi Susani Notti and M-PESA transaction, the appellant contended that he had registered his number in the name of Mwasi Susani Notti who had NIDA numbers.

In a brief rejoinder, the appellant submitted that the respondent stated lies as the keys to the room was in their possession and facts shows that they had already sold the fifteen (15) sacks of maize. The appellant submitted further that he had sent the money to Mwasi Susani Notti from a prayer of the respondent to send the same to his relative.

I perused the record of this appeal and found that the record is silent on any written contract between the parties as complained by the appellant, that there was no any agreement between the contesting parties. However, the handwritten record of the primary court, at page 11 of the typed proceedings of the case, displays that on 23rd December 2021, the appellant testified that he was with Mr. Wilson Thomas with their maize consignments searching for a place to preserve the same.

The record shows further that on 27th September 2020, they found and entered into an agreement with the appellant to preserve One Hundred and Fifty (150) sacks of maize and on 29th September 2020, the appellant sold, without permission of the respondent, a total of fifteen (15) sacks and fifty eight (58) amboni of maize to Mwalimu and had only paid part payment of Tanzanian Shillings Two Hundred Eighty Thousand Only (280,000/=) through M-PESA. From the testimony of the respondent, two exhibits were tendered and

admitted as SM-A and SU-A which show the transaction of money between the appellant and Mwasi Susani Notti and maize transactions between Mr. Wilson Thomas and the appellant

The evidences in SM-A and SU-A, during admission in the case, were not protested by both parties. The testimony of the respondent with regard to meeting, oral agreement and preservation of maize amounting to fifteen (15) sacks and fifty eight (58) amboni, was not contested or cross-examined by the appellant during the trial at the primary court. The testimony is further supported by the appellant as reflected at page 24 of the handwritten proceedings of the primary court. However, on page 27 of the handwritten proceedings of the primary court, the appellant contested selling the said maize of the respondent without his permission.

The facts regarding communications and meeting of the appellant, the respondent and Mr. Wilson Thomas are further testified by Mr. Manumbu Mtesigwa Andrea (SU2), Bulendabufwe Village Executive Officer, as reflected at page 36 of the handwritten proceedings of the primary court and Mr. Sebastian Mafuru (SU2), as reflected at page 42 of the handwritten proceedings of the primary court.

In the circumstances of the present case, it is obvious that the parties in this dispute had entered into oral agreement and in its

execution, the dispute arose and was coined under the provision of section 304 of the Code. Additionally, I have thoroughly perused the record of this appeal and did not find anywhere in the primary court and district court where the appellant complained on existence or non-existence of agreement between him and the respondent or Mr. Wilson Thomas. The appellant raised the matter in this appeal as an escape route, which cannot be entertained by this court.

I am aware the appellant complained on nexus between his mobile number, exhibit SU-A, Mwasi Sussani Notti, mobile number +255 769 479 047 and the appellant. My understanding tells me that evidences in criminal cases are taken and considered in totality of facts narrated from the stories registered by both parties (see: **Henry Mpangwe & Two Other v. Republic** [1974] LRT 50; **Ndege Marangwe v. Republic** [1964] EACA 156; and **Selemani Rashid @ Masele & Another v. Republic**, Criminal Appeal No. 164 of 2019). In the present case, the totality of the evidences tendered show that the appellant committed the offence of cheating contrary to section 304 of the Code.

I understand the appellant during the hearing of this appeal complained on arithmetical differences and inconsistencies on numbers of sacks and amboni maize and the amount of money involved in the dispute. However, in my considered opinion, that was

not an issue before the primary court. Arithmetic errors, in cases like the present one, are minor and do not go to the merit of the matter and in any case did not prejudice or occasioned a failure to justice. The cited errors in this case are cured under section 388 (1) of the **Criminal Procedure Act** [Cap. 20 R.E. 2019] (the Act) as supported by the precedents of our superior court in **Dickson Elia Nsamba Shapwata v. Republic**, Criminal Appeal No. 92 of 2007 and **Republic v. Yanga Omari Yanga**, Economic Case No. 1 of 2020.

The main issue which brought the parties in this dispute before the primary court, as depicted at page 7 of the judgment, was whether: *mlalamikaji ameweza kuthibitisha shitaka lake la wizi wa kuaminiwa pasipo kuacha chembe yeyote ya shaka*. The issue received a positive reply in the holding displayed at page 9 of the decision, that: *mlalamikaji umeweza kuthibitisha shitaka hilo pasipo kuacha chembe yeyote ya shaka*. The reasoning of the primary court shows at page 8 of the judgment that:

...mshitakiwa alishindwa kumleta mahakamani kama shahidi mtu wa pili aliyekuwa nafanya naye biashara ya mahindi badala yake akaleta watu ambao hawafahamu undani wa jambo hili... ushahidi wa mshtakiwa umekuwa wa kutia mashaka... mashahidi aliowaleta wana miji yao na shughuli zao hivyo sio rahisi kushuhudia kila tukio

lililokuwa linafanyika pale nyumbani kwake... SU1 ni Mtendaji wa Kijiji na SU2 ni Mkulima.

This thinking of the primary court was shared and supported by the district court at page 2 of the decision of the district court that:

I had ample opportunity to see trial court record...exhibit SM-A and SU-A prove that appellant through M-PESA transaction sent 280,000/= only... the evidence of adduced by the respondent prove the case beyond reasonable doubt that the appellant without consent of the respondent sold 15 sacks of maize...

I am quietly aware that the appellant pleaded before this court that the decision of the district court be quashed and proceedings of the trial court be set aside. However, practice of this court and Court of Appeal shows that the second appellate court should refrain itself from disturbing concurrent findings of facts in lower courts, unless there is proof of misapprehension of evidence leading to miscarriage of justice or violations of principles of law or procedure (see: **Amratlal Damodar Maltaser & Another T/A Zanzibar Silk Stores v. A.H. Jariwalla T/A Zanzibar Hotel** [1980] TLR 31; **Samwel Kimaro v. Hiday Didas**, Civil Appeal No. 271 of 2018; **Malumbo v. Director of Public Prosecutions** [2011] 1 EA 280; and **Petro Wateghe v. Nicodemu Medard**, Misc. Land Case Appeal No. 44 of 2020).

In the present appeal, I see no proof of misapprehension of evidence leading to miscarriage of justice or violations of principles of law or procedure by the lower courts. I am therefore determined to refrain from disturbing concurrent findings of facts of the lower courts hence follow the course of the precedents of this court and Court of Appeal, without any reservations.

Having said so, I think, this appeal was brought to this court without sufficient materials to display good reasons of appeal hence dismissed in entirety. I uphold the findings and decisions of the primary court as reflected at page 11 of the Judgment and district court as reflected at page 2 of the judgment.

It is so ordered.

Right of appeal explained.




F. H. Mtulya

Judge

26.05.2022

This judgment was delivered in chambers under the seal of this court in the presence of the parties, Mr. Gatawa Magaji and Mr. Mwandwi Shimba.


F. H. Mtulya

Judge

26.05.2022.