THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

PC CRIMINAL APPEAL CASE NO 4 OF 2022

(Originating from Criminal Case No 43 of 2022; Mtama Primary Court and from Criminal Appeal No 4/2022 in the District Court of Lindi at Lindi)

NURDIN ISSA NAMBILANJE..... APPELLANT

VERSUS

ELICIUS EMMANUEL LUKAMBA .....RESPONDENT

JUDGEMENT

15/4/ & 26/6/2023

LALTAIKA, J.

The appellant herein **NURDIN ISSA NAMBILANJE** is dissatisfied with the decision of the District Court of Lindi at Lindi (the first appellate court) in Criminal Appeal Case NO. 4 of 2022 adjudged in favour of the respondent. The genesis of the appeal goes back to the decision of Mtama Primary Court (the trial court) in Criminal Case No. 43 of 2022. In this case, the appellant was arraigned in court charged with **Obtaining goods by**

false pretenses Contrary of section 302 of the penal code. Cap, 16 R.E 2022.

When the charge was read over and explained to the accused, he denied the offence. The trial court entered a plea of not guilty and proceeded to conduct a full trial. After the full trial, the trial court convicted the appellant as charged and sentenced him to a conditional discharge that he does not commit any offence within (6) six months. The appellant was also ordered to compensate the respondent the tune of **TZS 4,350,000/=** (say Tanzanian shillings Four Million Three hundred thousand and fifty only).

Dissatisfied, the appellant appealed to this Court on six grounds as reproduced hereunder

1. *That the trial appellate court grossly erred in law and in fact by upholding the wrong decision reached by the lower court*
2. *That the trial appellate court grossly erred in law and in fact in when failed (sic!) or refused to give chance the appellant to explain the ground of appeal either orally or by written form according to the request imposed (sic!) in court at the date fixed for mention before hearing date.*
3. *That the trial appellate court grossly erred in and in (sic) fact by ignoring the 1st ground appeal (sic) raised by the appellant that, the matter at hand arose from the breached (sic!) of contract and not criminal case.*
4. *That the trial appellate court grossly erred in law and in fact when proceeded to convict the appellant while the (complainant) or respondent failed to prove the case beyond reasonable doubt against the appellant.*
5. *That the trial appellate court grossly erred in law and in fact in its decision by upholding the decision of the lower court which failed to translate section 302 of the Penal Code to the meaning of receiving goods or money by false pretence, while the respondent (complainant) himself breached the contract.*
6. *That the trial appellate court grossly erred in law and in fact in its decision by upholding the wrong decision reached by the lower court, which failed to understand that the matter before the court is civil in nature and not criminal.*

When the matter was **called on for mention on 5/4/2022 the** appellant requested to argue the appeal by way of written submissions on pretext that he was a stammering person and not a gifted speaker. There being no objection from the respondent, a schedule to that effect was jointly agreed upon. I take this opportunity to thank the parties (and their unanimous legal aid providers/drafters) for their dedication and compliance with the court's order. The next part of this judgment summarizes the written submissions. Unfortunately, the written submissions do not neatly follow the structure of the grounds of appeal but that is understandable when parties are not represented by counsel

The appellant addressed the court, stating that he would like to consolidate the grounds of appeal as follows: ground number one and ground number two, ground number three and ground number six. Ground number 4 and 5 would be discussed separately. The appellant argued that the trial appellate court was wrong in upholding the wrong decision made by the lower courts. He also claimed that the trial magistrate, when the matter was before the appellate court, erred in law and in fact by not giving the appellant an opportunity to deeply argue the appeal, either orally or by written submission, as requested in court. The appellant stated that the prayer to argue the case in written submission was not recorded in the trial appellant court proceedings, indicating that the appellant was not given the chance to do so. This denial of the right to state the case in the preferred manner went against the principles of natural justice. The appellant further argued that the trial primary court did not accurately record the statements

testified by the appellant during the trial and selectively chose what to include in the appellant's statements.

The appellant pointed out that even at the appellate stage, the appellant's requests and prayers were not recorded, which he considered a denial of the right to be heard. The respondent himself, during a court appearance on April 5, 2023, accused the appellant of abusing the court process by not adhering to the request. The appellant had requested to argue the appeal through written submission, but this request was not granted and not recorded anywhere.

The appellant emphasized that the failure of the trial appellant court to afford the opportunity to argue the appeal in the preferred manner undermined the entire decision. He referred to a judgment by the Court of Appeal of Tanzania in the case of **Yahaya Selemani Mralya (Administrative of the estate of the late Selemani Mralya Vs Stephano Sijia and 3 mothers, Civil Appeal No. 13 of 2017),** where it was stated that affording parties an opportunity to be heard is a right under Article 13(6)(a) of the constitution and the breach of this right undermines the entire decision.

The appellant mentioned that in the primary court, the trial magistrate intentionally and without proper recording, failed to accurately document the testimony of the defense side, as mentioned earlier. He claimed that the magistrate filtered out important issues testified by the appellant and recorded incorrect and weak testimony from the respondent. The court of **Appeal of Tanzania in the case of Kaheme Manyemela Maneno Vs**

Republic (Criminal Appeal NO. 212 of 2014) stated that the evidence was not recorded in accordance with the requirements of the law. The appellant referred to another case, **Avor Ngonyani Vs Magdalena T. Ngondo (Land Appeal No. 12 of 2016),** where it was observed that the proceedings were not correctly recorded and that legal proceedings must be accurately recorded without filtering or summarizing the defense.

The appellant then turned to discuss the third and sixth grounds of appeal together. He stated that the matter between the parties arose from a possible breach of contract. He mentioned that the respondent and a witness testified before the court regarding their need for a person skilled in drilling water. The appellant stated that he directed them to another person with a more powerful drilling machine after discussing the geographical constraints of the area. Later, the respondent approached the appellant again through a referral from **Mr. Busara. They had a conversation, and the respondent deposited three million Tanzanian shillings (Tshs. 3,000,000/=) in the appellant's account for the required materials.** The appellant began the job as agreed but encountered a broken instrument during the drilling process.

He informed the respondent, purchased a replacement instrument with five hundred thousand Tanzanian shillings, and continued the work until reaching the agreed-upon water level of fifty meters. The appellant claimed that instead of seeking alternative solutions through discussion, the respondent decided to bring the matter to the police station, accusing the appellant of stealing money by false pretense, which the appellant argued was untrue.

The appellant argued that the matter between the parties was purely civil in nature, arising from a possible breach of contract. He questioned why the respondent was prosecuting him under a criminal offense and stated that breach of contract should not lead to criminal litigation unless fraudulent or dishonest intentions were evident from the beginning. He referred to a case in India, Sarabjit Kaur Vs State of Punjab and another, which emphasized that criminal courts should not be used to settle civil disputes unless fraudulent or dishonest intentions are proven. The appellant criticized both the primary court and the appellate court for erring in law and in fact when determining his case, convicting him, and sentencing him for a criminal offense related to the breach of contract.

The appellant mentioned that, in the primary court, it was alleged that the trial magistrate intentionally and without proper recording had failed to accurately document the testimony of the defense side, as mentioned earlier. He claimed that important issues testified by the appellant were filtered out by the magistrate, who instead recorded incorrect and weak testimony from the respondent. It was stated that the Court of Appeal of Tanzania, **in the case of Kaheme Manyemela Maneno Vs Republic (Criminal Appeal NO. 212 of 2014),** had mentioned that the evidence was not recorded in accordance with the requirements of the law. The appellant referred to another case, Avor Ngonyani Vs Magdalena T. Ngondo (Land Appeal No. 12 of 2016), in which it was observed that the proceedings were not correctly recorded and emphasized the need for accurate recording of legal proceedings without filtering or summarizing the defense.

The appellant then proceeded to discuss the third and sixth grounds of appeal together. He stated that the matter between the parties arose from a possible breach of contract. It was mentioned that the respondent and a witness had testified before the court regarding their need for a person skilled in drilling water. The appellant stated that, after discussing the geographical constraints of the area, he directed them to another person with a more powerful drilling machine. Later, the respondent approached the appellant again through a referral from Mr. Busara. They had a conversation, and the respondent deposited three million Tanzanian shillings (Tshs. 3,000,000/=) in the appellant's account for the required materials. According to the appellant, he commenced the job as agreed but encountered a broken instrument during the drilling process.

The appellant argued that the matter between the parties was purely civil in nature, arising from a possible breach of contract. He questioned why the respondent was prosecuting him under a criminal offense and stated that breach of contract should not lead to criminal litigation unless fraudulent or dishonest intentions were evident from the beginning. Reference was made to the case **of Sarabjit Kaur Vs State of Punjab** and another from India, which emphasized that criminal courts should not be used to settle civil disputes unless fraudulent or dishonest intentions are proven. The appellant criticized both the primary court and the appellate court for erring in law and in fact when determining his case, convicting him, and sentencing him for a criminal offense related to the breach of contract.

The respondent, on his part in response to the issues raised, stated that the magistrate had given the appellant the opportunity to defend and

argue his case, which was evident in the court record of the Decision of the District Court magistrate on page 3. The respondent argued that there was no evidence suggesting bias or infringement of the appellant's rights during the proceedings. Therefore, the issue raised by the appellant was baseless and lacked legal merit.

The respondent addressed the court and mentioned that all material evidence presented by the parties had been recorded. The appellant disputed the record of the court and **invoked Section 58 of the Law of Evidence Act [Cap 6 R: E 2022]**, requesting the court to take judicial note of the case.

In response to the appellant's written submission regarding grounds three and six, which stated that the matter between the parties arose from a breach of contract, the respondent argued that the appellant was prosecuted for the offense of Obtaining Money by False Pretense under **Section 302 of The Penal Code [Cap 16 R: E 2022].** The respondent outlined the elements required to prove this offense and stated that the case was purely criminal in nature.

The respondent presented inculpatory statements and facts made by the appellant during his trial, which demonstrated his fraudulent intentions and actions. The respondent emphasized that the appellant had obtained money from the respondent through false representations and had failed to fulfill his promises.

The respondent referred to the case **of Sarabjit Kaur and Another vs State of Punjab and another, F.I.R NO.430,** which the appellant had

cited. However, the respondent argued that this case was not applicable in their situation because the appellant had engaged in fraudulent and dishonest acts, which substantiated the offense charged **under Section 302 of the Penal Code [Cap 16 R: E 2022].**

In conclusion, the respondent stated that the appellant's appeal was baseless and lacked legal standing. The respondent requested the court to dismiss the appeal, uphold the conviction and sentence, and order the appellant to compensate the respondent.

In rejoinder, the appellant stated that the respondent had initiated a criminal case against him before Mtama Primary Court for the offense of obtaining goods by false pretenses, contrary to Section 302 of the Penal Code (Cap. 16 RE. 2022). The lower court, after a full trial, found him guilty of the offense charged, convicted, and sentenced him to conditional discharge, and ordered him to compensate the victim with Tzs. 4,350,000/=, while the respondent failed to prove the case against the appellant beyond reasonable doubt.

The appellant expressed his grievance with the aforementioned decision and subsequently filed an appeal before the trial appellate court. During the appeal hearing, the trial magistrate unjustifiably refused to consider the appellant's request to determine the appeal by way of written submission. This refusal was not recorded in the proceedings, which infringes upon the principles of natural justice and constitutional provisions, as outlined in Article 13 (6) [a] of the Constitution of the United Republic of Tanzania.

The appellant emphasized the importance of the rules of natural justice, citing previous cases such as **Mahona Vs University of Dar es salaam (1981) T.L.R .55 and Pancras Alexander Vs Republic (1981) T.L.P 92.** He explained that the right to be heard, known as the audi alterem partem rule, requires that a person be given the opportunity to present their side of the story before being condemned or judged.

In the present case, the trial magistrate recorded a statement that was not spoken by the appellant without reasonable grounds. The appellant had requested to argue the appeal by way of written submission, but the trial court failed to record this request and ultimately decided the case with bias in favor of the respondent. The appellant stated that the respondent himself confirmed this fact during a meeting on April 5, 2023. The appellant argued that the case between the parties was of a civil nature arising from a breach of contract and not a criminal case.

The appellant contended that the prosecution or complainant failed to prove the case beyond reasonable doubt, as required by Rule 1 (1) of the Magistrates' Courts (Rules of Evidence in Primary Court) Regulations. He cited cases such as **Alphonce Mapunda Vs Republic (2006) T.L.R. 395 and John Makolobela and Others Vs Republic** (2002) T.L.R. 296, which established the burden of proof lying on the prosecution and the need for credible evidence to establish guilt beyond reasonable doubt.

Based on the weak evidence presented by the complainant, the appellant argued that the trial court failed to analyze the evidence and determine whether it implicated the appellant in the charged offense. The

appellant claimed that the trial court did not consider whether the offense charged was correct or not, as every provision in the Penal Code has elements constituting an offense. He maintained that the elements required for the offense charged were not present in his case.

I have dispassionately considered the revival submissions. My analysis will center on only one ground namely whether the case was a civil or a criminal matter. I gather that in March 2021 the appellant had received a phone call from a person named Beni, who worked for the respondent. Beni requested a meeting with his boss, the respondent, at Mshamu Guest House in Mtama District. The appellant explained that during the meeting, both the **respondent and Beni asked him to drill a water well on the respondent's farm in Lihimba.**

The appellant stated that he inquired about the geographical area of the respondent's farm after they narrated the details to him. In response, the appellant informed them about **the limitations of his drilling machine**, stating that it could not **drill beyond 50 meters**. He also mentioned that he knew the area and believed it would be difficult to find water as required by the respondent.

The appellant further explained that, aside from that, he directed the respondent and Beni to another person who possessed a larger machine suitable for the job. He provided them with the mobile phone number of this individual and left it at that. The respondent contacted the recommended person, and after their conversation, the individual demanded a total amount of **Twelve Million Tanzanian shillings (TZS. 12,000,000/=).** However,

the respondent was unable to afford that sum. Consequently, the appellant left them there without reaching any agreement.

A few days later, the respondent personally approached another person and requested both the water well drilling service and the appellant's contact information. The respondent subsequently called the appellant, having been assured by various individuals that the appellant was the only person in the village who performed water drilling activities for both individuals and different institutions.

According to the appellant, it was the respondent and his employee, Beni, who contacted him for the second time, seeking the service of drilling water on the respondent's farm. The appellant clarified that they approached him again after the respondent had tried and failed to find water in another location. They went to the intended drilling area together, but the appellant informed them that his machine was not capable of drilling beyond fifty meters. He explained that the terrain of the hill area where water was intended to be drilled made it difficult for his machine to operate. However, they managed to find another area outside of the respondent's farm. Subsequently, they sat down and discussed the cost, and after the appellant mentioned the required materials, he informed the respondent of the amount he needed.

The appellant stated that he informed the respondent about the total amount of money, which was six million Tanzanian shillings (TZS 6,000,000/=). The respondent requested a deduction, and the appellant

agreed to reduce it **to five million three hundred thousand Tanzanian shillings (TZS 5,300,000/=).**

After reaching an agreement, the appellant instructed the respondent to purchase the required materials in Dar es Salaam while they were present there. The respondent personally asked the appellant to find and procure the materials, and subsequently deposited three million Tanzanian shillings (TZS 3,000,000/=) into the appellant's account. The appellant withdrew the deposited amount and traveled to Dar es Salaam to buy all the necessary materials. After several days, he transferred the materials to the respondent's farm, preparing them for the water drilling process. The appellant mentioned that it took him several days to reach the respondent's farm due to the poor infrastructure and road conditions.

Upon arriving at the destination, the appellant immediately began the water drilling work. However, during the drilling process, one of the important instruments broke. The appellant promptly informed the respondent about the situation and requested additional funds to purchase a replacement. He acquired the necessary instrument and proceeded with the water drilling while the respondent was present. After reaching a depth of fifty meters (50m), the appellant started connecting the pipes.

The appellant explained that he did not possess a generator and informed the respondent of this. In response, the respondent asked the appellant to find a generator at his own expense. The appellant managed to find a generator and brought it to the site to extract water. Water was successfully pumped out, and the respondent witnessed it firsthand.

However, the respondent **later claimed that the water extracted was insufficient for his needs.** The appellant reiterated that according to their agreement and the capabilities of his machine, reaching a depth of fifty meters (50m) fulfilled the agreed-upon terms. Nonetheless, the respondent disagreed, suggesting that there might be another underlying issue not directly related to the water, as agreed upon in their agreement.

The appellant stated that he had completed the job as per the agreement and had removed the personal instrument used for drilling water. He mentioned that the respondent then took the matter to the police. After the information reached the officer in charge of Mtama Police station, he directed the respondent to initiate civil litigation before the lower court. **The respondent and another police officer** decided to create a criminal charge against the appellant, accusing him of receiving money by false pretense.

It does not take much thought to realize this was a purely contractual agreement between the parties. There is no criminality at all. It has been argued that one of the reason many countries in Africa experience prison congestion is lack of will to explore other ways of resolving disputes that the criminal machinery. The Court of Appeal decision IN **MTWA MICHAEL KATUSA V. R. Crim App. 577 of 2015 (Unreported)** and this court's decision in **RAHIM MOHAMED MBUNGO @TONGOLANGA V. R.** Crim App 23 of 22 HCT Mtwara (Unreported) have clearly tried to show why it is improper to force a civil matter into a criminal regime.

In the upshot, I allow the appeal. I hereby quash and set aside the trial court's conviction and sentence and release the appellant from all unlawful orders imposed.

It is so ordered.

E.I. LALTAIKA
Judge
26/6/2023

Court

Judgement delivered this 26th day of June 2023 in the presence of the appellant and in the absence of the respondent.

E.I. LALTAIKA
Judge
26/6/2023