

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA**

CRIMINAL APPEAL NO. 19 OF 2022

*(C/f Criminal Appeal No. 7 of 2021 District Court of Babati at Babati, Original Criminal Case No. 69 of
2021 Galapo Primary Court)*

MICHAEL KITUMI MOLLEL APPELLANT

VERSUS

HAMIDU JUMA RESPONDENT

JUDGMENT

14th & 30th June, 2023

TIGANGA, J.

The appellant, Michael Mollel was charged and convicted by Galapo Primary Court (the trial court) for the offence of obtaining money by false pretence contrary to section 302 of the Penal Code, Cap 16 R.E. 2019 (the Penal Code). He was aggrieved by the decision, hence appealed to the District Court of Babati at Babati in Criminal Appeal No. 7 of 2022 in which the trial court's decision was upheld.

The brief factual background of this appeal as reflected from the subordinate courts' records is to the effect that on 19/04/2020 at Gereji ya Bonge area, Galapo village within Gallapo Ward in Babati District the

appellant with intent to defraud obtained Tshs. 3,000,000/= from the respondent. According to the evidence he asked for the money Tshs. 3,000,000/= so that he could service a tractor and in return he cultivates the respondent's farm. The transaction was conducted at a garage called "Gereji ya Bonge" which serviced the said tractor but after the service, the appellant did not bother to honour the agreement of cultivating the respondent's farm, instead, he disappeared.

In his defence, he did not say much about whether or not he was indebted. He just explained how he was arrested. The trial court found him guilty, convicted him and sentenced him to pay Tsh. 300,000/= fine or serve two months imprisonment. He was also ordered to pay back Tshs. 3,000,000/= owed to the respondent. He was dissatisfied by the decision hence, appealed to the first appellate court which upheld the decision hence the current appeal with three grounds as follows;

1. That, both the first appellate and trial court erred in law and facts in delivering judgment in favour of the respondent while the respondent failed to prove the case to the standard required by him.
2. That, both the first appellate and trial court erred in law and facts in failing to evaluate properly the evidence before it.

3. That, both the first appellate and trial court erred in law and facts in failing to observe the law during the determination of the matter.

Hearing of the appeal was by way of written submissions, the appellant appeared himself and unrepresented whereas the respondent never made appearance consequent of that non-appearance the appeal proceeded ex-parte against him.

Starting with the first ground of appeal, the appellant claimed that, the subordinate courts erred in delivering judgment in favour of the respondent while the case was not proved beyond reasonable doubt as required under section 3 (2) (a) of the **Evidence Act**, [Cap 6, R.E. 2019] (the Evidence Act). He argued that, there is no written agreement between him and the respondent regarding the money owed. According to him, the respondents' witness testified on seeing him being given money by the appellant, to wit; 2,000,000/= but in the absence of any written agreement, the evidence remained weak to hold a conviction against him.

On the second ground, he argued that, the subordinate courts failed to properly evaluate the evidence before it. He mentioned that, there were witnesses who contradicted each other on how much the accused person was indebted or on the amount of money they saw given to the complainant.

In his view, had they analysed the evidence thoroughly and determined the raised issues, they would have reached to just decision.

On the third ground, it was the appellant's submission that this case against the accused person was not proved beyond reasonable doubt as per section 3 (2) (a) of the Evidence Act. He contended that there were a lot of doubts in the evidence by the prosecution, which did not warrant his conviction. To support his argument he cited the case of **William Ntumbi vs Director of Public Prosecution**, Criminal Appeal No. 320 of 2019, where it was held that, for a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person. He prayed this court to allow the appeal with cost.

After going through both parties' submissions and the trial court's records, I find the main issue which calls the decision of this court is whether this appeal has merits. In resolving this issue I will now start with the first ground of appeal which is whether the case against the appellant was proven to the required standard. This being the second appeal, I will be guided with the principle elucidated in the case of **Abdully Ally vs. The Republic**, Criminal Appeal No. 389 of 2021, CAT at Dsm (unreported) that;

*"We are not losing sight that, this being the second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there are no mis-direction or non-directions on evidence. However, where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence with a view of making its own findings. See for example **Director of Public Prosecutions vs. Jaffari Mfaume Kawawa** [1981] TLR 149, **Salum Mhando v. Republic** [1993] TLR 170 and **Mussa Mwaikunda v. The Republic** [2006] TLR 387."*

Having the above principle in mind, it is undisputed that, the appellant was charged with and convicted of the offence of obtaining money by false pretence contrary to section 302 of the Penal Code. The section reads;

"Any person who by any false pretence and with intent to defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen, commits an offence and is liable to imprisonment for seven years."

This offence is defined in section 301 of the same law which states that;

"Any representation by words, writing or conduct of a matter of fact or of intention, which representation is false and the person making it knows to be false or does not believe to be true."

In the case of **Gaudence Sangu vs. The Republic**, Criminal Appeal No. 88 of 2020 CAT at Mbeya (unreported), the Court of Appeal mentioned the major ingredients to be proved in the offence of obtaining money by false pretence. It held thus;

*"The offence of obtaining money by false pretence is committed when two ingredients exist that is to say; false representation and intent to defraud. See; **Juma Swalehe v. Republic** [2003] T.L.R. 304."*

Applying the above authorities in the appeal at hand, the appellant challenged the trial court for finding him guilty and the first appellate court in upholding such a decision while the case against him was not proved to the required standard. He argues that had these courts properly evaluated the evidence, they would have decided otherwise as there was no written agreement. I took the liberty of going through each of the prosecution witness and their testimonies. As intimated briefly hereinabove, they successfully showed that, the appellant herein asked for his tractor to be serviced and as the costs of such service he was supposed to cultivate the respondent's farm. He was initially given Tshs. 2,000,000/= a transaction which was done in the presence of PW4 at his garage, who also was a mechanic who serviced the said tractor. After four days, they met again at

the same garage, where the appellant asked the respondent for Tshs. 500,000/= so that he could take care of his sick wife, the amount which he was given. After 14 days, they met again at the same garage after the tractor was ready and the appellant asked the respondent for another Tshs. 500,000/= for fuel so that they start the cultivation, he was given such money, but instead of doing the job, he disappeared until when he was arrested.

From the evidence, all of the ingredients of the offence to wit; false representation and intent to defraud were proved. The appellant took a total of Tshs. 3,000,000/= from the respondent on an agreement that, he will cultivate his farm after servicing the tractor but did not bother to honour such agreement as he disappeared until when he was arrested. This proves that he intentionally deceived the respondent to get the money knowing that, he will never cultivate his farm as promised.

The appellant also challenged the fact that there was no written agreement between him and the respondent. This will not detain me much. Looking at the trial court's records, it is undisputed that, there was no written agreement but an oral one and proving the terms of an oral contract such

as the one challenged by the appellant, is a pure question of facts. Most often, it is established through the oral testimonies of the parties and of the persons who were present during the formation of the agreement. Proof of oral agreements may also be inferred from the conduct of the parties prior to and after the formation of the agreement. All three types of evidence have been demonstrated in the present case. As the testimonies of PW1, PW3 and especially PW4 who were present when the oral agreement was entered his uncontroverted testimony even during cross-examination attracts considerable weight. That said, there was no evidence to discredit prosecution evidence that, there was an oral contract between the parties but the appellant knowingly did not intend to honour such agreement but rather deceive the respondent into lending him money to service the tractor knowingly that he will not cultivate the appellant's farm as agreed.

Looking at the appellant's defence, he did not say much to rebut the fact that, he was owed by the respondent instead he narrated how he was arrested. Although it is a criminal trite principle that, it is not the duty of the defence to prove his innocence but the prosecution to prove the case at the required standard, I am of the profound view that, the appellant managed to prove his case beyond reasonable doubt against the respondent.

Apart from that, during the trial before the trial court, the appellant did not cross-examine the respondent on the crucial issues regarding the matter at hand. In the case of **The Director of Public Prosecutions vs. Justice Lumima Katiti & 3 Others**, Criminal Appeal No. 15 of 2018 CAT at Dsm (unreported), the Court of Appeal had this to say regarding failure to cross-examine on crucial matters:

*"It is a known principle of law that failure to cross-examine on a material point is taken to be admission of the fact in question. [See. **Nyerere Nyague vs. The Republic**, Criminal Appeal No. 67 of 2010 cited in **Chora Samson @ Kiberiti v. Republic**, Criminal Appeal No. 516 of 2019 (both unreported)]. In addition, cross-examination has the object of advancing the version of the party cross-examining. In **Haji Manelo Bonye v. Republic**, Criminal Appeal No. 338 of 2008 (unreported) quoting **Goodluck Kyando** (supra) it was stated that:-*

"The object of cross-examination is-

- (i) To elicit from the witness evidence supporting the cross-examining party's version of the facts in issue;*
- (ii) To weaken or cast doubt upon the accuracy of the evidence given by the witness in chief; and*

(iii) In appropriate circumstances to impeach the witness's credibility. (emphasis supplied)."

Considering the fact that the respondent had time to cross-examine the appellant and all his witnesses regarding the Tshs. 3,000,000/=, but his cross-examination did not raise any doubt strong enough to discredit the prosecution's evidence on that aspect. In that regard, I do not see misapprehension of justice, mis-directions or non-directions of the evidence which require me to interfere with the concurrent findings of the subordinate court.

With the above analysis, I find the appeal to have no merit and proceed to dismiss it in its entirety. The appellant's conviction was deserving, thus, the subordinate courts' decisions are hereby upheld.

It is so ordered.

DATED and delivered at **ARUSHA** this 30th day of June, 2023




J.C. TIGANGA

JUDGE