

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

**DC. CRIMINAL APPEAL NO. 56 OF 2022**

*(Arising from the decision of the District Court of Tabora in  
Criminal Case No. 70 of 2021)*

**MONICA PAULO @ CHIZA..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 04/08/2023*

*Date of Judgment: 09/08/2023*

**KADILU, J.**

The appellant is challenging the conviction and sentence meted out to her by the District Court of Tabora in Criminal Case No. 70 of 2021. The appellant was charged with the offence of obtaining money by false pretence contrary to Section 302 of the Penal Code, [Cap. 16 R.E. 2019]. According to the particulars of the offence, she was charged jointly with other two persons to have falsely pretended and obtained Tshs. thirty million (30,000,000/=) from one Alicia Bihagazi after selling to her a house on plot number 218 Block RR-Ng'ambo area while knowing that the same was a collateral which was to be auctioned by NMB due to default to repay the loan.

During the trial, the prosecution side called five witnesses and tendered several exhibits to prove that the appellant committed the charged offence whereas the defence paraded three witnesses, being the accused persons themselves. At the conclusion of the trial, the appellant was found guilty and sentenced to serve three years imprisonment while her co accused were acquitted. She was as well ordered to pay compensation of Tshs. thirty million (30,000,000/=) to the family of the

victim of the crime who by that time had already passed away. The conviction and sentence aggrieved the appellant. She decided to appeal to this court against both the conviction and sentence. Through the service of Ms. Stella Thomas Nyakyi learned Counsel, the appellant filed three grounds of appeal which were as follows: -

- 1. That, the Senior Resident Magistrate erred in law and facts by holding that the appellant was the sole blameworthy party while the evidence proves otherwise.*
- 2. That, the Senior Resident Magistrate erred in law and facts to convict the appellant of the offence of obtaining money by false pretence while the prosecution fails to prove the offence to the standard required.*
- 3. That, the Senior Resident Magistrate erred in law and facts for not considering the appellant's evidence thus she was just a mere witness.*

When the appeal came up for hearing, the appellant was represented by Advocate Stella Thomas Nyakyi whereas the Republic was represented by Mr. Steven Mnzava, learned State Attorney. Submitting on the first ground of appeal, Ms. Nyakyi submitted that the prosecution had a duty to show that the appellant made false pretence or misrepresentation and as a result, she obtained money from the victim.

The learned Advocate argued that PW1 testified that the house owner was the appellant's husband one Daud Elias Zakaria and after the sale, the money was deposited to the bank account No. 51002505119 in the NMB belonging to one Nestory Elias Zakayo, the appellant's brother-in-law for the reason that the appellant's husband had no bank account

with the NMB. The said Nestory Elias Zakayo withdrew from his bank account Tshs. 25,975,000/= on the same day and allegedly, handed it over to his brother, the appellant's husband. According to Ms. Stella, there is no proof that the appellant obtained money from the victim or from Nestory Elias Zakayo, (DW2).

Submitting on the second ground of appeal, Ms. Nyakyi argued that evidence of the prosecution is very clear that it was PW1 who requested to buy a house from Daud Elias Zakaria and that the appellant was a mere witness to the sale agreement, which is not a crime. She cited the case of ***Method Kaluwa Chengula v. R.***, Criminal Appeal No. 92 of 2021, Court of Appeal of Tanzania at Dar es salaam in which it was held that one should not be convicted of obtaining money by false pretence by merely witnessing another person doing it.

On the third ground of appeal, Ms. Nyakyi submitted that the appellant testified that she knew nothing about her husband's default to repay the loan. She said she was only called to sign several documents on account of being the borrower's wife. She concluded that if the trial court could have considered the appellant's evidence and evaluate it properly, it would not have convicted the appellant of the offense of obtaining money by false pretence as it did. On the strength of those arguments, Ms. Nyakyi prayed this appeal to be allowed. She urged the court to quash the decision of the trial court and set aside conviction and sentence.

In reply to the appellant's submissions, Mr. Steven opposed the appeal generally and submitted that all elements of the offence the appellant was charged with were proved without leaving any doubt. He

stated that the trial court's typed proceedings show that the victim was informed by DW3 that the house in question was owned by the appellant and her husband. Subsequently, the husband signed a contract of sale as well as the appellant as the co-owner of the house. The learned State Attorney referred to exhibit PY, contract of sale which provides in clause 6 that by signing the agreement, the sellers admit to have received Tshs. 30,000,000/= as sale price for the house.

It was further submission by Mr. Steven that the appellant acknowledged to have received the said money from the victim and that she never disputed it while testifying at the lower court or cross examine the prosecution witnesses on that point. The learned State Attorney explained that, it is a known principle of law that failure to cross-examine on a material point is taken as an admission of the fact in question. He made reference to the case of ***Nyerere Nyague v. R.***, Criminal Appeal No. 67 of 2010, cited with approval in ***Chora Samson @ Kiberiti v. R.***, Criminal Appeal No. 516 of 2019.

Regarding the third ground of appeal, it was Mr. Steven's submission that in any disposition of matrimonial house, the wife's consent is vital and without it, no disposition can be effective as approval for disposition would not be granted by the Commissioner for Land. He cited Sections 59 (1) of the Law of Marriage Act, [Cap. 29 R.E. 2019] and Section 114 (1) of the Land Act [Cap. 113 R.E. 2019]. He expounded that proceedings of the trial court reveal that, the appellant had consented to the loan advanced to her husband by signing the spousal consent form.

In regards to the second grounds of appeal, the learned State Attorney submitted that for the offence of obtaining money by false

pretence to be established, prosecution side has to prove beyond reasonable doubt that the accused made false pretence or misrepresentation and he or she did obtain money as a result of his false representation. The same position was observed in the case of ***Juma Swalehe v. R.***, 2003 TLR 304 in which it was held that for the offence of obtaining money by false pretence to stand, two things must be established; false representation and intent to defraud which led to obtaining money.

Mr. Steven argued that, the case of ***Method Kaluwa Chengula v. R.***, cited by the appellant's Advocate is distinguishable from the instant case to the extent that, the appellant in this case did sign the contract of sale of the disputed house together with her husband as the sellers as referred in Exhibit PY. He said, at pages 7, 15 and 32 of the proceedings, prosecution witnesses explained how the appellant did misrepresent that they are lawful owners of the house and the said house was free from any incumbrances. Relying on that representation, the victim decided to buy the said house, something which turned to be her detriment. Finally, Mr. Steven prayed the appeal to be dismissed and decision of the trial court to be upheld.

In rejoinder, Ms. Nyakyi submitted that the trial court's records and evidence indicate nothing about the appellant making fraud and receive the money rather than being a witness who only signed the sale contract. She further submitted that the loan was obtained by appellant's husband, the appellant only consented as the wife hence, the defaulter was not the appellant but her husband. She maintained that the appellant did not commit the charged offence so, she prayed the court to allow the appeal.



I have considered the competing arguments of the parties and I am of the view that the task of this court is now to re-examine evidence presented to the trial court and find out whether the appeal is meritorious or otherwise. As already shown, the appellant was charged with the offence of obtaining money by false pretence contrary to Section 302 of the Penal Code, [Cap. 16 R.E. 2019]. This offence is also referred to as fraud or deception. It typically involves the intentional misrepresentation of facts or the use of deceitful tactics to obtain money, goods, or services from another person. Its specific elements may be varying depending on the jurisdiction, but according to the Black's Law Dictionary, false pretence generally involves:

- (a) False representation; the offender makes false statements, representation, or pretence to the victim. This can be in the form of oral or written statements, actions, or any other means of communication.*
- (b) Knowledge of falsity; the offender must be aware that the representation is false at the time it is made. In other words, he is knowingly and intentionally misleading the victim.*
- (c) Intent to deceive; the offender must intend to deceive the victim by making false representation. The intention must be to induce the victim to rely on false statements made by the offender.*
- (d) Reliance; the victim must reasonably rely on the false representation made by the offender. His reliance on false statements is a crucial element of the offense.*
- (e) Obtaining property or money; as a result of false pretence, the offender must obtain property, money, or some other benefit from the victim. The offender gains something of value through his fraudulent actions.*
- (f) Unlawful gain; the property or money obtained by the offender must be acquired unlawfully. The acquisition is achieved through deceit, fraud, or other dishonest means.*

In the instant appeal, the appellant represented to be one of the owners of the house while knowing the same to be false. The purpose was to induce the victim to purchase the said house from the appellant and her husband. At the end of the trial, the court was satisfied that ingredients of the charged offence were established to the standard required by the law. It then convicted and sentenced the appellant to three years imprisonment. She was also ordered to compensate the family of the victim to the tune of Tshs. 30,000,000/= being purchase price received by the appellant's husband for the sale of the house in question.

The trial court found that there was no doubt that the late Alicia Bihagazi (victim) paid to the appellant's husband Tshs. 4,000,000/= cash and deposited Tshs. 26,000,000/= in the bank account No. 510002505119 owned by the appellant's brother-in-law (DW2) for the purchase of the house with descriptions of plot No. 218 "RR" H/D at Ngámbo area. The court was satisfied as well that the said brother-in-law withdrew from his bank account Tshs. 25, 975,000/= as shown in exhibit 3E, the money which was handed to Daud Elias @ Zakayo, the appellant's husband.

According to Mussa Rashid @ Busuhwa, who was a middleman locally known as *Dalali* and who was involved in the initial stage of inspection of the house in question and during the purchase, the late Alicia was attracted by the house after having showed it to her via WhatsApp photos. When Alicia arrived at Tabora, Busuhwa took her to the said house where they first met the appellant before her husband joined them later. No doubt, the appellant and her husband were involved in selling the said house to the victim and the evidence indicates that they received the said

amount from the victim through the husband's brother, one Nestory Elias Zakayo.

It is now an established position of law in this jurisdiction that where a point is not cross-examined upon, it cannot later be challenged as it is considered as admitted. See ***Nyere Nyague v. R.***, (*supra*) where it was held that:

*"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."*

Other cases on that subject include ***Damina Luhere v. R.***, Criminal Appeal No. 501 of 2007, and ***George Maili Kemboge v. R.***, Criminal Appeal No. 327 of 2013 both decided by the Court of Appeal.

Ms. Nyakyi was of the view that the appellant knew nothing about the loan and that her husband defaulted to repay it, not her. It was asserted that it was the husband who made follow up of the loan and the appellant was only called to sign several documents on the account that she is Daud's wife. Ms. Nyakyi's view is not supported by the evidence on record. According to the record at page 39 of proceedings, PW4 who was the loan officer at NMB at the time the loan was advanced narrated that, the loan which was obtained by the appellant's husband was consented by his wife, the appellant. This proves the existence of common intention between the appellant and her husband.

I also revisited page 32 of the proceedings where PW3 (Advocate Lucas Ndanga) narrated that on the 4<sup>th</sup> day of May 2020, the appellant and her husband went to his office and requested him to prepare a contract of sale of the house between them and the victim. After preparing



the said contract, both the appellant and her husband signed it. The contract itself explain who are the sellers and they guaranteed that the said house had no encumbrance whatsoever. All these show that the appellant and her husband jointly made false statements, representations or pretence to the victim while knowing the same to be false at the time they were made. The representations were acted upon by the victim to the advantage of the appellant and her husband.

Based on the above reasons, this court holds that the case in the trial court was proved against the appellant beyond reasonable doubt and there is nothing to fault the findings by the trial court. Accordingly, the appeal is dismissed for lack of merits. However, this court is not yet done with the sentence meted upon the appellant. In the trial court, the appellant was convicted for obtaining money by false pretence from Alicia Bihagazi, Tshs. 30,000,000/=. After the conviction, punishment for this offence is provided under Section 302 of the Penal Code:

*"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, is guilty of an offence and is liable to imprisonment for seven years."*

After convicting the appellant, during mitigation it was alleged that the appellant was too young to be in jail custody, she was the first offender and she is a mother and father to her children after the husband had deserted her, so she deserves leniency. As a result, the trial court sentenced her to serve three years imprisonment. It came up before hearing of this appeal that, the appellant was pregnant. For that reason, her Advocate made an application to this court to grant the appellant bail pending appeal. The application was granted. It also happened on the day

of delivering judgment of this appeal that, the appellant has an infant/a newborn aged forty (40) days only, making it inexpedient to inflict the sentence of imprisonment on her.

In the circumstances, although this court has maintained conviction of the appellant in Criminal Case No. 70 of 2021, I find it inevitable to alter the sentence imposed to her after the conviction. As such, I hereby alter the nature of the sentence by discharging the appellant under Section 38 (4) of the Penal Code [Cap. 16 R.E. 2022] and invoke the provisions of Section 366 (1) (b) of the Criminal Procedure Act, [Cap. 20 R.E. 2022] to order the appellant, Monica Paulo @ Chiza to pay compensation of Tshs. thirty million (30,000,000/=) to the family of the late Alicia Edward @ Bihangazi. Right of appeal is explained for any party aggrieved by this decision.

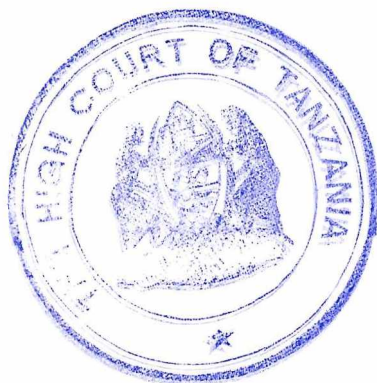
**It is so decided.**

  
**KADILU, M.J.**

**JUDGE**

**09/08/2023.**

Judgment delivered in chamber on the 9<sup>th</sup> Day of August, 2023 in the presence of Mrs. Monica Paulo @ Chiza, the appellant and Mr. Dickson Swai, State Attorney for the respondent.



  
**KADILU, M.J.,**

**JUDGE**

**09/08/2023.**