IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

PC. CRIMINAL APPEAL NO. 6 OF 2023

(Arising from Criminal Appeal NO. 1 of 2023 in the District Court of Mbeya before Mbeya Hon. P.J Rupia S.R.M, originated from criminal case No. 571/2022 in Mwanjelwa Primary Court)

LUGANO S/O MWAIJUKI.....APPELLANT

VERSUS

FESTO S/O DAIMON.....RESPONDENT

JUDGMENT

Date of last Order: 3/07/12023

Date of Judgement: 28/8/2023

NONGWA, J.

Previously, the respondent in this case was charged at Mwanjelwa Primary court for the offence of obtaining money by false pretense contrary to section 302 of penal code [Cap. 16 R.E 2022]. It was stated in the charge sheet of the trial court that on December 2021 at airport area within Mbeya region, the respondent took money from the appellant to wit 3,179,000/= on the promise that he will give timber to the appellant but he did not comply with the promise. At the end of hearing the trial court found that the case was proved then convicted and sentenced the respondent to conditional discharge for three months and an order to pay the appellant 2,500,000/=.

Aggrieved with the decision of the trial court, the respondent appealed at district court with two grounds of appeal that the learned trial magistrate erred in law and in fact by convicting the appellant on the charge which was not proved to the required standard and by convicting the appellant while the case was civil one and not criminal case as per law.

After determination of appeal, the district court had same view as the trial court that the case was proved because the respondent herein did not deny the fact that the appellant demanded money from him but the amount that the appellant alleged is not true. That the amount that appellant demanded from him is only 1,300,000/=, the district court in exercise its appellate jurisdiction varied the decision of primary court and reduced the amount from Tshs.2,500,000/= to Tshs.1,300,000/= which the respondent agreed that it is the amount which respondent demand from him and the sentence for conditional discharge remained the same.

The appellant herein dissatisfied with the decision of the district court filed this appeal which contain two grounds of appeal that;

1. That the District court erred in law and facts by reaching its decision without considering and evaluating evidence of the appellant that was tendered at the trial court.

2. That the district court erred in law and facts for failure to rise the amount of compensation from Tshs.2,500,000/= to Tshs.3,179,000/= basing on the evidence tendered by the in the trial court.

In this appeal, the appellant appeared in person while the respondent under representation of Mr. Alfred Chapwa Learned Advocate.

During hearing, the appellant on the 1st ground, the appellant argued that the district court did not consider and evaluate evidence of the appellant. That the magistrate reduced the amount he was supposed to be paid saying the appellant was not allowed to lend money on the ground that he had no license to give loan to the respondent while the appellant had documentary and electronic evidence together with witnesses enough to give weight to appellant's case.

The appellant argued further that the respondent had no tangible evidence at trial as he admitted that he borrowed Tshs. 760,000/= but actually borrowed 800,000/= returned 350,000/= while remaining with 400,000/= which he paid later thus he contradicted himself. The appellant contented further that in the District Court, the magistrate gave the decision as if the appellant landed the money to the Respondent, while at the trial court he filed a Criminal Case and not a Civil case.

On the on the 2nd ground, the appellant submitted that the court at the district level ought to have raised the amount after considering the electronic evidence that was not considered at the primary court level. That the district court had power to raise the amount the respondent was liable after looking into the evidence tendered at the trial court. He therefore, prayed that this court to raise the amount the respondent is liable and consider appellant's submission and order respondent to pay the costs and any other relief that the court deems fit.

The respondent counsel objected the appeal, submitting that the district court considered the evidence on record, referring page 5 of the trial court proceedings where the appellant stated to have given Tshs.1,300,000/= to the respondent and that the rest Tshs.350,000/= was given to one Bariki not respondent and Tshs.450,000/=was sister's debt. In those circumstances the evidence does not connect the respondent to all amounts.

On the 2nd ground the counsel argued that the ground is on profit of 2nd trip of goods. However, it is not clear about the value of the goods and what profit was expected. On page 17th of primary court proceedings, the respondent admits to be indebted Tshs.1,300,000/= on which the appellant also admits to have lent the respondent and therefore, district

court was right, nowhere Tshs.2,500,000/= is read from the proceedings of trial court, but on the 6th page of the Judgment the court states that the respondent is supposed to pay Tshs.2,500,000/= which is not right.

Referring the 3rd page of district court judgment, the Counsel argued that the court removed the amount of Tshs.2,500,000/= which both sides admitted and is clearly shown on the records. That is where the appellant argues that it was not a business of lending money. At page 3 of the Judgment, the district court stated that if it was not a criminal case it could be decided otherwise, because criminal case has to be proved beyond reasonable doubt. As such the district court was right in its decision.

On the weight of evidence tendered at the trial court, the counsel argued that from the proceedings of trial court, page 4, 5, 6 and 7 nowhere documentary or electronic evidence is seen to have been tendered. He referred page 6 of the trial court judgment arguing that the appellant was satisfied with the decision as he did not even appeal while the respondent not satisfied appealed, this court therefore, cannot add up the amount a thing which was not raised at the district court as first appellate court. That it was proper for the district court using its powers under section 21 (1) (b) of MCA Cap. 11 R. E. 2019 reducing the amount

as it was not reflecting in the proceedings. The counsel prayed this appeal be dismissed.

Having carefully considered the court records, grounds of appeal and submissions from both parties, I will not dot make deliberation on the grounds of appeal and their submission made by the parties in this appeal for the reason I intend demonstrate bellow.

I wish to re state the long-established principles in criminal justice that the onus of proof in criminal cases, that the accused committed the offence for which he is charged with is always on the side of prosecution and not on the accused person. The court of Appeal in Tanzania in the case of **Mohamed Haruna @ Mtupeni & Another v Republic**, Criminal Appeal No. 25 of 2007 (unreported) held that;

> *"...of course, in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proof beyond a reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case"*

Also, I am aware with the position of the law that the trial court is better placed at assessing the evidence of witnesses than an appellate court. As such an appellate court is precluded from interfering with the

assessment of evidence by the trial court save where there are compelling circumstances or reason to do so. These could be where there are material contradictions in the testimony of witnesses or where there are mis-directions, non-directions, mis-apprehensions, or miscarriage of justice. This was stated in number of court decisions including the cases of **Jaffari Mfaume Kawawa** [1981] TLR 149 **Bakari Abdallah Masudi v Republic,** Criminal Appeal No. 126 of 2017 (unreported), **Ally Mpalagana v Republic,** Criminal Appeal No. 213 of 2016 (unreported), **Musa Mwaikunda vs Republic;** Criminal Appeal No. 174 of 2016 (unreported) and **Michael Alias Republic,** Criminal Appeal No. 243 of 2009 (unreported)

In this case, at the trial court the responded was charged with the offence of obtaining money by false pretence contrary to section 302 of penal code. The section reads that 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 to deliver to any other person anything capable of being stolen, is guilty of an offence and is liable for imprisonment for seven years.

I have perused the court records in particular trial court record on the offence the respondent was charged with and the evidence presented

by the appellant together with his witnesses to prove the charge and come with the following issues;

1. *whether the evidence adduced by the appellant at the trial court together with his witness proved the offence of obtaining money by false pretence and*
2. *Whether the trial court and district court discharged its burden of evaluating and analyzing the evidence adduced at trial court*

I will discuss both two issues collectively, it should also be noted that the respondent in this appeal after being convicted and sentenced by the trial court he lodged his petition of appeal to the district court and on the second ground of appeal he claimed that the learned trial magistrate erred in law and fact by convicting and sentencing the appellant while the case was civil one and not criminal case as per evidence tendered.

I have gone through the evidence adduced by the appellant in this case, there was no dispute that the appellant and respondent were conducting a business of timber which was like a joint venture, in course of doing such business the appellant gave money to respondent, but it seems their business on part of respondent went wrong as the result the appellant started to claim to be refunded his money from the respondent, the fact which was not disputed by the respondent at the trial court but

the only dispute was on the amount claimed, while the appellant claimed the amount of 3,179,300/=, the respondent agreed the amount of 1,300,000/=

For clarity, the appellant at the trial court testified that;

"Katika kufanya biashara SUI alikuja kwa lengo la kuunganisha nguvu ya pamoja, tuanze pamoja biashara ...tulimpa laki tano ampe mtu huyo kwaajili ya kibali.... mzigo uliisha, bariki alikuwa anadai fedha. ndipo tuliporudi kwa SUI kuuliza imekuaje. Na mshitakiwa akadai hela ametuma kwenye msitu ambapo atachana mbao na kurejesha hela....baada ya SUI kueleza kuwa atachana mbao ili alipe deni ikabidi tupigiane mahesabu....SUI akasema tutoe mbao na kumuacha na deni analodaiwa na tulifanya hivyo deni analodaiwa ni 3,885,950/= na katika kiwango hicho pia tulitoa faida aliyochangia. Baada kutoa garama, faida na fedha aliyochangia deni linalobaki ni 3,179,300/= na alisema anaweza anaweza kulipa fedha au mbao. Baada ya kuona siku zinaenda na hatekelezi anavyoahidi nikamtafuta lakini bado akawa anasumbua. Nilipompigia tena simu akasema atalipa deni... tumefika hapa mahakamani".

From the above piece of evidence quoted from the evidence of the appellant together with his witnesses tendered at the trial court, I find that the appellants evidence was not proving the offence of obtaining money by false pretense because there was no proof that the respondent had intent to defraud, even the respondent himself on his defense narrated on how he faced some obstacles in course of doing such business as a result he failed to get the appellant money on time. I find that this

case was fit to be instituted as normal civil case and not criminal case as it was instituted at the trial court, this is in accordance with the evidence available in the trial court record.

It is the findings of this court that being a criminal case at the trial court the case was not proved beyond reasonable doubt, the judgment and proceedings of both trial court and district court are set a side, the appellant if still wishes, he may file his case in the proper forum or right track which is a normal civil suit. Appeal is hereby dismissed.

It is so ordered.

Dated and **Delivered** at Mbeya this 28th August, 2023 in presence of the appellant only.

V. M. Nongwa

Judge