THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

PC CRIMINAL APPEAL NO 1 OF 2023

(Emanates from the decision of Mbeya District Court in Criminal Appeal No. 15 of 2022, originated from criminal case No. 407 of 2021 of Mbalizi Primary Court)

STEVEN NZUNDA.....1ST APPELLANT

JACOBU SHUNGU.....2ND APPELLANT

VERSUS

JONAS ZAMBI.....RESPONDENT

JUDGMENT

Date of hearing: 10/07/2023

Date of judgment: 21/8/2023

Nongwa, J.

The appellants in this appeal were charged, convicted and sentenced before Mbalizi Primary court (the trial court) with the offence of obtaining money by false pretense contrary to section 304 of Penal Code [Cap 16 R.E 2019], It was alleged that the appellants herein and one Wile Njosi who is not part of this appeal, on 25/03/2019 around 01:00 Pm at Malowe Village, Mbeya Rural District within Mbeya Region by false pretense obtained money from one Jonas Zambi to wit 7,000,000/=.

Aggrieved with the decision of the trial court, the appellants appealed at District court on three grounds of appeal as follows; firstly,

that the trial primary court erred in law and in facts in convicting the appellants while the respondent failed to prove his case on the standard required. Secondly, that the trial primary court erred in law and facts as it failed to analyze properly the evidence adduced by the appellants hence arrived at wrong decision and thirdly, that the trial court erred in law and facts in reaching its decision because there was no enough evidence to prove the offence against the appellants. The district court ordered the appeal to be disposed by way of written submission but respondent never filed reply to submission in chief. After determination of the appellants appeal the district court upheld the decision of the trial court on the reason that the evidence of the trial court shows clearly that the accused persons used false pretense of being witchdoctors to extort money from the respondent.

Still aggrieved with the decision of District court the appellant lodged this appeal based on four grounds;

1. That the District court erred in law and facts in upholding the decision of Mbalizi primary court while the respondent failed to prove the case on the standard required by law.

2. That the District court erred in law and facts in convicting the appellants while it failed to properly analyze and evaluate the evidence adduced by the herein.
3. The district court erred in law and in facts in upholding the decision of primary court while the respondent never defended his case in appeal stage.
4. That the trial court erred in law in convicting the appellant.

By request of parties, the appeal was ordered to be disposed by way of written submissions, the appellants complied with scheduling order but respondent filed his reply out of scheduled time and the court considered this as non-appearance on party of the respondent, this submission is therefore not considered.

In summary the appellants in their submission in chief on the 1st ground, submitted that the case was not proved to the standard required by law. He cited the case of **Joseph John Makune vs Republic [1986] TLR, 44** that, the cardinal Principal of law is that the burden is on the prosecution to prove its case. The burden is not cast on the accused to prove his innocence, there are few known exceptions to this principle, one being where the accused raises the defense of insanity in which case he must prove it on the balance of probability.

The appellants submitted further that, the record of the trial court shows that the respondent went to court with his sons and their testimony were contradicting each other, that the wife of the respondent never appeared to testify on anything happened in their family as was alleged to be sick.

On the 2nd ground the appellants submitted that it was the duty of District court to re-evaluate evidence adduced by parties in the trial court but the district court never considered the written submission filed by the appellant even the evidence recorded by the trial court and upheld the unjust decision of the trial court. They cited the case of **Ndizu Mgasa vs Masisa Magasha** (1999) TLR 202, in which the Court of Appeal had insisted the duty of the court to reevaluate the evidence a fresh. That the first appellate court neglected its duty as a result ended upholding the decision of the trial court.

On the 3rd ground the appellants argued that at the 1st appellate court they agreed to argue appeal by way of written submission but respondent never filed his submission as agreed and scheduled by court, he argued that the effect of not filling written submission is equivalent to non-appearance at hearing or want of prosecution, they cited the case of **Kelvine Thobias Mvenile vs Republic,** Criminal Appeal No. 32 of 2022 on the consequences of failure to file written submission. It is the position

of the law that failure to file written submission on the date scheduled by the court, suggest absence of a party on hearing without notice and abuse of court process which can never be condoned.

From the above position it was the appellants' argument that the first appellate court erred in upholding the decision of the trial court while the respondent abused the court process. On the 4th ground the appellants argued that they were wrongly convicted.

Having carefully considered the court records, grounds of appeal and appellants' submissions in support of this appeal. I find the appeal raise two issues of determination namely;

1. whether the case was proved beyond the reasonable doubt at the trial court. (grounds No. 1, 2 and 4)
2. Whether the appellate court was correct to uphold the decision of the primary court while the respondent never defended his case at the appellate stage. (ground No. 3)

In my deliberation, I will start with the 2nd issue on whether the appellate court was correct to uphold the decision of the primary court while respondent never defended his case at the appellate stage. The appellants argued that the appellate court erred to uphold the decision of the trial court because the appeal at district court was ordered to be

disposed by way of written submission but the respondent never filed submission which is equivalent to non-appearance at hearing or want of prosecution, so he abused the court process. I settle with the appellants' submissions that failure to comply with scheduling orders of court to file written submission is as good as non-appearance on a date fixed for hearing. This was provided in case of of **Fredrick Mutafungwa versus CRDB 1996 Ltd and Others,** land Case No. 146 of 2004 CAT (unreported) where the court held that the practice of filing submissions is tantamount to a hearing and therefore failure to file submission has been linked to non-appearance or want of prosecution.

Also, in the case of **Ms. Olypia Cowero versus Editor of the Express and Three Others,** Civil case No. 176 of 2005 (unreported) it was held that where a party fails to file written submission in compliance with a scheduled order, the consequences are similar to those of failure to appear and prosecute or defend.

I have gone through District court record and find that the appeal was ordered to be argued by way of written submission but respondent never complied with scheduling order of filing submission. Under **Rule 17 (3) of the Judicature and Application of laws (Criminal Appeal and Revision in Proceedings origination from Primary Court**

Rules 2021, the law allows the appellate court to proceed with appeal in absence of the respondent where the appellant has appeared during hearing. In that regard the appellate court proceeded with hearing the appeal in absence of respondent submission however, the appellate court found that the appeal has no merit then it upheld the decision of primary court.

As to the 1st issue on whether the case was proved beyond the reasonable doubt at the trial court, it is clear from the records at the trial court the appellants were charged with the offence of **obtaining money by false pretense c/s section 304 of penal Code [Cap 16 R.E 2019]** this provision states that;

> *"any person who by means of any fraudulent trick or device obtain from any other person anything capable of being stolen or any other person to or deliver to any person anything capable of being stolen or to pay or deliver to any person anything capable of being stolen or to pay or deliver to any person any money or goods or any greater sum of money or greater quantity of goods than he would have paid or deliver but for such trick or device, is guilty of an offence and is liable to imprisonment for three years."*

To prove case complainant called three witnesses; the complainant himself Jonas Zambia (SM1), Sefania Sentikumi (SM 2) and Sylvester Jonas (SM3).

The complainant testified that his wife was sick and the first accused told him that his wife sickness is curable, after few days the first appellant arrived together with two accused persons to the complainant, they introduced to him to be witch doctors, they told him that his wife will be treated then they did some magical things and asked to be given 50,000/= by the Respondent. Then the appellants told the Respondent that they were going to report his matter to chief, after a while accused persons told complainant that the chief had accepted and his problem was to be treated at cemeteries, he was ordered to go with chicken and 100,000/= he went to cemeteries, and he was told by the appellants to obey all instruction he will be given and not tell any person, then they told him to sell all stocks of animals he had at his home on the reason that it has destroyed him and give money to the appellants, when he hesitated to obey with that instruction they threatened him as a result he sold all stock of animals he had and gave money to the appellants as per instructions to wit Tshs. 7,000,000/=. The appellants on their testimony denied all allegations.

The law is settled to the effect that every witness is entitled to the credence unless there are reasons to doubt the witness, as it was stated

in the case of **Goodluck Kyando Vs Republic,** Criminal Appeal No 118 of 2003 (CAT, unreported) it was held that

Going through the proceedings of the trial court, I find that the evidence of the complainant who is the respondent, mentioned the appellants on commission of the offence charged with, however, the record does not indicate the appellants' cross examination on the whole evidence adduced by respondent. The law is settled to the effect that facts not cross examined are taken to have been accepted by the Party affected. In the case of **Bakari Abdallah Masudi vs The Republic,** Criminal Appeal No. 126 of 2017 at page 11 the Court of Appeal held that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence on that aspect.

Arguing on the first ground, the appellants submitted that the respondent and their witnesses' testimony were contradicting each other and the wife of respondent was not called to testify on what transpired in their family for it was alleged she was sick.

Starting with contention that the wife of respondent was not called to testify at the trial court, it is a settled law that no number of witnesses required to prove the existence of the particular fact. This is provided under section under section **143 of The Law of Evidence Act [Cap 6**

R. E 2022], that no number of witnesses shall in any case be required to the proof of any fact.

It is also a settled position of law that party to a suit is obliged to call witness if such witness is material witness. This was also stated in the case of **Hemedi Said vs Mohamedi Mbilu [TLR] 113,** that where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interest.

In this case at the trial court, complainant called Sefania (SM2) and Sylvester Jonas (SM3). In my opinion these were material witnesses in accordance with their testimonies as appears in proceedings of the trial court compared to the wife of the complainant/respondent who witnessed nothing.

It is a trite 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 unless 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, as it was stated in number of

court decisions including the cases of **Bakari Abdallah Masudi v Republic**, Criminal Appeal No. 126 of 2017 (unreported); **Ally Mpalagana v Republic**, Criminal Appeal No. 213 of 2016 (unreported); **Jaffari Mfaume Kawawa** [1981] TLR 149, **Musa Mwaikunda vs Republic**; Criminal Appeal No. 174 of 2016 (unreported) and **Michael Alias Republic**, Criminal Appeal No. 243 of 2009 (unreported).

In the appeal at hand, the appellant argued that the witnesses' testimony on party of the respondent were contradicting each other but have not pointed at the alleged contradictions in order to enable this court to see if there were any and whether they are material contradictions which goes to the root of the case or not. I have also gone through the court record and discovered no contradictions to warrant interference on the findings of the trial court. Failures for the appellant to cross examine the whole evidence adduced by respondent renders the respondent testimony credible.

In that respect I find no reason to interfere with the findings of both lower courts, the appeal lacks merit hence dismissed.

Dated and **Delivered** at Mbeya this 21st August, 2023.

V. M. NONGWA
JUDGE