

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

(DC) CRIMINAL APPEAL NO. 19 OF 2023

(Originating from the District Court of Dodoma at Dodoma in Criminal Case No. 72 of 2022)

SALUM SHABAN JERRY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

30/5/2023 & 29/8/2023

KHALFAN, J.

The Appellant, Salum Shaban Jerry, was charged with and convicted of the offence of OBTAINING MONEY BY FALSE PRETENCE contrary to sections 301 and 302 of the Penal Code [Cap 16 R.E 2022] in the District Court of Dodoma at Dodoma. He was sentenced to serve six (6) month imprisonment and pay the victim of crime TZS 16,000,000/= immediately upon serving the said sentence; hence, this appeal to the Court.

The Appellant's Petition of Appeal comprises seven (7) grounds of appeal, thus:



1. *That, the trial court grossly erred in law and facts when acted on the evidence of the prosecution side which did not prove the case against the Appellant beyond reasonable doubt.*
2. *That, the trial court grossly erred in law and facts for concluding that there was false pretence on the part of the Appellant.*
3. *That, the trial court grossly erred in law and facts for not holding that there was variance between the charge and evidence adduced by the prosecution side.*
4. *That, the trial court grossly erred in law and facts for convicting the Appellant while the case was typically civil case.*
5. *That, the trial court grossly erred in law and facts when it did not notice that the evidence of the PW2's was very clear that there was negotiation between the Appellant and PW2 deposited monies for that, not only that but also no single piece of evidence to that effect that the Appellant at any time made false representation to obtain money from PW2 as charged under section 302 of the Penal Code, [Cap 16. RE 2019].*
6. *That, the trial court did not think that it is clear for a person to be charged and convicted of the offence of obtaining money by false pretence misrepresentation and on the strength of misrepresentation to obtain money.*



7. That, the trial court grossly erred in law and facts when it convicted the Appellant without considering the Appellant's defence.

When the Appeal was heard in the Court on the 30th day of May, 2023, the Appellant was represented by Mr. Moses Mwampashe, the learned counsel whilst the Respondent Republic was represented by Ms. Magreth Bilal, the learned state attorney and Mr. Leonard Chale, the learned senior state attorney.

Arguing for the appeal, the Appellant opted to drop the 3rd and 4th grounds while consolidating the 1st, 2nd, 5th and 6th grounds into one major ground that, *'the prosecution case was not proved beyond reasonable doubt against him before the trial court'*. The Appellant submitted that in proving the offence of obtaining money by false pretence, the prosecution must prove three key ingredients (namely; false pretence, fraudulent intention and inducement in obtaining the amount of money) as explained by the Court of Appeal of the United Republic of Tanzania on page 10 of the case of **Method Kaluwa Chengula vs. The Republic** (CAT) Criminal Appeal No. 92 of 2021, Dar-es-Salaam Registry (unreported).



The Appellant submitted that the prosecution failed to prove the key ingredients because: *Firstly*, there was no witness who testified that the Appellant induced the victim of crime (PW2) to obtain the money stated in the charge sheet. *Secondly*, no witness testified that the Appellant pretended to obtain the alleged amount of money. That, on page 14 of the typed record of the proceedings of the trial court, PW2 testified that he had been doing business of maize for seven (7) years with the Appellant. That, the same fact was testified by the Appellant in his defence, that he had been doing business with the complainant for seven (7) years. The Appellant thus argued that under the circumstances, it could not be established that the Appellant pretended to be doing such business.

Thirdly, the Appellant submitted that there was no evidence by the prosecution in the trial court to prove that the Appellant had fraudulent intent. That, even the charge sheet itself failed to disclose the key element of 'fraudulent intent'. Thus, the Appellant argued that under the circumstances, the charge sheet did not disclose any offence known in law. To back up this point, the Appellant referred this Court to page 4 of



the case of **Rebeka Rashid Smaboya vs. The Republic** (CAT) Criminal Appeal No.18 of 2015, Mbeya Registry (unreported) wherein the Court of Appeal reiterated what it stated in the case of **Msafiri Kulindwa vs. Republic** [1984] TLR 276.

On the 7th ground of appeal, the Appellant submitted that the trial court erred in law and fact when it convicted the Appellant without considering his defence. The Appellant submitted that every witness is entitled to credence and must be believed and his testimony accepted unless there are cogent reasons for not believing him as stated in the case of **Goodluck Kyando vs. Republic** [2006] TLR 363.

The Appellant thus submitted that his defence was not given credence without there being adduced reasons for such denial. That, on page 23 of the typed record of the proceedings of the trial court, the Appellant testified that sometime in 2021, he received money from the victim of crime (PW2) and successfully made arrangements for loading the maize cargo in truck no. T278 ATS for transportation from Tunduma to Mombasa. The Appellant thus submitted that, had the trial court money by false pretence was not committed rather there was a



contradiction/ miscommunication particularly as to where the cargo was to be sent. The Appellant thus stated that such misunderstanding between the parties amounted to a civil matter. To support his argument, the Appellant referred this Court to the case of **Hussein Iddi and Another vs. Republic** [1986] TLR 166. At last, the Appellant prayed the Court to allow the appeal, quash conviction and set aside the sentence against him.

The Respondent Republic contested the appeal. Responding to the first ground as argued collectively by the Appellant, the Respondent submitted that the charge sheet in the instant case was not at variance with the evidence adduced in the trial court. That, on page 8 of the trial court judgment, the trial magistrate made reference to and quoted sections 301 and 302 and further on page 9, she clarified the sections in relation to the offence the Appellant was charged with as indicated in the charge sheet contrary to the cases of **Method Kaluwa Chengula** (*supra*) and **Rebeka Rashid Samboya** (*supra*) cited by the Appellant. The Respondent submitted that all the key ingredients of the offence were discussed by the trial magistrate. That, the Respondent Republic stated



that even if the charge sheet did not disclose the offence, the Appellant was not prejudiced because he gave his defence and the same was capable of being curable under section 388 of the Criminal Procedure Act, [Cap 20 R.E 2022].

The Respondent Republic further submitted that the Appellant did not object the bank statement tendered by the branch manager as reflected on page 11 and 12 of the typed proceedings of the trial court. That, the trial court analysed the defence case at length as seen on page 5 and 6 of the trial court's judgement on how the Appellant admitted that there was no shipment of the sacks of maize from his go down. Thus, the Respondent stated that the trial court considered the defence case.

The Respondent went on submitting that in the trial court, the Appellant did not object to have received the TZS 16,000,000/= and had not delivered any consignment in that respect. That, during mitigation, he began to pay TZS 4,500,000/= which implied that he understood the matter before him. The Respondent referred the Court to the cases of **Hamida Nuhu & Another vs. The Republic** (HC) DC Criminal Appeal No.106 of 2019, Dodoma Registry (unreported) and **Jumapili Masanja**



vs. The Republic (HC) Criminal Appeal No.204 of 2020 Mwanza Registry (unreported) which explains on the burden of proof in the offence of obtaining goods by false pretence. The Respondent Republic prayed the Court to dismiss the appeal and upheld the trial court's judgment.

In rejoinder, the Appellant maintained his submissions in chief and added that the offence was not proved beyond reasonable doubt because the key ingredients of the offence were not specifically proved by any prosecution witness save that the trial Magistrate discussed them in her judgment. The Appellant submitted that the charge sheet does not contain the wording 'with intent to defraud' which is very crucial to the offence. The Appellant stated that not every delay to pay some outstanding amounts to false pretence or intent to defraud rather a breach of contract.

The Appellant further rejoined that the defect in the charge sheet is not curable under section 388 of the Criminal Procedure Act, [Cap 20 R.E 2022] because in the instant case, the Appellant had already served part of his jail sentence, thus, ordering a re-trial would prejudice him. That, the exhibits tendered by the prosecution witness did not prove the



offence. That, during mitigation, the Appellant cannot be said to have admitted to committing the offence since mitigation comes after the accused is convicted.

The Appellant also stated that the cases of **Hamida Nuhu** (*supra*) and **Jumapili Masanja** (*supra*) are all distinguishable in relation to the case at hand and that both are not binding on this Court. The Appellant prayed the Court to allow the appeal quash conviction and set aside the sentence against him.

Having considered the submission by both parties, in determining this appeal, in the trial court, Amos Daniel Mubusi (PW1) the Bank Manager of NMB Bank Dodoma *inter alia*, tendered the bank statements (Exhibit P1) of both Chadai Salim Ndwata (PW2) the victim of crime and the Appellant together with the Fund Transfer Request Form (Exhibit P2). Of which they were all not objected by the Appellant. PW2 testified that he was a business man dealing in cereal crops business and that he had been doing business with the Appellant for over seven (7) years whereby it was normally utmost two days to receive the consignment from him. In cross-examination, PW2 stated that he had done business with Appellant



for over ten times, and in all those times the Appellant was delivering the consignment timely. That, their business dealings were based on good faith and trust. G86 D/CPL Salim (PW2) the police officer, testified that he investigated the case after he was assigned on 11/1/2022 and that during the investigation, the Appellant admitted to have received the money but did not deliver the maize consignment.

In defence in the trial court, the Appellant (DW1) testified that he was a businessman based in Tunduma and was dealing with cereal crops. That, PW2 was his friend and a relative like. That, on 14/12/2021, TZS 16,000,000/= (being payment for buying and transporting 300 sacks of maize to PW2) was deposited into his NMB account. That, on 17/12/2021 he bought the maize consignment and sent it to PW2 via a truck owned by one Hamis Kangoma. That, PW2 directed him to transport the said consignment to Mombasa. In cross-examination, the Appellant stated that he had not adduced proof on the 300 sacks of maize from his go down, that he had not named the agent/dealer in Mombasa who received the consignment. That, their communications were by and large through phone and sometimes face to face when PW2 visited in Tunduma. Juslius



Anslem Tanganyika (DW2), the go down worker testified that; he had known the Appellant and PW2 who were related for over five (5) years. That, the Appellant instructed him to load PW2's consignment for transportation to Mombasa. That, thereafter, DW2 sent PW2 the number of the driver whose truck was loaded with his consignment. In cross-examination, DW2 stated that there was no proof adduced in respect to the delivery of the consignment in Mombasa.

Basing on the evidence, there is no dispute that on 14/12/2021, the Appellant received TZS 16,000,000/= from PW2 being monies agreed for transportation of 300 sacks of maize from Tunduma to Mombasa. What is in dispute is the lack of proof of transportation and delivery of the said maize.

The particulars of the offence in the charge sheet and the testimony by the prosecution witnesses in the trial court do not constitute the offence the Appellant was charged with as per the provision of the law. The Appellant cannot be said to have falsely pretended to sell the maize to PW2 on 14/12/2021 as he was actually engaged in that very same business for over seven (7) years with PW2. There was also no evidence



by the prosecution of fraudulent intention on the part of the Appellant in respect to the transaction. What is evident in the record is that the Appellant received TZS 16,000,000/= but PW2 did not receive the consignment of 300 sacks of maize as agreed to transact.

The Court sees that since there was an oral agreement between PW2 and the Appellant for delivery of maize, the dispute, if any, between them could have been resolved by way of a civil action before a court of competent jurisdiction and not by way of a criminal action against either party to the said agreement as it was in this case.

In other words, the case, if any, against the Appellant could be of a civil nature, for the material facts of the case as led by the prosecution against the Appellant do not support criminal liability for want of proof of the key ingredients of the offence (i.e. false pretence, fraudulent intention) on the Appellant's part. To say the least, the prosecution failed to prove the case against the Appellant beyond reasonable doubt.

That said, the appeal is hereby allowed. The conviction, sentence and compensatory order thereof, respectively, are hereby severally and together quashed and set aside accordingly.

A handwritten signature in blue ink, appearing to be 'H. H. H.', is located in the bottom right corner of the page.

If the victim of crime (PW2) is still interested in recovering either the agreed consignment of maize or his monies, if any, may institute civil proceedings against the Appellant in a court of competent jurisdiction.




F. R. KHALFAN

JUDGE

29/8/2023