

**IN THE HIGH COURT OF TANZANIA**

**MWANZA SUB – REGISTRY**

**AT MWANZA**

**CRIMINAL APPEAL NO. 113 OF 2023**

*(Arising from the Decision of the Resident Magistrate Court of Geita at Geita in Criminal Case No. 291 of 2021 dated 21<sup>st</sup> March 2023)*

**OTMARY GEROLD KOMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

*Date of last order: 10<sup>th</sup> November 2023*

*Date of Judgement: 15<sup>th</sup> November 2023*

**MTEMBWA, J.:**

In the Resident Magistrate Court of Geita, the Appellant was charged with the offence of obtaining money by false presence contrary to ***section 302 of the Penal Code Cap 16 [R.E 2019]*** now ***[R.E 2022]***. It was alleged that the Appellant, on diverse dates

between 11<sup>th</sup> January 2016 and 18<sup>th</sup> October 2017, at Geita Town Council area within Geita District of Geita Region, with intent to defraud SR. MARIA FELISTER MANYANGU, an accountant of the Registered Trustees of Catholic Diocese of Geita, obtained a total of Tzs. 29,000,000/= after he had falsely misrepresented via payment receipt No. 0001544 dated 11<sup>th</sup> January 2016 that Tzs. 35,000,000/= had already been paid by him to Geita Town Council as price for allocation of Plot No. 466 Block "A" Magogo, Geita, the fact he knew to be false.

The Appellant pleaded not guilty to the charge. Consequently, the prosecution paraded eight (8) witnesses and tendered six (6) exhibits. The Appellant testified himself as DW1 and tendered nine (9) exhibits.

To appreciate the appeal before me I find it opt to narrate the background of the matter. The Appellant used to be an officer in the Geita Regional Commissioner's office until sometime in 2017. Among others, he had a duty to advise the Regional Commissioner on matters related to land. With intent to deceive Catholic Diocese of Geita, the Appellant promised to secure a land known by its registration as, Plot No. 466 Block "A" Magogo. The arrangement was

such that the Appellant would pay for the Plot the sum of Tsh. 35,000,000/= and the Diocese will then, in turn, refund him.

The facts reveal further that, on 11<sup>th</sup> June 2016, the Appellant presented to the diocese a Receipt No. 001544 dated 11<sup>th</sup> January 2016 evidencing that he has already paid for the Plot. He requested to be refunded. It was then the diocese through its accountant one sister Maria Felister Manyangu paid, between 11<sup>th</sup> January 2016 and 18<sup>th</sup> October 2017, to the Appellant the sum of Tsh. 29,000,000/=. The transactions were made through Account No. 150232327900 in the name of Komba and Associates Law Attorneys operated by CRDB Bank PLC.

That after sometimes, the said Diocese made a follow up and it was learnt that the said Plot is owned by another entity. It was also learnt that the Appellant never paid the sum of Tsh. 35,000,000/= to the Government for land allocation. As such, a charge of obtaining money by false pretence was preferred by prosecution.

Having evaluated the evidence adduced during hearing, the trial court convicted the Appellant as charged and was sentenced to pay a fine of Tsh. 3,000,000/= failure of which to serve three years in prison. Still undaunted the Appellant seeks to impugn the decision to

demonstrate his innocence and he has filed before this Court a Petition of Appeal with the following grounds;

- 1. That the trial court erred in law in improperly admitting Exhibits P3, P4, and P5 and using them in convicting the Appellant.*
- 2. That the trial Court grossly erred in law and facts in convicting the Appellant for the offences charged while the Prosecution had failed to prove its case beyond all reasonable doubts.*
- 3. That the trial Court erred in law and facts in its failure to analyse and consider the Appellant's evidence, which was made during trial.*

During hearing of this appeal, the Appellant was represented by Mr. Kassim Gilla, the learned Advocate while the Respondent Republic was represented by Ms. Deodatha Dotto, the learned State Attorney. Hearing proceeded orally.

Mr. Gilla kickstarted by submitting on the first ground of appeal. He said, the trial court erred by admitting Exhibits P3, P4 and P5 and using them to convict the Appellant. He added that the said Exhibits were not read after admission and as such, the Appellant did not know the contents therein. He referred me to pages 52 and 53 of the

typed Proceedings of the trial Court. That in view of the case of ***Issa Said Issa V. Republic, Criminal Appellant No. 435 of 2020, CA at Arusha***, the exhibits should be expunged, he added.

Mr. Gilla combined the second and third grounds of appeal and argued them together. On this, he submitted that the Appellant was charged of the the offence of obtaining money by false pretence contrary to ***section 302 of the Penal Code***. However, looking at the particulars of the offence, one essential element, that is ***"false pretence"*** is missing. That what can be traced is the second element which is ***"with intent to defraud"***. He added that, the effect of such omission can be seen at pages 13 and 14 of the proceedings where the facts adduced during Preliminary Hearing did not refer to such element.

Mr. Gilla attacked the testimonies of PW1 and PW3 and highlighted that they did not testify or explain on how the offence was committed by false pretence. That failure to contain such vital element renders the charge to be defective. He cited the case of ***Pius Neema Isaya V. Republic, Criminal Appeal No. 211 of 2012, CA at Arusha*** and referred me to pages 3 and 4 of the said Jugdement. He also cited the case of ***James Duru @ NADE V.***

***Republic, Criminal Appeal No. 100 of 2020 CA at Moshi*** and referred to me at pages 6 and 7 of the said Judgement.

On the other hands, with regard to the second element, that is ***"with intent to defraud"***, Mr. Gilla submitted that the trial court wrongly relied on Exhibit P1 as there was no evidence that the Appellant handled the said exhibit to Doris. He added that there was no link between the said exhibit and the Appellant. In fact, that there was no evidence that the Appellant and the complainant entered into agreement to secure a Plot. The learned counsel faulted the prosecution evidence and viewed that there was no evidence that the Appellant happened to be a land officer for Geita Township Council. He contended further that had the trial court considered the alleged shortcomings, it could have arrived at the conclusion that the relationship that existed between the Appellant and the complainant was purely Advocate – client relationship. That failure to consider as such, the offence was not proved to the required standards in view of ***section 3(2) (a) of the Evidence Act***. He lastly beseeched this court to find that the appeal has merit.

On her part, Ms. Dotto submitted that the Republic supports the conviction and sentences meted out against the Appellant. She added

that, having perused the records, she discovered that Exhibit P3 and P5 were correctly admitted. She was however in agreement with Mr. Gilla that Exhibit P4 was not read after it was admitted. She prayed that the same finds the fate it deserves. However, she implored this Court to spare the oral accounts in lieu of the exhibit expunged and she cited the case of ***Saganda Saganda Kasanzu V. Republic, Criminal Appeal No. 53 of 2019.***

On the second ground of appeal, Ms. Dotto submitted that the commission of the offense was proved beyond reasonable doubts. That PW3 testified to have deposited the sum of Tsh. 29,000,000/= to Komba and Associates Bank Account after the agreement was reached between the Appellant and the complainant. In addition, that the Appellant falsely presented the deposit slip evidencing that the sum of Tsh. 35,000,000/= was paid the fact which was not true. As such, she opined, the offence of false pretence was committed by the Appellant as there was no Plot which was allocated to the complainant diocese. She cited the case of ***Goodluck Kyando V. Republic (2006) TLR 363*** and observed that every witness must be believed unless proved otherwise.

On the third ground of appeal Ms. Dotto submitted that the trial court correctly considered the evidence of the Appellant but, very unfortunate, his defense was not watertight. That even if the same was not considered, still, this Honourable Court can consider it.

Arguing of the competence of the Charge, Ms. Dotto submitted that, looking at the charge sheet closely, one finds that the element of false presence was disclosed and that the error, if any, can be cured under ***section 388(1) of Criminal Procedure Code***. She lastly submitted that, since the charge was proved to the required standards, this Honourable Court finds that the appeal has no merits.

In his brief rejoinder, Mr. Gilla submitted that when the charge lacks some essential ingredients, ***section 388(1) of CPA*** is inapplicable. On whether Exhibit P3 and P5 were correctly admitted, Mr. Gilla left that to the domain of this Honourable Court. He distinguished the cases of ***Saganda Saganda Kasanzu V. Republic (supra)*** and ***Goodluck Kyando V. Republic (supra)*** and added that the same were cited out of context. He added that, it is not a duty of the Appellant to provide the defense which is watertight. That it was the prosecution who supposed to prove the offence beyond reasonable doubts by providing cogent evidence leaving no stone



unturned. He then reiterated what he submitted during submissions in chief.

Having heard the rival submissions by the counsels, the issue before me is whether the offence of obtaining money by false pretence contrary to ***section 302 of the Penal Code*** was proved to the required standards of the law, that is, beyond reasonable doubts.

In his submissions, Mr. Gilla revealed a new issue that was not part of the grounds of appeal filed by the Appellant. He narrated that the Charge sheet did not include one essential element, that is “false pretence” and that, as such, the same was fatally defective. Ms. Dotto viewed that the said element was fully disclosed and that if not, such omission is curable under ***section 388(1) of CPA***. As said before, this issue has been brought by way of oral submission during hearing without leave of this Honourable Court. However, since it is an issue of law, I think it is pertinent that I look into it first. For clarity, I reproduce the charge hereunder;

#### **CHARGE**

##### **STATEMENT OF THE OFFENCE**

***OBTAINING MONEY BY FALSE PRETENCE; contrary to  
section 302 of the Penal Code, (Cap 16 R.E 2019)***

**PARTICULARS OF THE OFFENCE**

*OTMARY GEROLD KOMBA, on diverse dates between 11<sup>th</sup> day of January 2016 and 18<sup>th</sup> October 2017 at Geita Town Council area within Geita District in Geita Region, **with intent to defraud** SR. MARIA FELISTER MANYUNGU - Accountant of the registered Trustees of Catholic Diocese of Geita obtained a total of Tzs 29,000,000/= from the said Registered Trustee of Catholic Diocese of Geita after he had **falsely misrepresented** via Payment Receipt No. 0001544 dated 11<sup>th</sup> January 2016 that Tsh. 35,000,000/= had already been paid by him to Geita Town Council as price for the allocation of Plot No. 466 Block 'A' Magogo – Geita in favour of the Registered Trustees of Catholic Diocese of Geita therefore he should be re-embursed, the fact he knew to be false. [emphasis is mine]*

From the above quoted portion of the charge to which the Appellant stood charged, it is evident that the offence of obtaining money by false pretence contrary to **section 302 of the Penal Code** was preferred by prosecution. It was alleged that the Appellant with **intent to defraud** SR. MARIA FELISTER MANYANGU, **falsely misrepresented** via Payment Receipt No. 0001544 dated 11<sup>th</sup> January 2016 that Tzs 35,000,000/= has already been paid by him to

Geita Town Council. For avoidance of doubts, let me ascertain whether the elements of the offence were disclosed in the particulars of the offence. **Section 302 of the Penal Code** 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, is guilty of an offence and is liable to imprisonment for seven years". [emphasis is mine]."*

Thus, it is discernible from the foregoing extract that "**false pretence**" and "**intent to defraud**" are essential ingredients of the offence of obtaining money by false pretence and it is, for that matter, thus essential that such elements must be alleged in the particulars of the offence. Looking at our Charge sheet as quoted above, it could appear, element of "**false pretence**" or "**falsely pretended**" was omitted.

In the charge to which the Appellant stood charged, the phrase "**falsely misrepresented**" was misplaced. The correct phrase in my conviction was "**falsely pretended**". The word pretence (noun) or pretending (verb) is deferent from misrepresentation (noun) or misrepresented(verb). At page 1063 of the **Chambers Twentieth**

**Century Dictionary by A.M. Macdonald**, the word pretence is defined to mean **false allegation** (alleging falsely). At page 840, the word **misrepresentation** is defined to mean *to represent falsely or to give a misleading interpretation*.

It follows therefore that the words pretence and misrepresentation are two different animal species. While the former connotes false allegations, the later connotes false representation. As such, if they are used, each one imports a different meaning.

At any rate and costs, the element of **"False Pretence"** is necessary and should be reflected in the particulars failure of which a charge becomes defective. In the cited case of **James DURU @ NADE (supra)**, the Court noted;

*"it is glaring that the words "by any false pretence" is an essential ingredient of the offence of obtaining money by false pretence with intent to defraud. As such, the false pretence must be alleged in the particulars of the offence. Given that the charge is the foundation of the trial, in terms of **section 135 of the Criminal Procedure Act Cap 20 [R.E 2022]**, the mode in which the offences are to be charged entails among things, stating all the ingredients of the offence in the particulars".*

The proposed charge sheet under second schedule of the ***Criminal Procedure Act*** provides as follow at item 12;

***12. False Pretence***

*Obtaining goods by false pretence, contrary to section 302 of the Penal Code.*

***PARTICULARS OF OFFENCE***

*A.B., on the..... day of in the region of..... **with intent to defraud**, obtained from S.P. 5 metres of cloth **by falsely pretending** that the said A.B. was a servant to J.S. and that he, the said A.B., had then been sent by the said J.S. to S.P., for the said cloth, and that he, the said A.B. was then authorised by the said J.S. to receive the said cloth on behalf of the said J.S. (emphasis mine)".*

The second schedule to CPA is not Biblical or Qur'anic verses that everything must be complied with *mutatis mutandis* but at any rate, a charge for obtaining money by false pretence must be substantially be drawn as such. The words "**with intent to defraud**" and "**by false presence**" or "**falsely pretending**" are necessary and must be alleged in the particulars. In the instant Charge Sheet, the element of false pretence is missing. It is important to note that the two

elements are inseparable. In the case ***Rebeka Rashidi Samboya V. Republic, Criminal Appeal No. 18 of 2015, CA at Mbeya***, by citing the case of ***Msaju Kulindwa V. Republic (1984) TLR 276***, the Court noted;

*"..A charge of obtaining by false pretences which does not include an averment that the pretence was made with intent to defraud is a charge which discloses no offence at all".*

In our charge sheet, the misrepresentation was made with intent to defraud. With respect that was not within the dictate of ***section 302 of the Penal Code***.

Ms. Dotto did not find purchase of the fact that the charge was defective for failure to include in the particulars the element of false pretence. She opined that the charge fully disclosed all elements in the particulars. She submitted further that the error, if any, is curable under ***section 388 (1) of CPA***. With respect the defective charge cannot be cured under the cited section. It is impossible to cure what is not in the existence. In the case of ***Uganda vs Hadi Jamal 14 [1964] E.A. 294***, the Court noted that, a charge which does not disclose any offence in the particulars of offence is manifestly wrong and could not be cured under ***section 341 of the Criminal***

**Procedure Code (the equivalent of our section 388 (1) of CPA).** In the circumstances, I agree with Mr. Gilla that the Appellant was charged and ultimately convicted on the defective charge leading to injustice.

Having so observed, the next issue is what will be fate of the Appellant with regards to the offence charged. I was prepared to order retrial but it is impractical in the circumstances where the charge is defective. The defunct Court of Appeal for East Africa, in ***Fatehali Manji vs. The Republic (1966) EA 343*** noted that;

*"In general, a retrial will be ordered only when the original trial was illegal or defective/ it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial".*  
*should only be made where the interests of justice require it.*

In ***Mayala Njigailele v. The Republic, Criminal Appeal No. 490 of 2015 (unreported)***, the court noted;

*"Normally an order of retrial is granted, in criminal case, when the basis of the case namely, the charge sheet is proper and is in existence. Since in this case the charge sheet is incurably defective, meaning it is not in existence, the question of retrial does not arise".*

While down to the end, I will not order retrial on the defective Charge sheet. That alone suffices to dispose this appeal without determining the grounds of appeal because they are premised on the conviction and sentence meted out from the defective charge.

In the end, this appeal has merit. The conviction is quashed and sentence meted against the Appellant by the trial court is set aside. Since the Appellant is not in prison, there will no order for his release. I order accordingly.

Right of appeal fully explained.

**DATED at MWANZA** this 15<sup>th</sup> November 2023.



  
**H.S. MTEMBWA**  
**JUDGE**