IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 19 OF 2022

[*Originating from Criminal Case No. 58 of 2020, in the District Court of Maswa at Maswa*]

TITO ALOIS KABUME.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

Nov. 7th & 10th, 2023

Morris, J

The District Court of Maswa convicted and sentenced Mr. Tito Alois Kabune, the appellant above, in Criminal Case No. 58 of 2020. He has now appealed before this Court challenging both conviction and sentence. At the District Court (*the trial court*), the appellant was charged with two counts of obtaining money by false pretence contrary to sections 301 and 302 of ***the Penal Code***, Cap 16 R.E. 2022 (*the Penal Code*).

Allegedly, the offence was committed on 26th and 28th July 2019. On the two dates he purportedly obtained Tshs. 150,000/= each from Mr. Ibrahim Ramadhan Kitama through M-PESA transactions Nos. 6GQ72KQMMMN and 6GSO2L32CHKQ respectively. It was alleged further

that the appellant pretended that such money was solicited by the chairman of the Maswa District Land and Housing Tribunal (DLHT). Incidentally, Mr. Kitama was an applicant in Misc. Land Application No. 139 of 2016 which was pending before the DLHT. So, the appellant allegedly told the applicant that the chairman demanded such money in order to rule in his (Mr. Kiama's) favour; the fact which he knew to be false. The trial court found him guilty of the offence and sentenced him to a 5-year imprisonment term. He became disgruntled, hence, this appeal.

The appeal is pegged on three grounds. **One**, that the trial court erred by convicting the appellant while the case was not proved beyond reasonable doubt; **two**, that PCCB appearing in both typed proceedings and judgment is non-existent; and **three**, the entire proceedings of the trial court was full of serious irregularities which led to miscarriage of justice.

When the matter came up for hearing, the appellant was represented by Advocate Emanuel Sululu. The respondent had the representation of Ms. Carolyne Mushi, learned State Attorney. Mr. Sululu,

however, abandoned the 2nd ground of appeal and prayed to argue the two remaining grounds simultaneously.

For the appeal Mr. Sululu submitted that, the trial court convicted the appellant for the offence which was not proved beyond reasonable doubt. He argued hereof that the prosecution evidence left significant gaps which cast doubt to the charge. He contended that, in law, when there are such kinds of doubts in the prosecution case, the matter should be resolved in the favour of the accused. To him, the appellant was charged with obtaining money by false pretence; the offence which was never proved by the respondent.

According to advocate Sululu, in order to prove the offence herein, three (3) elements must be fully established. He named those elements as: intent to defraud; existence of false pretence; and obtaining something capable of being stolen. In his view, these ingredients were not proved to the required standard, especially the first two. Making reference to the record, he argued that no evidence proved that the appellant had the intent to defraud. In his view, PW1 (victim) and PW2 (Chairman) did not establish how the appellant intentionally defrauded the victim (PW1). In addition, even PW3 did not corroborate the evidence

of PW1 and PW2. Hence, he submitted that evident is the fact that such evidence was not able to prove the exact dates when the alleged offence was committed. And that, whereas the victim (PW1) testified that he reported the incident to both DLHT and PCCB on 29/9/2019; PW2 & PW3 stated that the event was reported on 23/9/2019. In the appellant's view, that chronology is illogical because seemingly the victim reported the incident (on 23/9/2019) much earlier than the alleged dates of the crime.

In addition, the appellant argued that the investigator (PW3) testified that he got the information from a good Samaritan/whistleblower that the appellant was demanding the said money from the victim. However, the alleged informer was not called to testify and prove commission of such offence by the appellant. Also, no reason was given to justify such key witness' absence. He submitted further that, in law, when a very important witness is not called to testify, the court should draw a negative inference that if such person were called, he would have testified against the interest of the whole case. I was referred to the case of ***Hemed Said v Mohamed Mbilu***, [1984] TLR 113.

Further, the appellant argued that throughout the proceedings, one **Makalin Nashi** whose phone number 0758858649 was used for the e-

money transactions herein was unknown to anybody. Further, the testimony of the investigator from PCCB (Grayson Chego- PW3), during cross-examination, indicates that he did not know **Makalin Nashi**.

The appellant's counsel argued further that the prosecution did not submit direct evidence to connect the appellant and the said phone number. That is, no evidence proved that such number belonged to the appellant. However, the only evidence relied on by both prosecution and the trial court in this regard is the testimonies by appellant's co-workers (PW2 & PW4) that the appellant had called them using the said mobile phone number. To the counsel, in order to erase doubts, the prosecution should have printed the relevant communication logs hereof. That, the mobile-money transfer print outs were generated but the communications details were not retrieved to confirm the allegations.

Moreover, the appellant faulted PW3 (investigator) for testifying that when the former went for interrogation at PCCB, he registered the said cellphone number in the visitors' register. He argued that though this evidence was also adopted by the trial court to convict the appellant, no evidence was brought to prove that it was him who wrote such number,

exhibit P3 (register), notwithstanding. To the appellant's counsel, more credible evidence such as handwriting expert report was inevitable.

Furthermore, the appellant argued that entire trial was tainted with serious legal irregularities. For instance, instead of PCCB prosecuting the charge (for it was a corruption case) the trial was conducted as an ordinary criminal trial. This anomaly created doubt. Further, if the whole matter was correctly handled, the victim-complainant should have been a co-accused. So, to him, the state twisted the mode of prosecution in order to unjustly prosecute the appellant. In addition, during cross-examination, the court recorded the witness answers without questions. Hence, the corresponding questions are not evident. This omission prejudiced the appellant because he unable to know which question attracted the recorded answer. Consequently, advocate Sululu prayed for the appeal to be allowed.

In reply, Ms. Mushi was of the view that the case was fully proved. So, she strongly opposed the appeal. She cited ***Cuthbert Napegwa Kishaluli & 2 Others v R***, Consolidated Criminal Appeal 149/2020 and 15/2021 (unreported at pages 27/28 of judgement) and restated the elements of the offence herein. To her, all elements constituting the

offence herein were fully satisfied vide testimonies of five (5) prosecution witnesses. For example, PW1 (pages 8 -11) stated that the appellant called him on 24/7/2019 and said that the chairperson (PW2) solicited Tshs 300,000/= so as to expedite the proceedings (page 10 of proceedings). Consequently, on 26/7/2019 and 28/7/2019 the said PW1 sent the said money to the appellant.

Regarding the difference in names of the appellant and that of the cellphone number, she submitted that the appellant informed PW1 that that was the name he used to register the mobile number. Further, DLHT Chairperson (PW2) confirmed the said number being the appellant's but denied demanding any money from PW1. Thus, PW1 eventually reported the incident at PCCB, (page 11 of proceedings). She also maintained that the prime testimony of PW1 was not controverted through cross examination. In law, she submitted failure to so cross-examine, the appellant is taken to accept the testimony. She referred to the case of ***Shomari Mohamed Mkwama v R***, Criminal Appeal 606 of 2021 (unreported, para 1, page 18).

In addition, the respondent submitted that the evidence of PW1 was corroborated by the Tribunal Chairperson (PW2, pages 15-18 of

proceedings). He confirmed both receiving PW1's complaints and the appellant's cellphone number on 23.9.2019. To the State Attorney, as long as the appellant did not cross-examine on such averments, he was taken to had admitted them accordingly.

Likewise, PW3 confirmed the testimony by PW1 about paying money to the appellant; and reporting the crime at PCCB. Moreover, PW3 testified (page 22) that the appellant entered the phone number to which the money was wired by PW1 into the PCCB visitors' register [exhibit P3] as his personal contact number. The investigator also stated that the said number had been used by the appellant to purchase the electricity token for LUKU meter No. 4300227932. Furthermore, at page 40 of proceedings, the appellant was cross-examined and he admitted that he registered no. 0758858649 on the exhibit P3 when he visited PCCB offices.

According to the respondent's Attorney, the printout of communications was not tendered. Notwithstanding such omission, she restated that the case was proved. After all, the expert opinion is not binding to the court. Instead, the appellant's co-workers (PW2 & PW4) who transacted with the former on daily basis proved fully that such number was his. The evidence of both witnesses (PW2 and PW4) was

found to be credible and reliable because the testifiers thereof had personal knowledge of the appellant's mobile number used in his course of duty.

In addition, the respondent insisted that the appellant had intent to defraud the victim as reiterated by PW1 and PW2.That is, PW2's title (DLHT Chairpersonship) was used to defraud PW1. Further, because PW2 denied having solicited for the money and/or obtained the same from PW1 or appellant; the latter had intent to defraud the victim accordingly. Furthermore, she submitted that there is no any contradiction as to when the offence was committed. To her, the charge and proceedings bear the similar dates of the counts herein (26th and 28th July 2019). Hence, as on 23/9/2019 the crime was reported to the Chairperson and on 29/9/2019 to PCCB; the set of dates does not present any inconsistencies to the crime herein.

The learned State Attorney also argued that the informer was not paraded as witness, because per section 143 of ***the Evidence Act***, (*supra*); no particular number of witnesses is mandatory to prove the charge. To the prosecution, the informer was not necessary for the other witnesses had discharged the onus of proving the charge satisfactorily.

Moreover, she controverted the appellant's argument that the case was not prosecuted by PCCB thus prejudicing him. To her, the case was legitimately investigated by PCCB, the investigating machinery of the state, but prosecution powers rests on the respondent (DPP's) mandate. Hence, the case was properly prosecuted and no prejudices/injustice were disclosed by the appellant because of such prosecution modal adopted by the state.

Regarding recording questions of cross-examination in a "Q & A" format; the respondent argued that such modality is not the requirement of the law. Hence, she prayed that the appeal should fail.

In line with the above contentions of parties, I will re-evaluate the evidence to determine two questions: *whether the crime against the appellant was proved fully* and *whether the trial court proceedings are tainted with irregularities*. This being the first appeal, I will re-evaluate the evidence on record. The objective is to determine if the prosecution established the appellant's guilt satisfactorily. This approach is justifiable pursuant to, among other authorities, ***Mussa Jumanne Mtandika v Republic***, Criminal Appeal No. 349 of 2018; ***Kaimu Said v Republic***,

Criminal Appeal No. 391 of 2019; and ***David Livingstone Simkwai and 8 Others v Republic***, Criminal Appeal No. 146 of 2016 (all unreported).

As pointed out above, the appellant was charged under sections 301 and 302 of ***the Penal Code***. I will reproduce these provisions for ease of grasp; they read;

> *"301. Any representation made by words, writing or conducts of a matter of fact or of intention, which representation is false act and the person making it knows it to be false or does not believe it to be true, is false pretence.*
>
> *302. 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."*

Therefore, for the offence of obtaining money by false pretence to be proved, prosecution needs to prove about six ingredients. **Firstly**, there must be representation made by the accused person by word writing or conduct; **secondly**, such representation must be on a matter of fact or intention; **thirdly**, the representation so made must be false; **fourthly**, the accused should be aware that the representation is false;

fifthly, the accused should intend to defraud; and **sixthly**, the accused must have obtained from the victim something capable of being stolen or the victim should be induced to deliver anything to any other person capable of being stolen. Hereof, read ***Cuthbert Napegwa Kishaluli & 2 others v R***, (supra); and ***Fatuma said Mahanyu v R***, Criminal Appeal No. 323 of 2019 (both unreported).

In line with the above elements, therefore, I will consider the evidence on record and submissions of the parties. Regarding the first and second elements; evidence indicate that PW1 (victim) approached the appellant for the purpose of knowing if the Chairman (PW2) could proceed with his case; and the need to engage an advocate. The appellant told him that the advocate was unnecessary because he (appellant) would talk to the Chairman instead. The *duo* exchanged contact numbers for further communication. On 24/7/2019, the appellant called and informed PW1 that the Chairman demanded Tshs. 300,000/= (see pages 9, 10 and 11 of the proceedings). During cross examination, no question was asked by the appellant to PW1 to challenge such testimony.

I am aware of the cardinal law that the accused person bears no burden to prove his innocence. Nevertheless, he should show his theme

of defence right at the trial; through cross examination, as an example. That position is discernible in the cases of ***Khalifa Hassan Malingula v R***, Criminal Appeal No. 7 of 2018; ***John Madata v R***, Criminal Appeal No. 453 of 2017; and ***July Joseph v R***, Criminal Appeal No. 226 of 2021 (all unreported). Henceforth, the prosecution proved that there was representation made by appellant's words as to intention to accelerate the victim's case at the DLHT.

Regarding the third and fourth elements, representation ought to be false and the accused needs to be aware of such falsity. To the appellant, the element of false pretence was not proved. The respondent, however, contended that proof was achieved as the presentation was false and no directives were given to the appellant from PW2 (the DLHT chairman).

From the record, PW1 went to PW2 and asked if the latter had received the money. PW2 told him that he knew nothing about the money (page 10 of the proceedings). Also, PW2 testified that he told PW1 that he never sent the appellant to do what he did (page 15 of the proceedings). To me, falseness of the appellant's representation is manifested by three tenets. **One**, the appellant never discussed the

victim's application with the Chairman (PW2). **Two**, PW2 never promised to determine the application in the victim's favour; and **three**, the Chairman did not solicit the money from the victim directly or through the appellant. Therefore, prosecution proved that the appellant made the representation which was false and he so knew it to be.

Furthermore, according to the appellant, the fifth element was not proved. That is, it was not proved that the appellant had intention to defraud. Nonetheless, it was submitted by the respondent that because PW2 denied having solicited for the money and/or obtained the same from PW1; the appellant had intent to (and did) defraud the victim accordingly. I agree with the respondent. Because there was no communication between the appellant and PW2 regarding the money or the purpose for which the same was to be paid by the victim; the appellant's false representation to PW1 intended to defraud him. Therefore, the 5th element was also proved.

On the last element, the prosecution is duty bound to prove that the accused received something capable of being stolen from the victim or he induced the victim to deliver to another person something capable of being stolen. To the appellant, this element was not proved because;

firstly, there are contradictions of the dates when the matter was reported to PCCB; secondly, the whistleblower was not called as a witness; thirdly, no direct evidence was tendered to connect the appellant and the phone number through which the money was transacted; fourthly, the trial court only relied on evidence of PW2 and PW4 without printout of their communication; and fifthly, there was no handwriting expert or independent witness to prove the appellant's handwriting in the PCCB visitor's book (exhibit P3).

It was the prosecution evidence that the appellant received two e-money credits of Tshs. 150,000/= each. The same were received via phone number 0758858649 by MPESA transaction No. 6GQ72KQMMMN and 6GSO2L32CHKQ respectively. The said transactions were proved by exhibits P5 (MPESA statement from phone number 0767328178 registered by the name of Ibrahim Kitama -PW1) and P5 (MPESA statement from phone number 0758858649 registered by the name Makharim Nashi).

It was further the evidence of prosecution that the latter number was used by the appellant for communication as testified by PW1, PW2 and PW4. That the same number was also used to buy the LUKU token of

Tshs.1900/=. Further, when the appellant visited PCCB offices, he wrote his name and the same phone number in the visitor's book on 13/08/2019 (exhibit P3).

It was the testimony of the appellant (page 40) that he used phone number 0718 629401 which was lost. He then registered Halotel number 0620652149. Nevertheless, during cross examination the appellant was recorded as;

> *"Yes, I have been in PCCCB's (sic) office and at last, they even took my mobile phone. At the* ***time I used to register in the Visitor's Book****. In that visitor's book* ***I used to write all the details, including names address and contacts****, the visitor is the one who write (sic) by his own hand. I don't remember which number I wrote on 13/8/2019 on that visitor's book.* ***The number I wrote is 0758 858649 but I don't recognize the number,*** *that was my handwriting and the signature is mine"* (emphasis added).

I am inclined to believe that the phone number 0758858649 was used by the appellant because: **one**, he gave the said number to PW1 for further/future communication between them (page 10 of the proceedings); **two**; the number was used for the two money transfer transactions totaling Tshs. 300,000/= out of the appellant's

representation to the victim PW1; **three**, evidence of PW2 (DLHT Chairman) hereof was not controverted by the appellant through cross examination. Therefore, the appellant is deemed that he accepted using the said number for communication with PW2. **Four**, the appellant confessed that wrote the said phone number at the PCCB visitor's book on 13/8/2019 as his personal contact number; and **five**, assuming that the money was sent to the said Makharim Nashi at the direction/instruction of the appellant. At page 10 of the proceedings, PW1 testified "…I asked why the different name? he replied that his name which he used for registration." This evidence was unchallenged by the appellant. Therefore, in alternative, the appellant accordingly induced PW1 to deliver/sent the money to Makharim Nashi. That is, the second limb of the element that the accused must have induced the victim to deliver to another person something capable of being stolen is satisfied.

Before I conclude on this element, I will address some contentions by Mr. Sululu, learned advocate. It was his contention that the date of reporting the incident by PW1 to DLHT and PCCB is at variance when considering evidence of PW1, PW2 and PW3. Whereas PW1 stated that

he reported the incident on 29/9/2019, PW2 and PW3 testified that the incident was reported on 23/9/2019.

I have taken liberty to read the evidence of PW1. At first, he testified that he went to DHLT on 23/09/2019. Then, he mentioned another date (29/09/2019). However, in my view the dates of reporting the incidence whether to DLHT or to PCCB was not important. All that was critical is proving the dates of transactions mentioned in the charge. See, ***Kassim Arimu @Mbawala v R***, Criminal Appeal No. 607 of 2021 (unreported). Further, in law, mere contradictions as to evidence may be ignored if they do not affect the remaining evidence on record. I have ***DPP v Daniel Mwasonga***, Criminal Appeal No. 64 of 2018 (unreported) to support my stance hereof.

In addition, the counsel contended that the whistleblower was not called as a witness. To him, such omission was fatal and the trial court needed to draw adverse inference against the prosecution. I agree to the proposition that when prosecution fails to call a material witnesses the court may draw adverse inference. See, also, ***Nkanga Daudi Nkanga v R***, criminal Appeal No. 316 of 2013; and ***Mashimba Dotto Lukubanija v R***., Criminal appeal No. 317 of 2013 (both unreported).

The foregoing position notwithstanding, I am not naïve to the canon that the witness who is not paraded shall be so material if his absence leaves the prosecution witness with reasonable doubt. In the matter at hand, PW3 testified;

> *"I remember on 23/09/2019 I was at PPCCCB's (sic) office Maswa, the information was delivered from secret informer that, Mr (sic) Tito s/o Aloyce Kabume demanded the sum of Tshs. 300,000/=from one Ibrahim s/o Ramadhan Kitama…"*

This excerpt above portrays that, apart from PW1, there was another person who informed PW3. However, in my view, such person was not so important than PW1 and PW2. The information the whistleblower gave to PW3 was the same with PW1's complaint. Hence, the non-procurement of the secret informer did not, in my view, undermine the prosecution's obligation towards *factum probandum*. As correctly submitted by the respondent, the prosecution case is not necessarily proved by number of witnesses but rather the weight of such witnesses' evidence.

In social context, the basis of the foregoing philosophical approach is in the adage that: "it is not the size of the dog in the fight, it is the size of the fight in the dog" that matters [***Tumaini Jona v R***, Criminal Appeal

No 337/2020; ***Christopher Marwa Mturi v R***, Criminal Appeal No. 56 of 2019; and ***Tafifu Hassan @Gumbe v R***, Criminal Appeal No. 436 of 2017 (all unreported)]. With adequate respect to the learned counsel, therefore, the contention intending to compel a party to the case to summon every Tom, Dick and Harry to testify in court is unprogressive.

It was further contended by the appellant that there was no printout of communication to the respective number to prove that there was communication between the appellant and his co-workers (PW2 & PW4). In my view, as I have endeavoured to elucidate above, prosecution evidence suffices to prove the appellant's connection with the said phone number. In particular, it was not necessary for the prosecution to tender the alleged printout while the evidence of PW2 was left unchallenged during cross examination.

The last contention that the handwriting expert or independent witness was required to prove the appellant's handwriting at the PCCB visitors book has no merit too. The appellant (page 40 of the proceedings) admitted the same to be his handwriting. After all, analysis of evidence and submissions in regard to the 6th element of the offence was also

proved beyond reasonable doubt. Hence, the first ground of appeal lacks merit.

Regarding the second ground of appeal, it was the contention by Mr. Sululu that it was irregular for the offence to be investigated by PCCB officer; and the appellant to be prosecuted under normal criminal trial channels. He also argued that PW1 was supposed to be a co-accused; and that the questions asked during cross examination were not recorded. I think all of these allegations should not detain the Court. The appellant does not exhibit how investigation by PCCB prejudiced him during the trial. In the proceedings subject of this appeal (obtaining money by false pretence), PW2 is a victim not a co-accused. Further, there is no law which requires the questions asked during cross examination to be recorded. The court is only required to record evidence of witness throughout examination in chief, cross examination or re-examination. Therefore, the second ground of appeal, too, lacks merit. It is disallowed.

In the upshot, the offence facing the appellant was proved beyond reasonable doubt. This Court will, thus, not interfere with the findings and verdict of the trial court. Hence, the appeal is barren of merit. It stands

dismissed. I so order. The right of appeal is duly explained to parties hereof.

C.K.K. Morris

Judge

November 10th, 2023

Judgement is delivered this 10th day of November 2023 in the presence of Mr. Tito Alois Kabume; the appellant and Messrs. Leonard Kiwango and Goodluck Saguya, state attorneys for the respondent.

C.K.K. Morris

Judge

November 10th, 2023