

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**THE HIGH COURT OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF DODOMA**  
**AT DODOMA**

**DC CRIMINAL APPEAL NO. 76 OF 2023**

*(Originating from Dodoma District Court in Criminal Case No. 84 of 2022)*

**DIONICE THOMAS BATHOROMEO .....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGEMENT**

*Date of Last Order 23/10/2023*

*Date of Judgement 09/11/2023*

**A. J. MAMBI, J**

The appellant, **DIONICE THOMAS BATHOROMEO** is challenging the decision of the District Court of Dodoma (*the trial Court*) in Criminal Case No. 84 of 2022 basing on the following grounds of appeal: -

- 1. That, the trial Magistrate erred in law and fact in basing and/or sustaining the conviction for obtaining monies by false pretense on the contradictory, inconsistent and implausible evidence of the five prosecution witnesses which did not prove the charge beyond all reasonable doubts against the Appellant.*



2. *That the trial Magistrate erred in law and in fact to convict and sentence the appellant while the charge was incurable and defective.*
3. *That the trial Magistrate erred in law and in fact to convict the Appellant without considering that there was no evidence given by prosecution witnesses establishing that the appellant had intention to defraud and deceive the prosecution witness who is PW1.*
4. *That, the trial court grossly erred in law and in fact when convicted the appellant in jail without to pass sentence upon, this was against the mandatory requirement of section 235(1) of the Criminal Procedure Act, Cap 20 R.E 2022 basing on that the appellant was prejudiced to be in prison without being sentenced.*
5. *That, the prosecution case was fabricated and planted thus not prove to the hilt but the trial court wrongly and unreasonably relied upon it on convicting the Appellant whose defense contention was so strong and of probative manner.*
6. *That the trial court erred in law and in fact when make an order in the commitment warrant that the appellant after completion of the sentence should pay T.shs. 32,000,000/= as compensation while in the copy of judgment the said order is not indicated the act which prejudiced the appellant.*
7. *That, the trial Magistrate grossly erred in law and fact when failed to consider the appellant defense when analyzing and evaluating the whole evidence by both side after full trial.*

The brief facts of this case are that the appellant was charged at the trial of Court with three counts, the 1<sup>st</sup> and 2<sup>nd</sup> count were of obtaining money

by false pretense c/s 301 and 302 and the 3<sup>rd</sup> Count was of forgery c/s 333, 335(a) and 337, both of the Penal Code [Cap 16 R: E 2019].

It was alleged by the prosecution at the trial Court that on different dates, that is from 8<sup>th</sup> October 2020 to 25<sup>th</sup> November 2020 and from 8<sup>th</sup> May, 2021 to 21<sup>st</sup> June 2021 the appellant with intent to defraud scooped from one Raphael Alex Ndamalya Tsh 20,019,200 and Tsh 11,790,000/= respectively. It was further alleged by the prosecution that these monies that were paid were for purposes of selling to the victim the lands on Plot No. 19/7 and 19/6 both at Block A at Mkalama within Dodoma City something which the appellant knew that the said plots did not belong to him. The prosecution further alleged that the appellant on diverse dates from 8<sup>th</sup> May 2021 to 21<sup>st</sup> June 2021 with intent to defraud did forge receipt no. DCC 580830 pretending that it was issued by the Dodoma City Council for payment of land rent of Tsh 2, 217,000/= while knowing that it was untrue.

The appellant having denied all the charges the matter went into trial. The trial Court having heard both parties, was satisfied with the prosecution evidence with respect to the 1<sup>st</sup> and 2<sup>nd</sup> count thus, it convicted the appellant with those two counts whilst acquitting him with respect to the third count. Having convicted the appellant with respect to the 1<sup>st</sup> and 2<sup>nd</sup> count, the trial Court sentenced him to serve five (5) years jail term for both two counts. On these sentences the trial Court ordered to run concurrently. The trial Court further ordered the appellant to compensate the victim Tsh 32,000,000/=the money that he obtained from him.

Dissatisfied, the appellant lodged his appeal before this Court basing on the grounds as enumerated above.

During the hearing before this Court the appellant who was represented by Neema Ahmed learned counsel in her submission dropped the sixth ground of appeal and argued jointly all the remaining grounds of appeal. In her submission Ms. Neema contended that the appellant was wrongly convicted as the prosecution failed to prove the charge of false pretence with regard to Plot No. 19/7 and Plot No 19/6 both at Block A in Mkalama within Dodoma City. She averred that there was exhibit D2 and P9 which proved that Plot No. 49 at Iyumbu was the property of the appellant. It was her view that these evidences proved that the appellant did not pretend himself which was the basis of his convictions. Ms. Neema went on arguing that the DC erred by convicting the appellant with an offence that did not relate to the charge sheet. She referred this Court to the decision of the court in **Eva Apolinary vs Daniel Sinda** PC. Crim. App. No. 10 of 2021, page 5.

With regard to the chargesheet Ms. Neema contended that the appellant was charged basing in defective charge sheet. Reference was made on the decision of the court in **James Duru@Nade vs The Republic**, criminal App. No. 100 of 2020 at page 6-7. On the other hand, Ms. Neema submitted that the trial court erred in law for not sentencing the appellant c/s 312 of CPA and finally she prayed this Court to dismiss this appeal.

Responding to the submission in chief, Ms. Sarah leading her fellow State Attorneys Mr. Mwakifuna and Ms. Tausi contended that the evidence of from the prosecution side proved the charge of false pretence beyond reasonable doubt. She averred further that the charge sheet had no any

problem as it was made under proper provision of the law. However, the learned State Attorney went on submitting that even if the words false pretence were not at the charge sheet, she was of the view that the charge cannot be defective as per section 301 of the CPA. She contended that the appellant had intention to act under false pretence over Plot No. 19/7 and Plot No. 19/6 both at Block A with Mkalama in Dodoma City.

The learned State Attorney went on arguing that the appellant was aware over the provision of the law and he defended his case and that, she argued, if the words false pretence were missing, that can be cured by section 388 CPA. Ms. Sarah submitted that the evidence of PW1 at Page 11-23 of proceedings is clear as the appellant told PW1 the plots belonged to him. She contended further that the appellant used to send PW1 control number to pay for the plots and that PW1 used to send money to the appellant through bank and mobile. The learned State Attorney submitted that the evidence of PW1 was corroborated by PW2 and further that the evidence of PW3 proved that the appellant used to receive money through his account as per exhibit no. 5,6,7&8. She added that an offence of false pretence was also proved by PW4.

With regard to the conviction and sentence, the learned State Attorney contended that the appellant was properly convicted and sentenced.

In her rejoinder Ms. Neema reiterated her submissions in chief by arguing that the appellant was wrongly charged at the trial Court.

Having summarised the submissions from both the appellant and the respondent (the prosecution) this Court is of the view that the main issue in this appeal is whether the prosecution proved the charges against the appellant beyond reasonable doubt. In other words, whether, on the basis



of evidence on record, the ingredients of the offence of obtaining money by false pretence were sufficiently proved by the prosecution.

It should be noted that in criminal cases it is the primary duty of the prosecution to prove its case beyond any reasonable doubt. It is a cardinal rule of law that this burden rests throughout with the prosecution (usually the state). See **Abel Mwanakatwe vs R**, Criminal Appeal No. 68 of 2005. That being the case, then it follows that in the instant case it was the duty of the prosecution to prove that indeed the victim, Raphael Alex Ndamalya was conned/defrauded by the appellant. That is to say, the prosecution in this case, was required to adduce evidence proving the fact that the appellant made a false representation in order to obtain money from the victim.

Section 301 and 302 of the Penal Code with which the appellant was charged provides that;

*"301. Any representation made by words, writing or conduct 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."*

Looking onto the wordings of the above provisions, it is clear that for a person to be charged and convicted of an offence of obtaining money by false pretence the prosecution should prove with evidence that the accused made false representation and that on the strength of the false

representation the accused obtained money from the victim. In other word the prosecution must prove that the victim acted on the basis of the false representation made by the accused.

Going throughout the evidence by the prosecution can we say that the victim, Raphael Alex Ndamalya acted (in paying purchase monies for the two plots of land that is Plot No. 19/7 and 19/6 Block A at Mkalama) on the basis of false representation made by the appellant? The answer is **No**. This is because in the whole evidence of the prosecution shows that the alleged victim, PW1 and the appellant had an oral sale and purchase agreement of the lands, that is Plot No. 19/7 and 19/6. The prosecution evidence further show that it was PW1 and his relative one Thomson Sifael Lyimo who were looking for the plots of land to purchase. Specifically, PW1 (Raphael Alex Ndamalya) in his evidence stated that he lives in Dar es Salaam. That in 2020 when he wanted to acquire a plot of land here in Dodoma, he instructed his relative Thomson Sifael Lyimo. PW1 went on testifying that he came to know the appellant through his relative Thomson Sifael Lyimo who informed him that the appellant was selling his land, Plot No. 19/7 Block A at Mkalama at Tsh 20,000,000/=. PW1 added that having seen the said plot, he was told that in order to get its title he had to pay some money to the appellant and the other to the city authority. PW1 stated after their agreement he paid the appellant a total of Tsh 14,000,000/= through his CRDB Bank account number. Then there after, PW1 stated, he was told to pay Tsh 1,000,000/= to one Jeremia who prepares control numbers. He added that having sent the said monies, Mr. Jeremiah sent him two control numbers where he paid Tsh 2,519,200/= for the said control numbers. PW1 stated that having paid for control numbers he sent Tsh 2,000,000/=.

PW1 further testified that after having concluded the transaction, and when the appellant was preparing transfer documents he offered him another plot for sale, which Plot No. 19/6 Block A at Mkalama. The purchase price they agreed was Tsh 10,000,000/=. PW1 stated that he went the same procedures of payment as in the first plot.

Having finished payment in respect of both two plots, PW1 stated, he came to notice that one plot was owned by a different person and the other non-existed. PW1 went on testifying that he reported the matter to the police. That upon arrest the appellant informed him that the two plots had been allocated to other people by the city authorities and so he agreed in writing to compensate him by his plot at Iyumbu New Town Centre, Plot No. 49. PW1 testified that when he was in the course of transferring the ownership of Plot No. 49 again, it was discovered that the appellant forged the documents. Hence, he reported the matter to the police which culminated to this case.

Going through all the prosecution witnesses there is no evidence to show the documents that were forged in respect with Plot No 49 Block "S" at Iyumbu New Town Centre. Furthermore, the evidence of PW1 was contradictory in that while he stated to have had purchased Plot No 19/7 and 19/6 Block A at Mkalama from the appellant in between Nov. 2020 and June, 2021 (see also exhibit P1, P2 and P3 which indicates that PW1 paid land fees to the Dodoma City Council and the Ministry of Lands in respect of Plot No 19/7 and 19/6 Block A at Mkalama in 2020 and 2021 respectively. That upon discovery that the appellant was not the owner then he agreed to compensate him with Plot No. 49 Block "S" at Iyumbu New Town Centre. This piece of evidence differs with exhibit P4 which is the sale agreement in respect with Plot No. 49 Block "S" at Iyumbu New



Town Center. Exhibit P4 indicates that PW1 and the appellant executed a sale and purchase agreement on 24/11/2021 where the appellant agreed to sale (not to compensate) his land (Plot No 49) to PW1 at Tsh 32,000,000/= . In their agreement the parties agreed that the date of disposition of the right of occupancy was on 23/11/2021. The said agreement reads in part as follows;

*'3. That, during execution of this deed the purchaser shall pay the vendor Tanzania Shilings Thirty-Two Million (Tsh 32,000,000/=) only as full payment.*

*4. That, the execution of the deed of disposition of the right of occupancy registered under the above reference is on 23<sup>rd</sup> November 2021."*

Going through exhibit P4 one notices that the parties entered into a fresh agreement. The document (a sale agreement) speaks for itself. There is nothing to suggest that the appellant was compensating PW1. Paragraph 3 of their sale agreement show that PW1 agreed that upon execution of their contract he would pay the appellant the purchase price. Furthermore, on paragraph 4 the parties agreed that even if they were executing their contract on 24/11/2021 the disposition of the land was on 23/11/2021. The question is if PW1 paid the purchase money in respect to Plot No 19/7 and 19/6 Block A at Mkalama long time before 23/11/2021 why then he didn't incorporate such useful information into their contract?

This raises question to be desired and in turn makes this Court believe the appellant version of his evidence that he never sold any land at Mkalama. Instead, he sold his land Plot 49 Block "S" at Iyumbu New Town Centre to PW1 (as per exhibit P4) but failed to make transfer due to this case.

In my view, looking into the circumstances of this case, this case appears to be of more civil than criminal. This because there is no evidence to prove that indeed it was the appellant who made a false representation to the victim causing him pay the purchase money in respect of Plot No 19/6 and 19/7 Block A at Mkalama. In my view if anything wrong happened in respect to their agreement the parties were required to seek legal redress at the civil court.

In light of the foregoing discussion, this Court finds that the prosecution failed to prove its case against the appellant beyond reasonable doubt as required by the law. In the circumstance I find that this appeal is meritorious and thus is allowed. In the premises, I quash the conviction and set aside the sentence imposed on the appellant and other subsequent orders. In the interest of justice, I order that the appellant be released from prison forthwith unless he is held on other lawful cause.



**A. J. MAMBI**

**JUDGE**

**09/11/2023**

Judgment delivered in Chambers this 9<sup>th</sup> day of November, 2023 in presence of both parties.



**A. J. MAMBI**

**JUDGE**

**09/11/2023**

Right of appeal explained.



**A. J. MAMBI**

**JUDGE**

**09/11/2023**