

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC. CRIMINAL APPEAL NO. 03 OF 2022

(Arising from Criminal Case No. 37 of 2022 in the District Court of Dodoma at Dodoma)

MASHA JOSEPH WITARE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14th March & 10th May, 2024

MUSOKWA, J.

In the District Court of Dodoma, the appellant was charged with eighteen counts. The 1st and 2nd counts were personation contrary to sections 369(1) and 371 of the Penal Code, Cap. 16, R.E. 2019 (Penal Code). For the 3rd to 9th counts, the appellant was charged with forgery contrary to sections 333, 335(a) and 337 of the Penal Code. The 10th to 16th counts, were for uttering false document contrary to sections 342 and 377 of the Penal Code. Finally, for the 17th and 18th counts, the charge was for obtaining money by false pretense contrary to section 302 of the Penal Code.

The prosecution paraded ten (10) witnesses and tendered 11 exhibits during the trial; whereby the defence had one (1) witness, the appellant

herein. Being found guilty of the charged offences, the appellant was convicted and sentenced to three years imprisonment in respect of the 1st count, three years for the 2nd count, and 5 years for the 3rd, 4th, 5th, 6th, 7th, 8th and 9th counts. Further, the appellant was sentenced to serve three (3) years imprisonment, for the 11th, 12th, 13th, 14th, and 16th count. In respect of the 17th and 18th counts, the appellant was sentenced to serve two (2) years imprisonment for each count. Notably, the sentences were to run concurrently.

Aggrieved, the appellant is challenging the conviction and related sentences under the following grounds of appeal: -

- 1. That, the learned trial magistrate grossly erred in law and fact by convicting the accused person (appellant) while the prosecution side failed to prove the case against the appellant beyond reasonable doubts.*
- 2. That, the learned trial magistrate grossly erred in law and fact when convicted the appellant while the trial was procedurally (sic) conducted.*
- 3. That, the learned trial magistrate grossly erred in law and fact by convicting the appellant based on contradictory and unreliable evidence adduced by ten (10) prosecution witnesses.*
- 4. That, the learned trial magistrate grossly erred in law and fact for the admissibility of the prosecution exhibits tendered in court during trial.*

5. *That, the learned trial magistrate grossly erred in law and fact by failing to comply with section 312(2) of the CPA Cap. 20 R.E 2019 when sentenced (sic) the accused person (appellant).*
6. *That, the learned trial magistrate grossly erred in law and fact in not drawing an adverse inference against the prosecution when deliberately failed to call the competent and compellable witnesses to testify during the trial without disclosed reason to be shown (sic).*
7. *That, the learned trial magistrate grossly erred in law and fact when admitted an extra judicial statement (Exhibit P2) while the same does not comply with the guidelines for the justice of peace given by the Chief Justice.*
8. *That, the learned trial magistrate grossly erred in law and fact by failing to give due consideration the defence raised by the appellant.*

On the date scheduled for the hearing of the appeal, Ms. Patricia Mkina, learned state attorney represented the respondent whereas the appellant appeared in person, unrepresented.

The appellant prayed for his grounds of appeal to be adopted and form part of his submissions. Arguing in support of his first ground of appeal, the appellant submitted that there are many anomalies which are evident during the trial. The appellant, clearly diverging from the said grounds of appeal, submitted that contrary to the law, an unjustifiable long period

lapsed between the date of his arrest and the date he was arraigned before the court.

On the second ground of appeal, the appellant submitted that the trial court wrongly admitted the Exhibit "P9" which was a National Identification Authority (NIDA) card. Referring to page 56 of the typed trial proceedings, the appellant stated that the aforementioned exhibit was brought to court by the witness himself and therefore was not stored following the proper chain of custody.

Proceeding to the third ground of appeal, the appellant averred that, the trial court erred in law and in fact to convict him based on contradictory and unreliable evidence. In explaining this ground further, the appellant referred to the testimonies of the witnesses as recorded from page 101 of the typed trial proceedings. In addition, the appellant submitted that the testimony of PW1 at page 13 of the typed proceedings, to a great extent contradicts the testimony of PW2 whose testimony is recorded from page 20 of the same proceedings. PW1 states that he met the appellant on 17/5/2021 and again on 18/5/2021, whereby PW2 states that he met the appellant on 18/5/2021. The appellant expressed his dismay that the trial court entered judgment against him despite the aforementioned discrepancies.

As to the fifth ground of appeal, it was his submission that the trial magistrate failed to comply with section 312(2) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (CPA) when issuing the sentence. The appellant argued that it is the requirement of the law that upon the accused being convicted, the trial magistrate should state the provision under which the accused has been convicted. According to him, this was not adhered to during the trial.

On the sixth ground of appeal, the appellant argued that, the trial magistrate erred in law and in fact by not drawing an adverse inference against the prosecution, despite their deliberate omission of calling competent and compellable witnesses to testify during trial. The prosecution, the appellant added, stated that they would call 15 witnesses to testify. Instead, only 10 witnesses were summoned to testify. Additionally, the appellant averred that all the witnesses that were brought to testify knew each other and had similar interests. Therefore, the appellant argued, that their testimony was evidently biased.

The appellant stated further that the remaining 5 witnesses who were not brought before the court were the most significant. Among these, is the alleged owner of Plot No. 434, namely Joseph Witare; and one Rughole Joseph, allegedly the owner of Plot No. 441. Other witnesses who

according to the appellant were material witnesses, is a court broker, namely Toshi, a second court broker, who was the colleague of Toshi, and staff members of the NIDA. The appellant contended that it is on record, that the aforementioned witnesses were listed by the prosecution as witnesses they were to summon to testify in court, but the prosecution failed to do so without sufficient reason.

In addressing the seventh ground of appeal, the appellant submitted that the trial court erred in law and fact by admitting an extra judicial statement, to wit, Exhibit "P2" in a manner that is inconsistent with the Guidelines which were issued by the Hon. Chief Justice. In support of his position, the appellant cited the case of **Hatibu Ghadhi and Others vs Republic, Criminal Appeal No. 44 of 1987** (unreported).

Concluding on the eighth ground of appeal, the appellant contended that the trial magistrate erred in law and fact by failing to duly consider the defense raised by the appellant, resulting in his conviction and sentence. He therefore prayed that this court should consider his grounds of appeal and determine this appeal in his favor.

In response, Ms. Patricia Mkina, learned state attorney submitted that, there are some issues which the appellant raised in his submission in chief which were not part of the grounds of appeal before this court. These

issues include the allegedly long period of time which he spent in the custody of the police before being arraigned before the court. Another issue was the Exhibit "P9", the NIDA card, which he alleged was not properly stored in the chain of custody. Ms. Mkina further contended the assertion by the appellant regarding the alleged contradicting testimonies of PW1 and PW2. The aforementioned, Ms. Mkina submitted, are new grounds of appeal and the state attorney prayed for the guidance of the court in this regard. In response to the guidance sought, the court directed that since the applicant did not seek a prior leave of this court on the added grounds of appeal; only the grounds of appeal that are before the court will be considered in the determination of the appeal.

Ms. Mkina, commenced by collectively attacking the 1st and 3rd grounds of appeal. Ms. Mkina argued that the prosecution proved the offence of personation, through the testimony of PW1. The witness PW1 testified that on 17/5/2021, while at his office, one Mwarami Juma personified himself for the purpose of fraudulently selling Plots No. 443 and No. 444, situated at Nala in Chinangali. Further that on 18/5/2021, the appellant presented himself by the name of Mwarami Juma, before an advocate, claiming that he was the seller of the plots aforementioned. Proceeding with her submission, Ms. Mkina averred that the appellant continued to

personify himself as the aforementioned person, before the advocate and the interested buyers, resulting in the sale of the said plots.

Following therefore, the contracts of sale contained the name and signature of Mwarami Juma, and the appellant's photo was affixed thereto. Ms. Mkina argued that the testimony of PW1 was supported by the testimony of PW8, the advocate who prepared the sale agreements. Further, that the cautioned statement which was tendered by PW4 was also proof of the commission of the offence of personation by the appellant, whereby the appellant made his confession thereto.

The learned state attorney averred that the count of forgery, was also proven beyond reasonable doubt. Ms. Mkina referred to the testimony of PW6, a forensic expert who upon his observation of the receipts No. 511/941, and No. 511/949, the findings were that the said receipts contained forged signatures, which were not the signatures of the accountant of Dodoma Municipal Council. This testimony was supported by the testimony of PW5, the accountant of Dodoma Municipal Council, whereby she did not recognize the signatures on the receipts and further claimed that they were not her signatures.

Proceeding further, Ms. Mkina submitted that PW7, the real Mwarami also testified that the signatures appearing on the sale agreements were not

his signatures. PW7 added that, the NIDA card that was submitted by the appellant to the advocate, differs in content with his NIDA card, more specifically the signature and the photo. According to the state attorney, the testimony of PW10, an investigation officer by the name of Corporal Ashraf, also supports the testimony of the other witnesses. The said officer tendered Exhibit P11, which is a letter from NIDA Offices, stating that the identification card that was used by the appellant was a forgery. In consideration of the aforementioned testimonies and the related Exhibits, it was the position of the learned state attorney that the offence of forgery was proven by the prosecution beyond reasonable doubt.

Ms. Mkina addressed the offence of uttering false documents whereas she stated that PW1, the buyer, testified that the letter of offer, and the receipts which the appellant issued to him, were false documents. Further, the testimony of PW8, the advocate, also proved this offence. In addition, Ms. Mkina submitted that the aforementioned testimonies were supported by the cautioned statement in which the appellant confessed to being the culprit of the charged offence.

On the count of obtaining money by false pretense, Ms. Mkina submitted that PW1 informed the court that on 17/5/2021, he paid TZS. 500,000 as advance payment for the said plots. PW1 stated further that on

18/5/2021, he completed payment of the balance of TZS. 5,500,000/=.

The said transaction took place in the office of the advocate. Furthermore, this testimony has been supported by the testimony of PW2. In his rejoinder, the appellant had nothing substantial to submit.

I have carefully gone through the records and submissions of both parties. The issue to be determined by this court is whether or not the charge against the appellant was proven to the standard required by the law in criminal cases. It is a trite law that in a criminal charge, the accused person must be convicted on the strength of the prosecution case and not on the weakness of his defense. Further, the burden of proof lies on the prosecution to prove the case against the accused beyond reasonable doubt.

I will commence by addressing the 1st, 3rd and 6th grounds of appeal collectively. The appellant alleges that the trial court erred to convict him while the prosecution failed to prove the case against him beyond reasonable doubt. Further, that the conviction was based on the contradictory testimonies of the prosecution witnesses. However, the appellant was not forthcoming on his submissions regarding the contradictory testimonies of the prosecution witnesses. On the other hand, the respondent extensively submitted on the credible testimonies

of the prosecution witnesses at the trial court which proved the charge against the appellant. Looking carefully at the records, the prosecution brought witnesses to testify in court on each count the appellant was charged with.

As regards to the offence of personation. The provision of section 369 (1) of the Penal Code reads as hereunder: -

"369 (1) Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of an offence."

The testimonies of PW1, PW8 and PW4 were relied upon by the prosecution to prove the count of personation against the appellant. The said witnesses were the complainant, the advocate who witnessed the sale agreement and the justice of peace respectively. I will draw attention to the testimony of PW4, the justice of peace which is recorded at page 32 of the typed trial court proceedings as reproduced hereunder: -

"He introduced to me as Masha Witare...he is the accused person at the dock. I inspected him he was okay and I asked him he told me he was not tortured at all. I started interrogating him after I finished I read over to him and he admits it...he signed in the end."

The extra-judicial statement was tendered by PW4 and admitted in court as Exhibit "P2" whereby the accused, the appellant herein, did not object to its admission or the contents thereof. The appellant is recorded in the

extra-judicial statement to admit selling his own plot, his father's and his brother's plots which he stated, that he was selling for the second time. The appellant is further recorded to admit that he committed the said offence knowingly but there were circumstances that forced him to do so. The said circumstances being that the appellant was in need of repaying a loan to which he had defaulted; a loan that he had processed to sort out some family problems. Clearly, the testimony of PW4, which is further corroborated by Exhibit "P2" and the testimonies of PW1 and PW8, sufficed to prove the count of personation against the appellant.

The appellant in his 7th ground of appeal vehemently challenges the admission of the extra-judicial statement, whereby he asserts that the procedure thereof was not in compliance with the Guidelines of the Hon. Chief Justice. In the case of **Jackson Protaz vs Republic**, Criminal Appeal No. 385 of 2020 the Court of Appeal of Tanzania (CAT) at page 11, referred to the case of **Japhet Thadei Msigwa vs Republic**, Criminal Appeal No. 367 of 2008 (unreported) whereby it was partly held that: -

"So, when justices of the peace are recording confessions of persons in custody of the police, they must follow the Chief Justices instructions to the letter. The section is couched in mandatory terms."

The Court stated further that: -

"We think the need to observe the Chief Justices instructions are two-fold. One, if the suspect decided to give such statement, he should be aware of the implications involved. Two, it will enable the trial court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntarily."

In the case of **Jackson Protaz** (supra), the CAT held further on page 12 that:

"The Court, in Japhet's case (supra) further enlisted the steps to be considered when justices of peace are recording confessions of persons in the custody of police. The steps to be considered which were reproduced as they appear in the Chief Justice's Guidelines include: -

- (i) The time and date of his arrest;*
- (ii) The place he was arrested;*
- (iii) The place he slept before the date he was brought to him;*
- (iv) Whether any person by threat or promise or violence has persuaded him to give the statement;*
- (v) Whether he really wishes to make the statement on his own free will;*
- (vi) That, if he makes a statement, the same may be used as evidence against him."*

In the case at hand, the trial court records indicate that the justice of peace-PW4, recorded the statement of the appellant according to the Chief Justice's guidelines. In view of the foregoing, the 7th ground of appeal is also devoid of merit and is considered by this court as an

afterthought. The reason being, as previously stated, that the appellant did not object to the admission or contents of the extra-judicial statement by the trial court.

The offence of forgery is provided for under sections 333 and 335(a) of the Penal Code which stipulate that: -

"333. Forgery is the making of a false document with intent to defraud or to do deceive.

335. Any person makes a false document who-

(a) makes a document which is false or which he has reason to believe is untrue;

The testimonies of PW6, PW5, PW7 and PW10; the forensic expert, an accountant from the Dodoma Municipal Council, the real Mwarami, and the investigation officer were relied upon by the prosecution in an attempt to prove the count of forgery. The aforementioned witnesses testified that the signatures on the receipts allegedly issued by the Dodoma Municipal Council, the signatures on the letter of offer, the sale agreement, and the Identification Card of the appellant, were all forgeries. The said testimonies were corroborated by the cautioned statement which was tendered by the investigation officer-PW3, and admitted by the court as Exhibit "P1". Notably, the appellant herein did not object to the admission of the cautioned statement. The testimony of PW3 is recorded at page 26 of the typed trial court proceedings as reproduced herein below: -

"Before I wrote anything I explained his rights....not to speak anything except by his own will....he told me he was able to say it alone. I explained the offence suspected to commit. He admitted to commit the offence charged."

On the offence of uttering false documents, section 342 of the Penal Code provides that: -

342. "Any person who knowingly and fraudulently utters a false document is guilty of an offence and is liable to the punishment, provided for in respect of the offence of forgery in relation to that document."

The testimonies of PW1 and PW8 were further relied upon by the prosecution to prove the count of uttering false documents. As per the records, the letter of offer and the receipts which the appellant issued to PW1, the buyer, were false. The testimony of PW8, the advocate who prepared the sale agreement between the appellant and the complainant was also relied upon. Further, the cautioned statement wherein the appellant confessed to committing the charged offence, corroborated the testimonies of PW1 and PW8.

As to the count of obtaining money by false pretenses, PW1, at page 14 of the trial court proceedings testified that on 17/5/2021, he paid TZS. 500,000 as advance payment for the said Plots and on 18/5/2021, he completed payment of the balance of TZS. 5,500,000/=. Further, he stated that the said transaction took place at the office of the advocate.

His testimony was supported by the testimony of PW2 at page 21 of the trial court proceedings. Section 302 of the CPA provides that: -

"Any person who by any false pretense 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."

From the foregoing provision, it is apparent that for a person to be charged and convicted of the offence of obtaining money by false pretense, the prosecution must adduce evidence to establish that the accused, through false pretense or misrepresentation, fraudulently obtained money from another person. In the instant appeal, based on the evidence adduced by the prosecution and based on the records, I am of the settled view that there was sufficient evidence for the trial court to convict the appellant for the said count. On the basis of the foregoing, this court opines that the prosecution successfully proved the case against the appellant beyond reasonable doubt. In this regard, the 1st, 3rd, 6th and 7th grounds of appeal are devoid of merits and they fail completely.

The 2nd and 4th grounds of appeal which challenge the conviction on the basis of the trial being wrongly conducted, including the improper admission of the exhibits tendered by the prosecution are

also baseless. Nowhere in the records does the appellant challenge the admission of the said exhibits.

With regard to the 5th ground of appeal, the appellant submitted that the trial magistrate failed to comply with section 312 (2) of the CPA when issuing the sentence. The appellant argued that upon conviction, the law requires the trial magistrate to state the provision under which the accused person has been convicted. The aforementioned section reads as follows: -

312 (2) "In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."

The appellant asserted that this provision was not adhered to during the trial. For ease of reference, the relevant part of the typed trial court proceedings at pages 35 and 36 is reproduced herein below:

"From the evidence deliberately adduced by the prosecution against the accused person it is sufficient to find accused person guilty in all eighteen counts stand charged. I convict I (sic) respect to the 1st and 2nd count contrary to section 369 (1) and 371 of the Penal Code Cap. 16, R.E. 2019, also I convict I (sic) relation to 3rd count to 9th counts contrary to section 333, 335 (a) and 337 of the Penal Code Cap. 16 R.E. 2019, in his 10th counts to 16 counts convicted for uttering false documents contrary to section 342 and 337 of the Penal Code Cap. 16 R.E. 2019, also convicted for obtaining money

by false pretense contrary to section 302 of the Penal Code in respect of the 17th and 18th counts."

From the above quotation, it is evident that the trial magistrate convicted the appellant for all the 18 counts, and for each count, the respective provision of the law was duly cited. Similarly, I find the 5th ground of appeal baseless and unfounded.

Finally, on the 8th ground of appeal, the appellant contends that the trial magistrate erred in law and fact by failing to duly consider his defence and on that basis, is challenging the resulting conviction and sentence. I refer to page 35 of the judgment of the trial court whereby the trial magistrate is recorded to state as follows: -

"I considered the accused person defense, he refused to commit all eighteen counts stand charged before this court....he failed to create reasonable doubt into the mind of this court on the evidence adduced by the prosecution."

Clearly, the defence of the accused was considered by the trial magistrate, contrary to the assertions of the appellant. Therefore, the conviction and corresponding sentences were meritorious. Hence, the 8th ground of appeal fails too. In consequence whereof, the entire appeal is hereby dismissed.

It is so ordered.

Right of appeal explained to the parties.

DATED at DODOMA this 10th day of May, 2024.



A handwritten signature in black ink, appearing to read "I.D. Musokwa".

I.D. MUSOKWA

JUDGE

Judgment delivered in the presence of Ms. Victoria Njau, state attorney representing the respondent; and in the presence of the appellant.



A handwritten signature in black ink, appearing to read "I.D. Musokwa".

I.D. MUSOKWA

JUDGE