IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SHINYANGA SUB-REGISTRY)

AT SHINYANGA

PC CRIMINAL APPEAL NO. 0439 OF 2024

(Arising from the District Court of Busega as Criminal Appeal No. 19 of 2023 and the same originating from Mkula Primary Court as Criminal Case No. 143/2023)

MATHIAS BALIHALI .....APPELLANT

VERSUS

MADUKA LUTONJA.....RESPONDENT

JUDGMENT

Date of Last Order: 20.03.2024

Date of Judgment: 14.06.2024

MWAKAHESYA, J.:

This is a second appeal arising from the judgment of the District Court of Busega affirming the respondent's acquittal by the Mkula Primary Court for the offence of obtaining money by false pretence contrary to section 302 of the Penal Code. The particulars of offence were couched in the manner that, the respondent on 23.06.2023 at Mkula Village within Mkula Ward, Busega District – Simiyu Region unlawfully obtained TZS 500,000/= from the appellant and failed to return the money.

During trial, two witnesses testified for the appellant's cause, that is, the appellant himself (SM1) and Nyilika Mathias (SM2); meanwhile the respondent (SU1) and Josia John (SU2) testified for the defence. The trial court acquitted the respondent, prompting the appellant to appeal to the District Court of Busega, where once again the respondent emerged victorious. Thus the appellant has filed the present appeal bearing the following grounds:

1. *That, both the trial and first appellate court erred in law and facts for failure to consider properly the evidence on record of which the appellant and the witness proved the case beyond reasonable doubts (sic);*
2. *That, both the trial and first appellate courts erred in law and facts for failure to note that, the respondent obtained money from the appellant based on an inducement;*
3. *That, both the trial and first appellate courts erred in law and facts for relying on the issue of civil case while it is pure criminal case; and*
4. *That, the first appellate court erred in law for holding that the charge does not contain the ingredient (sic) of the offence while a duty to amend a charge in primary court is vested to the court itself.*

At the hearing of the appeal, both parties appeared in person, unrepresented.

Submitting on the first ground of appeal, the appellant was of the view that the trial court and the first appellate court failed to evaluate the evidence that he gave at the trial court and also failed to properly consider the evidence of SM2 who testified that he (the appellant) gave the amount of TZS. 500,000/= to the respondent.

It was the respondent's response that the primary court and the first appellate court were correct in finding that the appellant had failed to prove the offence he (the respondent) was charged with.

I find it prudent to reproduce the provision of the law creating the offence, for clarity. Section 302 of the Penal Code reads:

> *"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."* [Emphasis mine]

From the provision, three ingredients stand out: the first being that there must be a false pretence, second there must be an intent to defraud; and third the person charged must obtain or cause another to deliver to another something capable of being stolen. See **Jadav v. Republic (1971) H.C.D. n. 393**.

As to what amounts to a "false pretence" it was held in **Jadav's case** (*supra*) that:

> *"The representation of a matter of fact is held to be false if the representor knew that it was false or that he did not believe in its truth, and* ***this representation has to relate to past or present fact****. It could not relate to the future for the simple reason that what is in future is unknown and could not therefore be said to be false…"* [Emphasis mine]

In **Augustino Brown Chanafi v. Republic (1968) H.C.D. n. 73**, it was held that, "*to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action*".

After establishing the essential ingredients of the offence that the respondent was charged with, we should now be in a better position to determine if the same were satisfied to the extent required by the law.

Having gone through the judgment of the trial court, the appellant's assertion is misguided. The trial magistrate considered the appellant's evidence as well as **SM2**'s evidence as it can be seen at pages 5-8 of the judgment. The learned trial magistrate was of the view that the false pretence was not established/proved and rather what established was more less a loan transaction between the appellant and the respondent, and was even of the view that the transaction fell within the realm of civil

and was not criminal in nature. The same observation was made by the learned appellate magistrate.

To add, during trial the appellant testified to the effect that, the respondent had approached him on 23.06.2023 and asked to borrow TZS 500,000/= to enable him to organize a TASAF meeting (the respondent alleging that he was a TASAF secretary) and the same will be returned after some time, and if he fails to return the money he will deliver cotton of the same value to the appellant.

If we are to pause here, and considering the ingredients of the offence the respondent was charged with, the appellant failed to establish the false pretence, was it that the respondent was a TASAF secretary? one might ask. If the answer is in the affirmative, then why didn't the appellant adduce evidence that the respondent was not a TASAF secretary? About the delivery of cotton of the value of the borrowed money instead, that promise related to a future event thus does not fall within the ambit of a false pretence in line with **Jadav's case** (*supra*).

SM2 who is the appellant's son, testified to the effect that on the material date the respondent borrowed TZS 500,000/= from the appellant in order to facilitate a meeting, but did not mention anything about TASAF

or the respondent claiming that he was the secretary of TASAF. Like the appellant, **SM2** testified that the respondent promised to return the money or deliver cotton of the same value.

Considering the above, I find that the first ground of appeal is unmeritorious and I dismiss it.

On the second ground of appeal, the appellant could only inform the court that the submission on the first ground of appeal applied to this ground as well and thus he had nothing to add. Meanwhile, the respondent replied that, he did not induce the appellant and never went to the appellant's place of business and request to be borrowed money to the tune of TZS 500,000/= and that is why there is no proof of him borrowing that money.

Revisiting the analysis when dealing with the first ground of appeal, to prove the charge that faced the respondent the appellant was supposed to prove a false pretence and not an "inducement" as he puts it. An inducement does not necessarily make something illegal but it is a mere catalyst for making a person behave in a certain manner. Therefore, even the promise to give back cotton instead of money could operate as an inducement and as said previously, the same being a promise for a future

act does not follow within the elements of a false pretence. I therefore, find the second ground of appeal lacking merit and proceed to dismiss it.

On the third ground of appeal, it was the appellant's contention that, this is a criminal case because the respondent was arrested and taken to court and it is not a civil case. The respondent's reply was that, the trial court and first appellate courts were correct in finding that this is not a criminal case but rather it is a civil case.

Again, revisiting the analysis on the previous grounds of appeal, the charge against the respondent was not proved, but evidence adduced by the appellant and **SM2** pointed out to a loan transaction rather than the respondent obtaining money by false pretence. Thus, this ground too fails and is dismissed.

On the fourth and final ground of appeal, the appellant could not expound it but beseeched the court for the same to be adopted as it is. The respondent's submission in reply was that, the charge he was facing was not proved beyond reasonable doubt and prayed for the appeal to be dismissed.

The charge facing the respondent at the trial court read:

"KOSA NA KIFUNGU CHA SHERIA: KUJIPATIA FEDHA KWA NJIA YA UDANGANYIFU K/F 302 SURA YA 16 K.A

MAELEZO YA KOSA: WEWE MSHITAKIWA MADUKA S/O LUTONJA UNASHITAKIWA KWAMBA MNAMO TAREHE 23/06/2023 MAJIRA YA SAA NANE MCHANA (2:00) KATIKA KITONGOJI CHA SOKONI KIJIJI CHA MKULA KATA YA MKULA, WILAYA YA BUSEGA, MKOA WA SIMIYU, KWA MAKUSUDI NA BILA HALALI ULICHUKUA FEDHA Tsh 500,000 (LAKI TANO) KWA MLALAMIKAJI MATHIAS S/O BALIHALI AKIWA KATIKA ENEO LAKE LA KAZI KITUO CHA KUPIMIA PAMBA MKULA NA KUSHINDWA KURUDISHA. HUKU UKIJUA KUFANYA HIVYO NI KOSA NA KINYUME CHA SHERIA.

SAHIHI YA MLALAMIKAJI"

This can be translated to;

"STATEMENT OF OFFENCE: OBTAINING MONEY BY FALSE PRETENCE CONTRARY TO SECTTION 302 OF THE PENAL CODE, CAP. 16

STATEMENT OF OFFENCE: THAT THE ACCUSED MADUKA S/O LUTONJA ON 23/06/2023 AT SOKONI …MKULA VILLAGE, MKULA WARD, BUSEGA DISTRICT, SIMIYU REGION, WITH INTENT AND ILLEGALLY OBTAINED TZS 500,000 (FIVE HUNDRED THOUSAND) FROM THE COMPLAINANT AT HIS PLACE OF BUSINESS WHICH IS MKULA COTTON WEIGHING CENTRE AND FAILED TO RETURN THE MONEY. KNOWING DOING SO IS AGAINST THE LAW.

COMPLAINANT'S SIGNATURE"

The above charge does not contain all the essential elements of the offence of obtaining money by false pretence. It does not suggest that

the respondent with false pretence obtained money from the appellant, but states that the obtaining of the money was against the law. The charge being an essential component in a criminal trial was wanting.

Thus, it was correct for the appellate magistrate to hold that the ingredients of the offence charged were not "enshrined" in the charge. As for the duty to amend the charge, it was the appellant who was the complainant and thus in charge of prosecuting his case, he cannot now shift that task to the trial court. In the end the fourth and final ground of appeal is dismissed for lack of merit.

In the upshot, this appeal is dismissed in its entirety.

DATED at **SHINYANGA** this 14th day of JUNE 2024

N.L. MWAKAHESYA

JUDGE

14/06/2024