

IN THE HIGH COURT OF TANZANIA

AT MWANZA

APPELLATE JURISDICTION

HIGH COURT CRIMINAL APPEAL NO. 197/1985

(Original Criminal Case No. 3 of 1984 of the District  
Court of Ukerewe District at Kabingo - Before Muyenjah  
Esq., District Magistrate)

STANSLAUS S/O MUNUBI MAJULA ..... APPELLANT  
(Original Accused)

VERSUS

THE UNITED REPUBLIC: ..... RESPONDENT  
(Original Prosecutor)

CHARGE:- 1st Count:- Stealing by agent s/a 273(b) of  
the Penal Code Ca. 16.

2nd Count:- Obtaining money by false pretences  
s/a 302 of the Penal Code Cap. 16.

J U D G E M E N T

KATITI, J:-

In the year 1980, the Complainant Stephen Lucas Mugea secured and obtained building plot No. 73, by along Nakatunguru Road, Nansio, UKERWE District. Desirous of constructing a house he began manufacturing bricks. In November 1983, the same complainant and Stanlaus Munubi s/o Majula hereafter to be referred to as the appellant, struck an agreement whereby the complainant offered a house construction job and the appellant accepted the same, at an agreed contractual amount shs. 3,300/=-, payable by stage by stage instalments. The cement variously described in terms of numbers, with which the said construction had to be done, was in the possession of P.W.4 Loya Bahelana, who had kept the same at the house then currently occupied by P.W.5 Pasasiza, but whose key was in possession of P.W.4. In January 1984, the complainant got, or received information that the appellant had thieftly sold six bags of cement, and one thousand bricks to P.W.3 Said Maloon at shs. 1760/- and 5,000/- respectively. This and such allegations, landed the appellant into the hands of the hounds of Justice, and hence the preference of two counts. The trial magistrate after hearing the case, came to the conclusion, to convict the appellant as charged, and hence the five years imprisonment on each count, sentences running concurrently, and subject to confirmation by the High Court.

The appellant aggrieved, has appealed against conviction.

During the prosecution of the appeal, the appellant as in the lower Court, denied committing the offences charged, charging the trial magistrate for treating the evidence shallowly to his prejudice. Representing the Republic was a Senior State Attorney Mr. Massaba, who for reason that I concurringly accept, declined to support conviction urging this Court, that freedom and liberty outside the four walls of prison, be restored unto the appellant. I shall hence ideal with the counts seriatim by relating the same to the evidence on record, to see where Justice as it is guided by the very evidence, settles.

On first count of stealing by agent, it was alleged that the appellant on 18/12/1983 did steal ten bags of cement valued at shs. 1,500/=, that had been entrusted to him by one Loya Balehana P.W.6, for the construction of Stepheno s/o Lucas Agetta P.W.I's house. It is common ground, that the appellant was a mason, who had been engaged to construct P.W.I's house. It is common ground and undisputed, that the very P.W.6, had instructions to be dishing out cement, to the appellant as and when the latter needed the same, for the construction of P.W.I's house. And if P.W.4 did give ten bags of cement to the appellant, that was in accordance to instructions, and there is no evidence suggesting that, the appellant did not utilize the said ten bags of cement, in the construction of the complainant's house. In fact the prosecution evidence, by P.W.3, Said Maloon, and P.W.4 Rashid Maruku is over whelmingly to the effect that the appellant had been constructing a foundation of P.W.I's house. But in human practical affairs, one cannot have his cake and eat it, - i.e. use the very cement for construction of the house, and illegally dispose of the same. It is practically untenable. With the above, I find myself in agreement with the Senior State Attorney Mr. Massaba that a conviction based on such evidence cannot stand. It is hereby quashed and sentence thereon set aside.

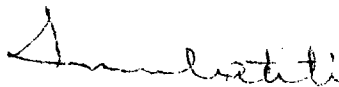
The second count of obtaining money by false pretences, did aver and allege, that the appellant, on the 9th day of January 1984 at about 9 a.m, at Nakatunguru, Ukerewe District, did with intent to defraud obtain shs. 1,760/= from Said Maloon so as to get six bags of cement which was false. With conspicuous unhappiness, with the wording of the particulars of offence, I shall go and delve into the depth of the charged offence. The main actors in the scene of this charged count, are P.W.2 PC. John, P.W.3 Said Maloon and P.W.4 Rashid Maruku. Without the advantage of credibility assessment, which is on technical grounds, not necessary at this stage,

the evidence, which the appellant perchantly challenges anyway, is that the appellant sold six bags of cement to P.W.3, in the presence of P.W.4 at shs. 1,760/=, and delivered the same to him. And that subsequently upon discovery that the cement had allegedly been illegally obtained, the accused refunded shs. 1,225/= to P.W.3. Even assuming the above facts are not encumbered by contraverty, the charge of obtaining money by false pretences can not stand. This is because so long as the purchaser got and obtained what he had bargained and paid for, vis-a-vis the purchaser, in this case P.W.3, and the vendor the appellant, thereis no that essential element, of false presentation, and intent to defraud, although the seller may have fraudulently and without claim of right obtained the property that is the subject of bargain, from the real owner. In this case, assuming the story is true, the appellant did deliver the goods and passed property in the same. From the above it is clear, the conviction cannot stand. The conviction is hereby quashed and sentence thereon set aside. The appellant to be set free unless he is otherwise legally held.

Delivered this 14th August, 1986.

MWANZA

14th August, 1986



E.W. KATITI

JUDGE