IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CRIMINAL APPEAL NO. 204 OF 2020

(Appeal from the Criminal Case No. 89 of 2019 in the District Court of Sengerema at Sengerema (Salehe, RM) dated 29th of April, 2020.)

JUMAPILI MASANJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

19th February, & 15th March, 2021

ISMAIL, J.

The appellant, along with two co-accused persons, were arraigned in the District Court of Sengerema at Sengerema, facing two counts. In the first count, the trio was charged with possession of witchcraft instruments contrary to sections 3 (ii) and 5 (2) of the Witchcraft Act, Cap. 18 R.E. 2019. The allegation is that, on 18th day of April, 2019, at about 16.30 hours, at Bomani area, Nyatukala village within Sengerema district, the said accused persons were unlawfully found in possession of assorted

witchcraft instruments. With respect to the second count, the allegation is that on 5th April, 2019, at 15.00 hours or thereabout, at Bomani area, Nyatukala village in Sengerema district, the accused persons, with intent to defraud, obtained the sum of TZS. 5,000,000/- from Agnes John, on the pretext that the same would be cleansed of bad omens and have the fake paper notes converted into real money, the fact they both knew was untrue.

All of the accused persons pleaded not guilty to both counts, necessitating a trial at which three witnesses testified in support of the prosecution's case, while the defence had two witnesses, comprised of the accused persons themselves. The second accused, Jonathan Elias decided to abandon the matter midway through the proceedings.

At the end of the proceedings, the trial court found the accused persons, including the appellant, guilty of the charged offences and were convicted. They were then sentenced to payment of fine or imprisonment in respect of the first count, while in the second count, each of the accused persons was sentenced to a five-year prison term, and payment of TZS. 5,000,000/- to PW2, the victim of the alleged fleecing.

This verdict did not go well with the appellant. He has chosen to take a ladder up, to this Court, through a six-ground petition of appeal, whose grounds are paraphrased as follows:

1. *That, the trial magistrate erred in law by convicting the appellant while the prosecution witnesses had failed to prove the case beyond reasonable doubt.*

2. *That the trial magistrate wrongly attached weight to the testimony of PW2 while the said testimony was fabricated.*

3. *That the witchcraft instruments allegedly found with the appellant were neither tendered in court nor was there an expert who would testify to the fact that the same were indeed such instruments, and allow the appellant to cross examine on that fact.*

4. *That neither a search warrant nor a certificate of seizure were tendered in court in respect of the seized witchcraft instruments.*

5. *That PW2 did not procure attendance of witnesses who witnessed the act of mixing money with papers and arrest them there and then with the sum of money allegedly involved in the scam.*

6. *That the prosecution's failure to bring the papers and the bucket allegedly used in mixing papers with the money means that the trial court was treated to a hearsay evidence which shouldn't have been relied on by the court. On the contrary, this ought to have given the appellant the benefit of the doubt.*

Hearing of the appeal was done through an audio tele-conference that involved the appellant, on one side, and the respondent through Mr. Castuce Ndamugoba, Senior State Attorney, on the other side.

Kicking off the discussion was the appellant who was expectedly laconic. He submitted that the trial court failed to give him justice. He prayed that his grounds of appeal be considered and have the appeal allowed.

For his part, Mr. Ndamugoba was opposed to the appeal. He expressed his support to the trial court's decision. With respect to ground one, his contention is that the prosecution's case was proved beyond reasonable doubt. He argued that this was done through PW2 and PW3. With respect to PW2's testimony, the contention is that the appellant went to her office and convinced her to invest money and reap the amount that would double her investment. The learned attorney asserted that after she had been conned, PW2 reported the matter to police, and PW3 was able to apprehend the rest of the suspects "ready handed" after PW2 had communicated the incident to PW3. He contended that the appellant was arrested by PW3 after the other suspects had been arrested. It was his

view that the prosecution's case had been proved beyond reasonable doubt.

Submitting on ground two, the learned counsel insisted that PW2's testimony was credible and impeccable. Mr. Ndamugoba submitted that there was no evidence of bad blood between PW2 and the appellant as to constitute the reason for the alleged fabrication of the evidence against him. The counsel held the view that this ground is hollow.

With regards to ground three, the respondent's counsel admitted that the instruments of witchcraft were not tendered in court. He was quick to submit, however, that such instruments were only relevant with respect to the offence of being found in possession of witchcraft instruments. He argued that such failure would not blur the appellant's involvement in the offence of obtaining money by false pretence. Mr. Ndamugoba conceded that the first count was not proved as what was tendered in court was a bag that did not convey anything worth of reliance in grounding the conviction.

With respect to ground four, Mr. Ndamugoba argued that the certificate of seizure and the search warrant were tendered in court. He submitted, however, that the anomaly in this case resides in the failure to

read out the said exhibits. This, he argued, had the effect of rendering the exhibits liable to expunging. He prayed that the said exhibits be expunged from the record.

Mr. Ndamugoba's contention in ground five is that PW2's testimony was enough to prove the case and form the basis for conviction. He also submitted that there is a testimony of PW1 who saw the appellant and his colleagues receiving money from PW2. While admitting that the appellant was not caught "ready handed", the learned attorney submitted that the appellant was arrested after the rest of his co-perpetrators had been arrested, and that the three were known to one another. It is the appellant who introduced the other accused persons to PW2.

On ground six of the appeal, the counsel's submission is that it is true that the equipment that is alleged to have been used in the scam was not tendered in court. He submitted, however, that this would not take away the fact that the appellant and his colleagues pinched PW2 of her money, and that this is what obtaining money by false pretence is. Mr. Ndamugoba submitted that the cautioned statements which were tendered and admitted were not read out to the accused, including the appellant. This

did not weaken the prosecution's case. The counsel prayed for dismissal of the appeal.

In his short rejoinder, the appellant denied knowing PW2 or any of the other accused persons. He maintained that he was innocent.

Deriving from the parties' contending submission, the singular issue for determination is whether this appeal carries any merit to warrant reversal of the trial court's decision.

I will begin with ground three of the appeal which mainly touches on the first count, in which the appellant was charged with being found in possession of witchcraft instruments. This is an offence charged under section 3 (b) of the Witchcraft Act, Cap. 18 R.E. 2019. Instruments of witchcraft are defined in section 2 as follows:

> *"means anything which is used or intended to be used or is commonly used, or which is represented or generally believed to possess the power, to prevent or delay any person to do any act which may lawfully refrain from doing, or to discover the person guilty of any alleged crime or other act of which complaint is made, or to cause death, injury or disease to any person or damage to any property or to put any person in fear, or by supernatural means to produce any natural phenomena, and includes charms and*

medicines commonly used for any of the purposes aforesaid."

Letting alone the question whether what is said to be instruments of witchcraft were indeed such instruments, Mr. Ndamugoba has conceded that none of the instruments listed in the charge sheet were tendered in court as a testimony that would support the charge under the first count in the charge sheet. The prosecution paraded nobody to prove that what was allegedly impounded from the appellant and his co-accused was in fact the instruments of witchcraft within the meaning of section 2 of Cap. 18. I agree, without any reservation, that this offence was not proved to warrant a conviction and the eventual sentence. I acquit the appellant of this offence.

I now turn my attention to the rest of the grounds and I begin with grounds five and six of the appeal in which the appellant's gravamen of complaint is that the appellants were not arrested on the spot and that the material which was used to con PW2, such as papers and buckets, were not tendered in court. I will hold in brief terms, as argued by the respondent's counsel that, presence or absence of the said materials would not have any decisive importance, taking into account that the charge of

false pretence. I take the view that the appellant's conviction or acquittal of the second count would be dependent on the testimony other than the papers or the bucket whose tendering is the appellant's point of consternation.

Mr. Ndamugoba has conceded that the cautioned statements which were tendered in court as exhibits P3, P4 and P5 were not read. As correctly alluded to by him, the proceedings do not indicate that these documents were read out after their admission. Such failure was a serious anomaly, and the consequence is to have them expunged from the record of proceedings and the prosecution's testimony. I order that the same be expunged.

Removal of this testimony leaves the oral account adduced by PW1, PW2 and PW3. With respect to PW1 (and not PW2), the appellant's contention is that her testimony is nothing but a bunch of third party account, otherwise known as hearsay evidence.

The trite position is that evidence can only be admissible if the same is direct, and that whatever else that is not direct is hearsay and, inadmissible. This is in terms of section 62 of the Tanzania Evidence Act, Cap. 6 R.E. 2019 which lays a general condition that oral evidence must be

direct. This position is fortified by the Privy Council's decision in ***Subraminium v. Public Prosecutor*** [1956] W.L.R. 965, in which it was held that hearsay evidence is an assertion of a person other than the witness testifying, offered as evidence of the truth of that assertion rather than as evidence of the fact that the assertion was made. Glancing through PW1's testimony, nothing convinces me that her testimony was a third party account. I say so because she was present and witnessed when money changed hands from PW2 to the appellant, and she was aware of what that money was to bring about. I vindicate PW1's testimony and hold that the same was nothing less than an eye witness account.

The next question requires me to cast an eye on the prosecution's testimony and make a conclusion if the prosecution failed to prove its case as contended by the appellant, in ground one of the appeal.

Let me preface my analysis on this ground by stating that, it is a cardinal principle, in criminal trials, that the duty is cast upon the prosecution to establish its case beyond reasonable doubt. This long standing principle has been underscored in countless decisions of the courts across jurisdictions. In ***Joseph John Makune v. Republic*** [1986] TLR 44, it was held:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence. There are few well known exceptions to this principle, one example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities ...."

Emphasis to this principle was put by the superior Court in ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (Mbeya-unreported), wherein it was guided as follows:

"We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise. Even then however, that burden is on the balance of probability and shift back to prosecution."

See also: ***Jonas Nkize v. Republic*** [1992] TLR 213; and ***The D.P.P v. Maria Joseph Somba***, CAT-Criminal Appeal No. 404 of 2007 (unreported).

The appellant and his co-accused were jointly charged with false pretence, an offence which is charged under the provisions of the Penal Code (supra), whose section 302 provides as follows:

"Any person who by false pretence, and with intent to defraud, obtaining from any other person anything capable of being stolen, is guilty of a misdemeanor (an offence), and is liable to imprisonment for seven years."

This offence is defined in section 301 of the Penal Code as follows:

"Any representation by words, writing or conduct of a matter of fact or of intention, which representation is false and the person making it knows to be false or does not believe to be true."

My scrupulous review of the testimony adduced by PW1, PW2 and PW3, reveals that the appellant was involved in making a representation, by words, that PW2 would generate money twice the amount she would deposit with the appellant and his colleagues. This testimony went as far as giving a blow by blow account on how the appellant called at PW2's resident, and was handed the sum of TZS. 5,000,000/- on the understanding that this money would yield twice as much. The appellant made this representation knowing that the same was false. While the sum which was handed to the appellant was not recovered and tendered as an exhibit, nothing has controverted this fact. This means that, the cumulative effect of the prosecution's testimony revealed and proved the following in relation to the appellant's culpability:

(i) That the appellant made a false representation as to an existing fact;

(ii) That the appellant was aware of the falsity of the representation;

(iii) That the appellant's false representation was intended to deceive PW2; and

(iv) That PW2 relied on the false representation to her detriment.

This reasoning is consistent with the reasoning in the old English case of ***R. v. John James Sullivan*** 30 Cr. App. R. 132 at 134, which was quoted with approval in the Nigerian case of ***Ijuaka v. Commissioner of Police*** (1976) LPELR (1466) 1 at 11. In the former, Humphreys, J., dealt with the issue of what had to be proved in order to establish intent to defraud or deceive, which is one of the essential elements in proving the charge of obtaining money by false pretences. He stated as follows:

> *"In order that a person may be convicted of that offence it has been said hundreds of times that it is necessary for the prosecution to prove to the satisfaction of the jury (court) that there was some mis-statement as to an existing fact made by the accused person; that it was false and false to*

his knowledge; that it acted on the mind of the person who parted with the money; that the proceeding on the part of the accused was fraudulent. That is the only meaning to apply to the words, with intent to defraud."

See: ***Adam Yusufu v. Republic***, HC-Criminal Appeal No. 75 of 2004 (unreported)

I take the view that the prosecution's testimony established the guilt of the appellant. As such, his conviction was well grounded, and I find nothing blemished about the trial court's holding in this respect. Ground one of the appeal fails.

Before I pen off, there is another disquieting issue that was raised by the appellant. This is to the effect that his defence was not considered in the impugned decision. Having read the judgment it comes out that, the decision did not factor in the defence testimony. The sole reason for that decision is gathered from the proceedings which clearly show that, after the ruling on a case to answer, delivered on 20th January, 2020, the appellant never showed up in any of the subsequent dates which were for defence hearing. This is gathered from pages 25, 26 and 27 of the proceedings at which it was indicated that the appellant entered disappearance, prompting the trial magistrate to issue a warrant of arrest.

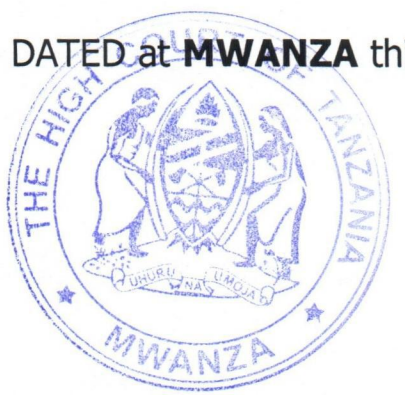
With this prolonged absence it was impossible that the judgment would factor in a defence that never was. It is the case of the appellant forfeiting his right to put up a defence and shore up any allegations levelled by the prosecution. It is my considered view that the trial magistrate could not be blamed for bringing the matter to a dignified closure, and the appellant cannot be heard to complain while the right to give his defence was given but not taken. In view of the foregoing, I find the contention by the appellant hollow and lacking in any material sense.

Consequently, I find and hold that the appeal is barren of fruits and I dismiss it. I confirm the trial court's decision on the second count, while conviction in respect of the first count is set aside.

It is so ordered.

Right of appeal duly explained to the parties.

DATED at **MWANZA** this 15th day of March, 2021.



M.K. ISMAIL

JUDGE