IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC CRIMINAL APPEAL NO. 11 OF 2010

(ORIGINATING FROM MUFINDI DISTRICT COURT
CRIMINAL CASE NO. 143/2009

EDWARD KISIKI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

R.K.MKUYE, J

The appellant, Edward Kisiki, was, before the District Court of Mufindi at Mafinga, charged with the offence of obtaining money by false pretences contrary to section 302 of the Penal Code, Cap 16, R.E. 2002. Following a full trial he was found guilty and sentenced to three years imprisonment without an option of fine. Dissatisfied with both conviction and sentence he has preferred an appeal to this court grounding two grounds of appeal which are:

1) The learned trial magistrate erred in law and facts by relying on the evidence which does not lead in support of the charge;

2) The learned trial magistrate erred in law and facts by failing to consider the defence evidence relying on the grounds which are misconceived.

On the 10/8/2010, when the appeal came up for hearing, this court by consent of both parties granted leave to argue it by way of written submissions. They have so done within the scheduled period.

The facts leading to this appeal can be briefly stated as follows:

The complainant, Dionisia Nicholaus (PW5) and the appellant Edward Kisiki knew each other. PW2 had traded in timber with the appellant on several occasions. In between 19th–23rd December 2008, PW2 deposited Shs. 5,000,000/= to the appellant through an account of Christopher Chalenge (PW1) so as to buy timber for her and transport the same to Dar es Salaam where she resided. That amount of money was taken by the appellant within the same period. It appears the agreement for the transaction was made orally– through a phone. The appellant failed to honour his promise. PW2 made efforts to trace the appellant because he did not supply her the load of timber, as they had agreed. Finally this case was instituted.

The appellant in his defence claimed that he could not furnish the required load of timber because part of the timber load was stolen; also the first timber load which he purchased was below the required standard. At any rate, he claimed, PW2 had taken part of the timber load and that he had deposited shs. 820,000/= as a top up for the difference of money he took and the timber taken.

Ms Ngilangwa who argued this appeal for the respondent Republic declined to support the conviction. She submitted on the grounds that, **one**, the prosecution did not prove that the appellant had made false representation that he could supply the said goods while knowing the same to be false, in the situation where the

appellant and PW2 used to trade in timbers on several occasions. **Two**, there was no evidence that the appellant obtained the said money with intent to defraud in the circumstances where the appellant and PW2 had made more than one oral contracts regarding timber trade including the one made through telephone conversation to the tune of Shs. 5,000,000/= for purchase of unnamed amount, type and sizes of timber which is under consideration.

After having gone through the record of the trial court together with the submissions of both the appellant and the learned state attorney I gather that, it is common knowledge that in between 19th to 23rd of December 2008 the complainant, PW2 ,had deposited Shs. 5,000,000/= into Christopher Chalenge's bank account. It is also common knowledge that the appellant had on the some dates taken Shs. 5,000,000/= from Dionisia Nicholaus so that he could buy timber for her. Also it is not in dispute that the appellant got the money in question through the Bank account of Christopher Chalenge into which it was deposited by PW2.

The issue is whether the appellant obtained money to the tune of shs. 5,000,000/= by false pretence.

False pretence is defined under section 301 of the Penal Code as hereunder:

> *" 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."*

According to this definition, in this case, it has to be established that when the appellant entered into the agreement with PW2 to purchase some timber for her, he represented himself or through other person that he will fulfil it while infact knowing that such representation was false or he did not himself believe to be true.

My curious perusal in the court record has revealed no evidence from the prosecution that shows that the appellant did represent himself at the time he agreed with PW2 to purchase timber for her while knowing that he will not do so.

At most there is evidence of prior course of dealing between the appellant and PW2 effected through mutual or oral contracts built on trust without any problems. There is evidence that the appellant was a long time timber dealer with PW2 as well as other traders as per evidence of PW2 and PW3, Nicolaus S. Malya, who was PW2's husband.

In the absence of the prosecution evidence that the appellant made false representation that he could supply timber to PW2 while he knew it to be false, I do not see how the appellant could be said that he made a false representation.

I now turn to the 2nd limb of the 1st ground of appeal which basically hinge on the issue of whether there was an intention to defraud by the appellants' failure to supply the alleged load of timber to PW2.

The appellant has argued that there was no such intention to defraud on his part. The appellant did not intend to breach the

contract entered into between him and PW2 to deliver the load of timber to her but it was a breach by frustrations caused by destruction and theft of the subject matter which was beyond his control. He further contended that the report was made to the police station vide R1/IR/346/2009/R1/RB/419/2009. He also referred this court the case Taylor V Caldwell (1863) 3 B & S 826 (1961-73) All ER Rep 24 as it was in Pradine V Jane (1903) 2KB 740 (CA). He further he stressed that there was no any intention to defraud on the part of the appellant.

The learned state attorney in the first place while citing the case of Johes Nduguru V R (1984) TLR 284 conceded that in an offence of obtaining money by false pretence, the ingredient of "intent to defraud" must be proved. After citing and relying on the definition of the term "to defraud" laid down by BUCKLEY J (who later become LORD WRENBURY in Re London and Globe Finance Corporation (1903) I CH. 728 and submitting at length the evidence purportedly proving the offence, she conceded that the prosecution failed to prove that the appellant did intent to defraud.

Indeed the term "to defraud" which is among the ingredients of the offence of obtaining money by false pretences is not defined under the Penal Code. However, the term was defined as correctly argued by the learned state attorney by Buckley in Re- London and Globe Finance Cooperation (supra) about 24 years ago when the leaned judge stated:

> " ... *To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by false*

hood to induce a state of mind; to defraud is by deceit to induce a course of action".

In an offence of obtaining money by false pretence, the ingredient, "intent to defraud" must be proved. In this case, therefore, it must be proved that the appellant when entering into an agreement did induce by deceit PW2 to act the manner she did, while he knew or believed that he will not supply the timber to PW2 as they had agreed. (See Johes Ndunguru's case (supra).

However, according to the available evidence or record the appellant had in more than one occasions entered into oral contracts regarding timber trade. Those contracts were built on trust and no problem had arisen in the past. The contract under consideration was entered orally through telephone conversation. Through that contract PW2 deposited shs. 5,000,000/= which was taken by the appellant through NMB Bank account of one Chalenge Christopher for purchasing timber for her. This oral contract was possible due to the trust they had built between themselves. I do not see how PW2 was induced by deceit by the appellant. She voluntarily entered into the said contract with the appellant as a person whom they have transacted even earlier.

But again, on the other hand the appellant gave explaination which was not seriously controverted by the prosecution as to why he did not supply the timber to PW2 as it was agreed. The reason advanced by the appellant was that the contract was frustrated or stopped before its performance as the timber was destructed (not in the required standard) and that some timber were stolen. To show that the problem was not tainted with ill intention he reported the

incident at Iringa Police Station. He also repaid PW2 Shs. 820,000 as shown in Exh. DI. There was evidence also that PW2 had collected some timber as was testified by Maliki Omary (DW4). I think, if the appellant had intended to defraud, he could have so done, more so, when taking into account that the contract was not reduced in writing and more so, that the terms of the contract in terms of the type, size, amount and time frame for delivering the said timber was not known. Obviously, if the appellant had ill mind he would have insisted that he had already supplied the timber to PW2 or could have denied to receive the money from PW2 when taking into consideration that it was deposited in someone else's account. All that he did not do. To the contrary the appellant was frank in whatever transpired. All this evidence clearly shows no intention to defraud on the appellant's part. At the end of the day, I find the appellant 1st ground of appeal has merit.

The appellant's 2nd ground of appeal relates to non consideration of the defence evidence. The appellants' argument, which is right in my view is that he was convicted on the basis of his evidence allegedly contradicting with the evidence of DW2 and DW4. While he said the timber were in cubic metres, DW2 and DW4 said the timber were in 2" X 4" and 2" X 6". He further clarified that the evidence did not contradict. He contented further that even if it was seen as contradicting, that contradiction did not touch the root of the matter. Much as the evidence of the appellant and DW2 and DW4 tried to provide description of timber in terms of quantity and sizes but I think the trial magistrate misdirected himself in convicting him basing on that evidence. I am so saying because the trial magistrate seems to have shifted the burden to prove the offence beyond reasonable doubt from the prosecution to the appellant.

The evidence regarding sizes, type, amount of timber and time frame for delivering the same to PW2 ought to have adduced by the prosecution. But the prosecution failed to do so. The appellant, instead, was convicted on the allegedly contradicting evidence which was in fact supposed to be brought by the prosecution.

But again there was evidence from the appellant as to why he was not able to supply the timber to PW2 as it was agreed. That the contract was frustrated due to destruction of timber and theft of some timber which evidence was not challenged by the prosecution any way.

Much as the trial magistrate knew the duty of defence, that is to raise a reasonable doubt, but he found that the appellant had failed to do it without showing how he failed to raise doubt.

The trial magistrate, under the circumstances ought to have given weight to the appellants' evidence as it cast doubt on the prosecution case as to the existence of normal business transaction between the appellant and PW2, in which case the transaction in question got frustrated due to unforeseen events. Also the fact that the appellant tried to reimburse PW2 shs. 820,000/= also proved that the appellant acted in normal business transaction and he had no intention to defraud PW2. On the other hand the money received by the appellant was for the purpose of a business relationship that had been established between the appellant and PW2 even before. There is no element of an intention to defraud. Even the PW2 acted under the trust built between them. As a result, the 2nd ground of appeal also has merits. That said, after looking at the totality of prosecution

evidence, I find that the prosecution failed to prove the case against the appellant beyond reasonable doubt.

For the above reasons, I allow the appeal and set aside both the conviction and sentences of the lower court together with the order for the payment of shs. 5,000,000/= and direct that the same be claimed by way of a civil suit. The appellant is to be released from custody forthwith unless held for other lawful reasons.

R.K.MKUYE

JUDGE

18/10/2010

Date: 18/10/2010

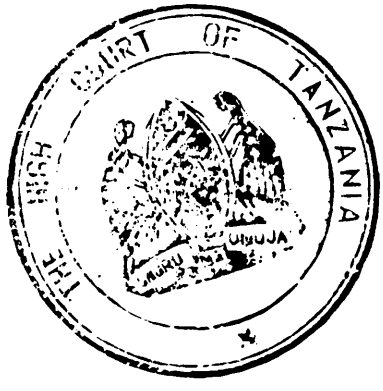
Coram: R.K.MKUYE, Judge

Appellant: Present

For Respondent: Mr. Matitu State Attorney for Republic

C/C: Nuru Abdallah

Delivered on this 18th day of October in the presence of the appellant and Mr. Matitu learned state attorney.



R.K.MKUYE

JUDGE

18/10/2010