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IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

APPELLATE JURIDICTION
(Dar es Salaam Registry)

CRIMINAL APPEAL NO. 75 OF 2004
(Originating from Kisutu Resident Magistrate's Court in Criminal Case No. 536 of 2002)

ADAM S/O YUSUFU ... ... APPELLANT

VERSUS

THE REPUBLIC ... ... RESPONDENT

JUDGMENT

OTHMAN, J.

The Appellant (2nd Accused) Adam s/o Yusufu was jointly charged before the Kisutu Resident Magistrate's Court with one Charles s/o Sheko (1st Accused), of the offence of obtaining money by false pretences u/s 302 of the Penal Code, Cap. 16 of the Laws. In the course of the trial, on 10/9/03, one of the second accused's surety informed the court that 1st accused had died. He submitted a Death Certificate allegedly issued by the District Registrar of Birth and Death, certificate of which was doubted by the prosecution. On 30/03/04, he was convicted of that offence, sentenced to a term of 4 years imprisonment, and ordered to pay Tz. Shs. 960,000/= as compensation to the complainant, one Dorin d/o Temu (PW.2). He now appeals against conviction, and sentence.

The particulars of the offence given by the prosecution at the trial court were that the appellant, jointly with the 1st accused, one 28/03/02 at Sinza Kinondoni, with intent to defraud did obtain Tz. Shs.960,000/= from PW.2 as house rent for a house situated at Plot No. 601, Block 'A' Sinza, to which they falsely pretended to be right owners of the house while it was not true.

The prosecution case at the trial court , as presented by its 6 witnesses was the following: PW.2, and her husband, PW. 3 were in search for a house to rent. About the 2nd week of February 2002, through PW.4, a Dalali, they were

put in contact with the appellant as supervisor (Msimamizi) of the house at Plot 610, Sinza (PW.2, PW.4.). According to PW.3, the appellant took the keys, showed him the house and informed him that rent was at 80,000/=, per month payable 1 year (i.e. 960,000/= Tz. Shs.). He further told him that the tenant who was occupying the house, the 1st accused, wanted to leave. Since he had to vacate prematurely, he was to be reimbursed 3 months rent. This was confirmed by the 1st accused, Charles Sheko in the presence of the appellant.

On 28/02/03, the day of payment, PW.2 and PW.3 went to effect the rent. They were accompanied by PW.1. She was to serve as a witness. Due to some urgency PW.3 had to leave before the transaction was concluded. A Lease Agreement was drawn up by a relative of the 1st accused who was outside after being asked to do so by him (PW.1, PW.2). On signing of the agreement, PW.2 paid Tz.Shs,. 960,000/=, representing one year's rent @ 80,000/= per month (PW.1, PW.2). The Appellant informed the new tenants that they could occupy the house after 3 days, in order to allow time for the 1st accused to vacate (PW.2, PW.3). The Appellant, thereafter, handed over the keys of the house (PW.2).

In March 2002, PW.2 and PW.3 moved in. In early May 2000, the house owner's wife informed the new tenants that their Lease Agreement had expired on 30/05/02. That if they wanted an extension they should contact her husband for a new agreement. PW.3 went to see PW.4 the Dalali who in turn approached the appellant, and advised him to introduce PW.3 to the house owner. The appellant confirmed that he had planned to do so (PW.4). PW.3 also followed this matter up directly with the Appellant. They agreed to go and see the house owner together. The appellant disappeared before that appointment. PW.3 then went to see the house owner, PW.5. He told him he knew the appellant since he was a child, that he had left the house in his hands, that he did not authorize him to receive rent, and that he had not received any rent payment (PW.3). PW.5 demanded new rent at 70,000/= per month, which PW.3 paid for six months (PW.3, PW.5). The matter was then referred to the police, and on a tip from PW.4 the appellant was arrested at Tabata, Kimanga and charged.

At the trial, the appellant who testified on affirmation and on his own behalf stated that he only acted as a witness in both the signing of the lease agreement and the subsequent payment of rent money. He also denied to having received any rent money from PW.2.

At the conclusion of the trial and on facts and evidence of both parties, the trial court convicted and sentenced the appellant. Aggrieved by both, on 17/6/04 he filed in the High Court a petition of appeal containing 4 grounds of appeal. To these 3 more ground of appeal were added on 11/10/04.

At the hearing of the appeal on 18/11/04, Mr. Kilule, learned Counsel advocated for the appellant, and Mr. Mdemu, learned State Attorney appeared for the Republic. It was agreed that the appeal be disposed of by way of written submission and were ordered accordingly. I thank both Counsels for their submissions.

Now to the law. Section 302 of the penal Code provides:-

> "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".

False pretence is defined in section 301, of the same Code, as "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".

Turning to the written submission the appellant appears to have abandoned the initial 4 grounds of appeal by not referring to them in his submission, He has focused on the 3 additional grounds. The republic on its part, has responded to all grounds of appeal. In the interest of justice, I shall dispose of all the 7 grounds of appeal. However, I shall combine a few since they are closely interrelated.

The essence of the appellant contention in additional Ground 2 and 3 is that the trial court erred in law and on the facts in dealing with the root of the

matter, namely whether the appellant obtained the alleged money from the complainant, PW.2. And more so in totally ignoring the evidence of PW.5, the house owner, which created a reasonable doubt as to whether the appellant did receive the money.

Under Section 302 of the Penal Code, obtaining from any other person any thing capable of being stolen, in the case, rent money, is one of the essential ingredients of the offence of false pretences. Another is that it should have been obtained as a consequence of the false pretence. In his written submission, the appellant contends that on the basis of the evidence of PW.2, PW.5 and DW.1 it was Charles Sheko (1st accused) that received the money. The Republic's response is that there is sufficient evidence to show that the appellant was paid Tz.Shs.960,000/= as rent by PW.1. This they assert is based on the evidence of PW.1, PW.2, PW.3, and PW4. The trial court in its judgement held that it was the appellant who took the money on the basis of the evidence of PW.1, PW.2 and the written lease agreement. It also found out that he had knowledge that the money was obtained by false pretence.

Having reviewed the trial records and the parties' submissions, I am of the opinion, as the trial court that rent money was paid to the appellant. I do so on the basis of the following. First, the evidence of PW.1, a direct witness. She accompanied PW.2 and PW.3 on 28/02/2002 to witness the transaction. She testified that the money was handed over to the appellant. Second, PW.2 the complainant said the same thing. Although as the appellant contends that on cross examination by the 1st accused, Charles Sheko, she stated that the money was paid to him immediately thereafter, on cross examination by the Court, PW.2 stated that she paid the appellant Tz. Shs. 960,000/=. Indeed the trial court had a duty to ascertain that fact given her response to the 1st accused that the very agreement she had just tendered and which was admitted as Exhibit 1 was not the agreement, but only a rough one. Thirdly, there is the corroborative evidence of PW.4, the Dalali. The appellant admitted to him that he is the one who usually stays with that rent money since it is misused by the landlord's family.

The appellant faults the trial court for totally ignoring the evidence of PW.5, which they submit, created a reasonable doubt on receipt by the appellant of the rent money. He testified that he was told by PW.2, he had given the money to Sheko, who had promised to bring it to him (i.e. PW.5). Having examined and compared the evidence, I prefer the evidence of PW.1, PW.2 and PW.4, I place lesser weight to the evidence of PW.5 on this particular matter. His testimony on 14/01/04 was not given in the presence of the 1st accused, as was that of PW.1 and PW,2. PW.6, the Police Officer who investigated the case testified that when he questioned PW.5 on the complaint, he tried to protect the appellant. Further, when PW.5 testified he had already been paid the house rent for six moths by PW.3, beginning June 2002.

The trial court cannot be faulted for not relying on the evidence of the PW.5 on this point. Thus, on the whole evidence in particular that of PW.1, PW.2, PW.3 and PW.4, the Dalali that he is the one that kept that money, I am satisfied as the trial court that the appellant was paid the rent money on 28/02/02 at the time of the conclusion of the lease agreement. I accordingly dismiss additional Grounds 2 and 3.

Grounds 4 of the appeal is that the trial court erred in law and on the facts in failing to appreciate the evidence before it that the appellant was a mere witness to the lease agreement. Learned Counsel for the appellant, Mr. Kilule urged the court that the ambiguity created by the appellant as to who the tenant and who the landlord was must be determined in favour of the appellant.

Section 210 of the Criminal Procedure Code, 1985 was complied with when PW.2 tendered the lease agreement in court. He read it, and pointed out the places in the lease agreement where each, the appellant, Charles Sheko and herself signed. On reading the agreement, it is not possible for me to decipher the signatures and determine with certainty the individual person behind each affixed handwritten signature. On the oral testimony of PW.2, the trial court was enlightened on that.

The trial court was correct in admitting it into evidence, especially in view of evidence of PW.2, PW.6, and the appellant that the agreement was signed by PW.2, Sheko and the appellant. The agreement in its ultimate

paragraph acknowledges that "all house money for the year completely received on 28/01/02. Tanzania Shs. (960,000/) Ninety hundreds and sixty thousands only". From the evidence, it was partly on the strength of the agreement that PW.2 parted with the rent money.

At the trial court, PW.1 testified that he signed as PW.2's witness. PW.2 stated that she signed it as well. The appellant admitted to signing it but his contention is that he did so as mere witness having been requested to do so by Sheko.

Even if it were to be admitted that the appellant may have affixed his signature as a witness, he was not a disinterested party. The appellant's role in the signing of the agreement cannot be appreciated solely on the basis of what transpired at the signing occasion. The court is entitled to draw inferences from facts, and from the appellant's involvement leading to the agreement.

Even as a witness the appellant had no authority to act as one. The agreement was in the name of the house owner, PW.5 not Charles Sheko. And PW.5 testified that he had no habit of using third parties to collect rent money on his behalf

As supervisor (Msimamizi) of the house engaged by PW.5, he should have informed him that 1 year's rent was paid and received. This upon signing of the agreement and payment in his presence. This he choose not to relay in spite of PW.5 telling Sheko in February 2002 in the presence of the appellant that should he (i.e. Sheko) find a new tenant, he would be reimbursed 3 month's rent covering premature vacation of the house, and that PW.5 would negotiate with any new tenant, as of June 2002.

From the overall evidence tendered the agreement was the culmination of the false pretences. To PW.2 the appellant had claimed to be the owner of the house. To PW.4, the Dalali, he stated that he was the supervisor delegated by the landlord. When PW.2 and PW.3 were searching for a house he opened the house for them to inspect and view. Both Charles Sheko and he narrated to PW.1, PW.2 and PW.4 that Sheko wanted to vacate the house, either because it was too big or because he was being transferred to Arusha. When he vacated, within 3 days after payment of the rent money, the handing over of the keys

between them was made in front of the Dalali, PW.4. The appellant assured PW.2 that Sheko would leave after he paid him. He also handed over the keys of the house after the agreement was signed and rent paid. After PW.2 and PW.3 moved in, he carried out minor repairs. All this to impress upon them that he was the right owner, which he was not.

The law provides under Section 23 of the Penal Code that where there is common intention each of the person who formed such intention in effecting an unlawful purpose is deemed to have committed that offence. From the evidence of prosecution witnesses I have highlighted earlier the agreement and the appellants actions and conduct there is sufficient evidence of common intention under Section 23 of the Penal Code it is immaterial whether the money was received by one or the other.

From all of above, the appellant was not a disinterested party in the signing of the agreement taking into consideration his representations. False representation may indeed be by words, conduct or in writing.

In Ground 1 and 2 and additional Ground 1 of the appeal the appellant contends that the trial court erred in law and on the facts by completely misapprehending the substance and quality of the evidence, including in evaluating it on the evidence of the accused, and assessing their credibility resulting in an unfair trial and miscarriage of justice. That it erred in convicting the appellant while the prosecution evidence did not at all establish their case beyond reasonable doubt. He relied on Jonas Nkize v. R. [1992] TLR. 213. The Republic on its part submitted that its duty to establish its case beyond reasonable doubt as required by law was discharged by the evidence of the 6 prosecution witnesses who testified.

Nkize's case is a correct statement of the law. In Criminal Cases, such as this one, the onus is on the prosecution to prove all the ingredient of the offence and unless it discharges that onus the prosecution cannot succeed. As a first appeal court, I have evaluated the facts, weighed the evidence and I am satisfied that the prosecution at the trial court proved its case. The appellant knowingly made false representation in fact in relation to the arrangements prior to, leading into, and subsequent to the rent of the house. These were made

with intent to defraud. They were calculated to impress upon PW.2 and PW.3 that they were dealing with the right owner. This representation caused PW.2 to part with the rent money. Accordingly, the aboveground of appeal has no merit.

Finally, the appellant submits as the 3rd ground of appeal that the trial court erred in law in sentencing the accused to a sentence which is too excessive. The Republic's response is that the sentence of 4 years imprisonment imposed upon the appellant is not excessive. That it is in the discretion of the court to sentence an accused person to any term as long as it does not exceed the maximum sentence provided for false pretences under Section 302 of the Penal Code, which is 7 years imprisonment.

Before an appeal tribunal interferes with a sentence it must consider whether the magistrate has in fact misdirected himself in any particular aspect or whether the sentence is so manifestly excessive that it is clear that there must have been a misdirection even though not explicit (Stephen s/o Mkone and Mara Co-operative Union (1984) Ltd.v. R., [1987] TLR. 36. In sentencing the appellant, the trial court took into account all relevant factors including mitigating circumstances. It considered the need to deter "utapeli' offences which had become the order of the day, and exercised its discretion to impose a sentence less than the maximum. It also ordered him to pay as compensation, Tz. Shs.960,000/=. The trial court committed no reasonable error in sentencing in principle and in fact.

All said, I accordingly dismiss the appeal and affirm the conviction and sete4nce of the trial court.

THE HIGH COURT OF TANZANIA

M. C. OTHMAN
JUDGE
12/01/05