

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)**

**CRIMINAL APPEAL NO. 323 OF 2019**

**FATUMA SAID MAHANYU..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

Appeal from the judgment of High Court of Tanzania at Arusha,

**(Mzuna, J.)**

dated the 12<sup>th</sup> day of February, 2019

in

**Criminal Appeal No. 139 of 2017**

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**JUDGMENT OF THE COURT**

*30<sup>th</sup> September, & 12<sup>th</sup> October, 2022*

**LILA, JA:**

The appellant, Fatuma Said Mahanyu, was charged before the District Court of Babati and was convicted of obtaining money by false pretences contrary to section 302 of the Penal Code. The appellant falsely represented herself to be the owner of a plot of land and thereby obtained money from one Theophil Joachim (PW1 or complainant) after selling it to him. The trial court sentenced her to serve twelve months imprisonment. It also ordered her to compensate the complainant TZS 14,000,000.00 and also pay TZS 500,000.00 being compensation for the loss and disturbance caused (general damages).

In the charge, the prosecution alleged that, on 28<sup>th</sup> April, 2015 at Babati Township within Babati District, the appellant with intent to defraud did obtain cash money TZS 14,000,000.00 from one Theophil Joachim after selling to him Plot No. 34 Block "R" located at Mji Mpya Babati Township by falsely pretending to be the owner of the said plot of land while knowing it was not true. A full trial ensued with the prosecution parading four (4) witnesses upon the appellant refuting the accusation. For the defence, two witnesses testified, including the appellant.

The substance of the prosecution evidence was short and easy to comprehend. Out of love and affection to his daughter one Marietha who was still schooling at Dodoma, Theophil Joachim (PW1) decided to buy her a plot. In the due course of looking for a plot, he met one Alex Evarist (PW2) and Katwa who connected him to the appellant who said had a plot for sale. The appellant took PW1 to the plot at Mji Mpya area Babati so as to see it and showed PW1 "Fomu ya Utambulisho" (Introduction Form) bearing her name which was admitted as exhibit P1 and receipts showing Plot No. 34 Block "R" as evidence of her ownership to the plot. It was agreed that the appellant would sell it at TZS 14 Million and the sell agreement (exhibit P2) was executed before an advocate in the presence of PW2 and the appellant's husband one

Kurwa and PW1 paid the appellant cash TZS 14 Million. PW1 signed the sale agreement on behalf of his daughter. The appellant promised to avail PW1 with the Title Deed to the plot but time passed without doing so. Not long, PW1 noticed some developments being effected on the plot and upon inquiring he was told that such development was being carried out by one Mariam Shabani Manota (PW4), the appellant's co-wife. PW1 approached the appellant to discuss over the matter about it, but was not well received as the appellant confirmed that construction was being effected by PW4 and he was told to seek for his right elsewhere instead of disturbing her. To confirm who owned the plot, PW1 visited the Land Office which confirmed PW4's ownership of the plot which information was later confirmed by PW4. A policeman, G. 3024 DC Amosi (PW3), who investigated the case, told the trial court that PW4 proved ownership of the plot by showing him a copy of a judgment of the district Land and housing Tribunal in Application No. 65 of 2008 (exhibit P3) which declared her and two others as lawful owners which was also confirmed by PW4 that her ownership of the plot was challenged by the appellant and the High Court decided in her favour.

In her defence evidence, the appellant (DW1), at first, denied transacting with and entering into any contract of sale of a plot with PW1 but later admitted it and signed exhibit P2 and that on that date, it

was Marieta who was there and not PW1. She stated that it was Marieta who was supposed to complain. She denied receiving money out of the sale agreement stating that payment was to be effected later on. She also admitted selling the house on that plot which she said belonged to her and her children which was their share out of the estate of her deceased husband one Waziri Said. She, too, admitted there being a case between her and PW4 over the plot in which she later emerged the winner.

On his part, Omari Waziri (DW2), the appellant's son, confirmed that he was called by the appellant to witness sale of their house between the appellant and Marietha Theophil at the advocate's office. He was told by DW1 to sign the sale agreement and he signed but was told by the appellant that payment was to be done later and would be informed.

At the conclusion of the trial, the trial court was satisfied beyond reasonable doubt that the appellant sold the house not belonging to her and received the money from PW1, convicted and sentenced her as indicated above which is now a subject of this appeal.

Like in the present appeal, the appellant lodged three grounds of appeal before the High Court raising similar complaints. In its

determination of the appeal the alleged contradictions were found to be non-existent, there was overwhelming evidence by PW1 to PW4 that the appellant received the money from PW1 and that evidence by close relatives, in terms of the Court's decision in **Waiki Amiri vs. Republic**, Criminal Appeal No. 230 of 2006 (unreported) is admissible and can be acted upon to convict an accused if the witnesses are credible. As to whether the charge was proved, the learned judge entertained no doubt that the appellant received money out of selling of a plot which did not belong to her and her conduct of avoiding PW1 exhibited her intention to defraud him. Relying on the persuasive decision in **R vs Dent** [1953] 2 All ER 806, he held that the appellant had no valid title to pass to PW1.

Still, the appellant was aggrieved. This is therefore a second appeal predicated, as hinted above, on the grounds similar to those considered and determined by the High Court. She is still complaining about **one**; the credibility of the prosecution evidence for being contradictory for it to be the basis of her conviction, **two**; fairness of the order for compensation and payment of damages arising from disturbance due to her defence and mitigation being disregarded, **three**; reliance on close relatives' evidence to convict her and **four**;

failure to call an advocate to prove that the sale agreement (contract) was executed in his office.

Before us for the hearing of the appeal, the appellant who was unrepresented and understandably a lay woman, took time to read the grounds of complaints as translated in Swahili language rather than elaborating them. Upon our engagement on that state of affairs, she opted to adopt the grounds of appeal as presented and she urged the Court to determine the appeal in her favour.

Three learned brains; Ms. Agnes Hyera, learned Senior State Attorney assisted by Ms. Adelaide Kassala and Ms. Naomi Mollel both learned State Attorneys, represented the respondent Republic in resisting the appellant's appeal.

Before venturing to assail the grounds of appeal, Ms Kassala started by stating the obvious that in a case of this nature the prosecution could not avoid proving three crucial ingredients constituting the offence. She outlined them to be; that there was false pretense by the appellant, she obtained money and she did so with intention to defraud which duty was discharged to the hilt through four witnesses produced in court. We entirely agree with the proposition on the law as

put forward by the learned State Attorney and, no doubt, will assist us at a later stage of our decision.

We propose to first deal with the complaint that the lower courts erred in relying on the evidence of closely related witnesses. Although there was no elaboration, the learned State Attorney, reflecting on what was argued before the first appellate court, discounted it for being baseless. Truly, the record bears no support to that contention for, as opposed to the appellant's contention, it was herself who called Omari Waziri (DW2), her son, to testify on her behalf. All the same, as was rightly submitted by the learned State Attorney, familiarity or blood relationship is of no essence but the credibility of their evidence. We need not overemphasize that the settled position is that there is no law which prohibits relatives to testify against or in favour of a person who is their relative. In the case of **Mustafa Ramadhani Kihyo Vs. The Republic**, [2006] TLR 323, the Court held that, the evidence of related witnesses is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited unless there is ground for doing so. The issue which begs for an answer is whether the respondent's evidence is credible in the light of the appellant's complaint in the first ground of appeal.

If we understood well the appellant by the phrase “respondent” her reference was to the prosecution witnesses. In her response, Ms. Kassala opted to argue it conjointly with the fourth complaint and submitted on four issues arising therefrom.

First to be addressed was the complaint on contradiction regarding where the money the proceeds of sale of the house was paid. The alleged contradiction was that while PW1 said it was before the advocate, PW2 said it was at Mji Mpya. Ms Kassala insisted that PW2 at page 17 of the record also said that the sale of the house was concluded at the advocate’s office and therefore the alleged contradiction was a total misconception. Ms Kassala cannot be but absolutely right on this as her assertion is backed by the record. The learned judge was of the same view and we agree with him. This complaint is baseless and we dismiss it.

Next to be addressed was credibility of the complainant (PW1). The High court considered this issue at length at page 112 of the record and found no reason to interfere with the finding of the trial court on that regard it having had the opportunity to observe his demeanour in the witness box. In fact, the learned judge found that PW1, PW2 and all other witnesses of the prosecution were credible. The learned State



Attorney agreed with him. This being a second appeal, we are steered to abide by the principle enunciated in our decision in the case of **Dickson Elia Nshamba Shapwata and Another Vs. The Republic**, Criminal Appeal No. 97 of 2002, (unreported) in which we held that:-

*"... A trial court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on the record which call for a reassessment of their credibility."*

(see also, **Omari Ahmed Vs. The Republic**, [1983] TLR 5 and **Seif Mohamed El-Abadan Vs. The Republic**, Criminal Appeal No. 323 of 2009 (unreported)).

We did not have had the advantage of observing and assessing the demeanour of the prosecution witnesses hence we see no justification to fault the finding of fact and credibility of the evidence of PW1 and other prosecution witnesses by the trial court.

Failure to call the advocate was another complaint under those two grounds of complaints. We share the views with the learned State Attorney that evidence presented by PW1 to PW4 sufficiently established that sale of the house was concluded at the advocate's office a fact which was later supported by the appellant and his witness (DW2). Failure to call the advocate to tender the sale agreement (contract) was found to be ineffectual by the learned judge holding that PW1 who

tendered it was a competent witness to do so. We similarly find no substance in this complaint. Settled law is to the effect that an exhibit may be tendered by any person who had, at any time, dealt with it. The object of the rule is to ascertain the identity of the said exhibit as the very one which it is claimed to connect the accused with the offence charged. We wish to reiterate what we said in the case of **The DPP vs. Mirzai Pirbakhsh @ Hadji and Three Others**, Criminal Appeal No. 493 of 2016 and in **The Director of Public Prosecutions vs Sharif Mohamed @ Athuman and 6 Others**, Criminal Appeal No. 74 of 2016 (both unreported) and, particularly the former, in which this Court listed the categories of people who can tender exhibits in court. It stated thus:

*"A person who at one point in time possesses anything, a subject matter of trial, as we said in **Kristina Case** is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering*

*the intended exhibits in question provided he has the knowledge of the thing in question.”*

In the instant case, PW1 was a party to the agreement and had possession of it. He was competent to tender it as exhibit. This complaint fails.

The last complaint under those grounds is that documentary exhibits were not tendered. As argued by Ms. Kassala, this complaint is nothing but a misguided missile. It is a total misconception of what transpired in court during the trial. The record bears out that four documentary exhibits were tendered as exhibits namely; one receipt and a form titled “Form ya Utambulisho” (exhibit P1), Sale Contract (exhibit P2), Judgment in Application No. 65 of 2008 (exhibit P3) and Order in Land Appeal No. 7 of 2013 (exhibit P4). The complaint is, for this reason, unfounded.

A compensatory order and an order for payment of general damages has been taken as an issue by the appellant alleging that they are a result of failure by both courts below to consider mitigation and defence evidence. At first, the appeal against payment of damages is misplaced as the same was set aside by the High Court. As for sustaining an order for payment of compensation or rather refunding

PW1 TZS 14 Million, Ms Kassala was at one with the learned judge's findings. The record, from pages 115 to 117, vividly show that the learned judge discussed at length the law on obtaining money by false pretence and evidence produced by PW1 to PW4 and was satisfied that they established that the appellant presented herself as owner and sold a plot to PW1 which plot was not her property and obtained or was paid 14 Million. He found the charge proved. We entirely agree with him and we would wish to add that her conduct of concealing the information that he had challenged PW4's ownership of the plot before the Tribunal and before the High Court and lost and thereby proceeding to sell that plot and obtained money, by itself, amounted to obtaining money by false pretence (see **Tambwe vs R** [1971] HCD n. 284). Although her defence evidence, as complained, was not discussed at length and specifically discounted, our own reflection of it, as earlier explained, that evidence was not consistent and at some stage, particularly during cross-examination, amounted to an admission that she sold her co-wife's house to PW1. It was actually a self-defeating evidence which by any stretch of imagination could not raise doubt but advance the prosecution case. Consequently, it could not tilt the plumb of justice in her favour. With the finding of guilty of the offence, mitigation factors would only serve the purpose of determining an appropriate custodial sentence or

fine payable and not the amount of money to be refunded which was obtained by the appellant by false pretenses. Our examination of the proceedings in respect of sentence, as rightly argued by the learned State Attorney, shows very clearly that the appellant being a first offender and other mitigation factors were considered and as a result, she was sentenced to serve a twelve months custodial sentence only which is far below the prescribed seven years' jail term.

In sum, this appeal fails and is dismissed in its entirety.

**DATED** at **ARUSHA** this 7<sup>th</sup> day of October, 2022.

S. A. LILA  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

The Judgment delivered this 12<sup>th</sup> day of October, 2022 in the presence of the Appellant in person and Ms. Lilian Kowero, learned State Attorney, for the Respondent/Republic both appeared through Video Link is hereby certified as a true copy of the original.



  
A. L. KALEGEYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**