

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA**

PC CRIMINAL APPEAL NO. 01 OF 2021

(Originating from Masasi District Court Criminal Appeal No. 11/2020
Original: Lisekele Primary Court Criminal Case No. 311/2020)

AISHA AHMAD.....APPELLANT

VERSUS

WATERCOM LIMITED-MASASI DEPOT.....RESPONDENT

JUDGMENT

4th & 26th October, 2021

DYANSOBERA, J.:

This is a second appeal. The appellant Aisha Ahmadi is challenging the decision of the District Court of Masasi which endorsed the trial court's order on compensation.

Before the Primary Court of Masasi District at Lisekese, it was alleged that the appellant, in January and July, 2020, by false pretences and with intent to deceive, obtained Tshs. 6, 354, 300/= in the sales of water and soda, the property of the then complainant now respondent, WaterCom Limited, Masasi Depot, contrary to Section 305 of the Penal Code [Cap. 16 R.E.2019]. To be precise and to the point, the charge at the Primary Court levelled against the appellant was couched in the following terms:

'Lalamiko:

Ninamlalamikia Aisha d/o Ahmad kwa kosa la kujipatia fedha kwa njia ya udanganyifu K/F 305 K/A Sura ya 16

Maelezo ya Kosa: Kuanzia mwezi Januari mpaka Julai, 2020, kwa nia ovu na kwa udanganyifu, mshtakiwa alijipatia pesa Tshs. 6, 354,300/= kutoka katika mauzo ya maji pamoja na soda ambazo ni mali ya mlalamikaji. Kitendo ambacho ni kosa kwa mujibu wa sheria'.

The appellant pleaded not guilty. The facts of the case which is well summarised by the District Court are not complicated. On various dates between February to May, 2020, the appellant was given by the respondent various consumables - water, soda and milk on the agreement that the appellant should sell the same and then remit the money to the respondent. In fulfilling her contractual obligation, the appellant received the goods at different times and was selling them but was giving to the respondent the money less the agreed amount. At the end of the day, the appellant owed the respondent a sum of Tshs. 6, 354, 300/=. When required to pay that amount, the appellant was giving only empty promises. The respondent took the matter to the trial court. It was opened as Criminal Case No. 311 of 2020 whereby the appellant was charged with obtaining money by false pretences contrary to section 305 of the Penal Code.

The trial court, after hearing the evidence of Hemed Kimera, the witness for the Complainant, and the defence, found the appellant guilty and convicted her under section 305 (a) of the Penal Code Cap. 16. The appellant was, consequently, sentenced to a discharge on condition that she committed no offence within ninety (90) days. She was further ordered to compensate the complainant the money she obtained by false pretences.

On the first appeal, the District Court was satisfied that the appellant was wrongly charged with a criminal offence as the case between the complainant and the accused at the trial was of civil nature. Notwithstanding that finding, the trial court, however, ordered the appellant to pay the money in question, that is Tshs. 6, 354, 300/=.

This decision aggrieved the appellant, hence this appeal. According to the petition of appeal, the following grounds have been preferred:-

1. That, the learned magistrate of Masasi District Court erred in law in his decision by ordering the appellant to pay the respondent Tshs. 6, 354, 300/= while knowing that the appeal before the court were (sic) criminal nature and her decision proved that the appellant were (sic) not guilty of the offence charged.
2. That, the learned Magistrate of Masasi District Court erred in law and fact by not considering that, the money ordered to be paid by the appellant must be proved specifically and that the

- appellant has a claim against the respondent and the same could be raised by way of counter claim if the matter were civil.
3. That, the learned Magistrate of Masasi District Court erred in law and fact by ordering the appellant to pay compensation of Tshs. 6354, 300/= while holding that the appellant is not guilty of the offence charged in the Primary Court.
 4. That, the learned Magistrate of Masasi District Court erred in law and fact by not considering that the said money of Tshs. 6, 354, 300/= should be proved in civil case even though counsel for the appellant agreed that the appellant caused loss but no amount to Tshs. 6, 354, 300/=.

The hearing of this appeal was conducted by way of written submissions. The respondent was represented by Mr. Florence Mwanawima, learned Counsel, who filed the respondent's Written Submission in response to the Appellant's Written Submission whereas the appellant appeared in person and prosecuted her appeal on her own.

I have considered the rival submissions. I have, likewise, perused the records of the lower courts. As the records clearly show, the appellant was charged before the trial Primary Court with obtaining money by false pretences c/s 305 of the Penal Code. Clearly, the appellant was wrongly charged. In the first place, the offence of obtaining money by false pretences does not fall under the provisions of section 305 but under section 302 of the Penal Code. It seems, the learned trial Resident Magistrate was aware of this defect and sought to cure it by convicting the

appellant under section 305 (a) of the same Code. That was worse because the offences under section 305 are not triable by the Primary Court. The trial court, therefore, acted without jurisdiction. The District Court was satisfied that the trial Primary Court committed an irregularity but was of the view that the irregularity was curable. Reliance was placed on the case of **Mohamed Clavery v. R**, Criminal Appeal No. 470 of 2017 whereby the Court of Appeal observed that a defective charge can be cured by the particulars of the offence and the adduced evidence.

With respect to the learned District Court Resident Magistrate, the cited case is not applicable in the circumstance of the case. The issue that featured at the trial court was not whether the charge was defective and curable but whether the Primary Court was seized with legal jurisdiction to try an offence under section 305 of the Penal Code. In that respect, the citing and application of the case of **Mohamed Clavery** was made out of context.

Second, the District Court was satisfied, and rightly so, that a criminal case would not stand as the matter was civil in nature. This finding is clear on page 10 of the typed judgment that:-

It is the finding of this court therefore that this matter was wrongly instituted as a criminal one, being civil in nature. However, since the

appellant agreed to have owed the respondent the money in question Tshs. 6, 354, 300/= . This court for the interest of justice order the appellant to pay the money to the respondent within the time prescribed by the trial court. Appeal partly allowed to the extent of the payment of compensation allowed'.

It is undeniable fact that the case against the appellant at the trial was purely civil and not criminal. According to the facts of the case, the respondent and appellant had an agreement in which there was an arrangement as to its terms including mode of payment. The facts presented fell short of proving the ingredients of the offence under either section 302 or section 305 of the Penal Code. Neither false pretences nor intention to defraud was established by the complainant. The default of any terms of their arrangement, if any, could not constitute a criminal offence for lack of requisite ingredients. Since the case was civil in nature, it was wrong for the learned Resident Magistrate in the District Court to endorse the payment of compensation. What was required of her, after finding that the matter was wrongly instituted as a criminal case it being civil in nature, was not to bless the compensation order but to quash the conviction, set aside the sentence and order on compensation.

Since the trial court had no jurisdiction to try the offence under section 305 (a) in view of the 1st Schedule, to the Magistrate's Courts Act [Cap.11 R.E.2019] which excludes the offences under section 305, the

decision and subsequent orders were a nullity. Likewise, the District Court which heard the appeal which originated from the case which was not only a nullity but was civil in nature and endorsed an order on compensation, was to say the list, an affront to justice and grave error in law occasioning miscarriage of justice. The intervention of this court is deserved. The appellant's complaints in her petition of appeal have, therefore, legal substance.

Consequently, this appeal is found to be meritorious and succeeds, the proceedings, judgments and attendant order are declared a nullity.

Conviction is quashed, sentence of conditional discharge set aside. The compensation order which was erroneously given by the trial court and endorsed by the District Court is set aside as well.

Order accordingly.



A handwritten signature in blue ink, appearing to read "W.P. Dyansobera".

W.P. Dyansobera

Judge

26.10.2021

This judgment is delivered under my hand and the seal of this Court on this 26th day of October, 2021 in the presence of the appellant and Mr. Florence Mwanawima, learned Counsel for the respondent.

Rights of appeal explained.



W.P. Dyansobera

Judge

