

TANZANIA / JUDGMENT

KELVIN JOSEPH MOSHI VS REPUBLIC AND 6 OTHERS

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI SUB REGISTRY AT MOSHI RM CRIMINAL APPEAL NO. 25426 OF 2024 (Originating from
Criminal Case No. 8077 of 2024 of the Resident Magistrate's Court of Moshi at Moshi) KELVIN
JOSEPH MOSHI APPELLANT VERSUS REPUBLIC
..... 1ST RESPONDENT BENSON STANLEY URIO
2ND RESPONDENT RAJAB JACKON MTATUU @ RICHARD 3RD RESPONDENT ALOYCE
LAURENT LYIMO @ MALETO 4TH RESPONDENT GEOFFREY RAPHAEL SIKA
..... 5TH RESPONDENT MICHAEL MPEHONGWA MCHOME 6TH
RESPONDENT STANLEY STEPHANO URIO 7TH RESPONDENT 1

JUDGMENT

27/01/2025 & 21/03/2025 SIMFUKWE, J. The appellant was charged and convicted of Obtaining goods by false pretences contrary to section 302 of the Penal Code [CAP 16 R.E 2022] before the Resident Magistrates' Court of Moshi. It was alleged that the appellant and the 2nd to 7th respondents herein and another person who is still at large on the 20th day of January 2024 at “Stand ya Mboya” area within Moshi district in Kilimanjaro Region, by false pretence and with intent to defraud, did obtain various goods to wit, 70 pieces of air freshener worthy 490,000/=, toothpicks worthy 576,000/=, toothbrushes worthy 118,800/=, 98 pieces sweet trip toothbrush worthy 294,000/=, 72 pieces of toto toothbrush worthy 90,000/=, 84 pieces of candela toothbrush worthy 126000/=, goyad toothbrushes worthy 80,000/=, 4 boxes of travel toothbrushes worthy 96,000/=, 8 boxes of Chinese toothbrushes worthy 320,00/=, 39 packets of clothes hangers (vibanio vya nguo) worthy 91,500/=, 19 pieces of 2 cotton buds worthy 38,000/=, 24 pieces of cotton buds worthy 45,000/=, 24 Packets of cockroach poison worthy 126,000/=, 2 boxes of Toilet balls worthy 168,000/=, 12 pieces of Toilet air fresh worthy 84,000/, 58 pieces of toilet balls worthy 174,000/=, 156 pieces of toilet balls worthy 140,000/=, 24 pieces of toilet balls worthy 168,000/=, 29 pieces of blue cleaner worthy 130,000/=, 63 pieces of Air freshener worthy 172,500/=, 63 pieces of air freshener worthy 389,000/=, 50 pieces of air freshener worthy 360,000/=, 126 pieces of air freshener worthy 3,785,000/=, 36 pieces of torch worthy 135,000/=, 2 packets of whistle worthy 70,000/=, 20 boxes of “udishakti” worthy 480,000/=, 12 pieces of baby camera worthy 36,000/=, 7 boxes of remote battery worthy 38,000/=, 9 dozens of handkerchiefs worthy 64,800/=, 5 boxes of

opener worthy 90,000/=, 88 pieces of razor worthy 491,000/=, 26 boxes of tooth brushes worth 93,600/=, 86 dozens of toothbrushes worth 215,000/=, 5 dozens of K.D.A brushes worthy 45,000/=, 1 dozen of Kiwi water 45,000/=, 1 dozen of Sherpa toto camera worthy 66,000/=, 2 boxes of blue 40,000/=, 4 boxes of Candene toothbrush worthy 240,000/=, 3 boxes of sweet trip toothbrush worthy 150,000/=, 3 boxes of sweet trip worthy 120,000/=, 1 Box of Day carol toothbrush worthy 40,000/=, 4 pieces of citizen calculator worthy 20,000/=, 24 pieces of small scientific calculator worthy 3 240,000/=, 12 pieces of Casio scientific calculator worthy 360,000/=, 1 dozen of citizen calculator worthy 240,000/=, 2 dozens of citizen laptop worthy 300,000/=, 18 pieces of blackboard duster worthy 54,000/=, 36 small candle packet worthy 144,000/=, 36 small candle packets worthy 288,000/=, 27 small candle packets worthy 243,000/=, 72 candle packets worthy 144,000/=, 8 packet CD marker packet worthy 144,000/=, 1 box of white board marker worthy 180,000/=, 1 box of high litter worthy 60,000/=, 6 boxes of campus mashell worthy 270,000/=, 1 box of toto colour worthy 14,400/=, 6 box big colour worthy 60,000/=, 1 box of dooms colour worthy 45,000/=, 48 pieces of colour "nataraj" worth 180,000/=, 24 box of maker pen worthy 72,000/=, 12 dozens of super glue worthy 72,000/=, 19 dozens of price label worthy 76,000/=, 1 box of glue stack worthy 36,000/=, 3 dozens of correction pen worthy 36,000/=, 1 box of I.D rope worthy 140,000/=, 36 pieces of notebook worth 288,000/=, 13 pieces of note book dairy worthy 120,000/=, 12 note books worth 84,000/=, 34 pieces of exercise rope (kamba ya mazoezi) worthy 238,000/=, 120 pieces of birthday cap worthy 60,000/=, 2 boxes of white pen worthy 96,000/=, 9 boxes of cello pen worthy 162,000/=, 6 boxes of piano pen worth 300,000/=, 8 boxes of small piano worthy 144,000/=, 6 boxes of piano gel pen worthy 288,000/=, 8 boxes of pen 4 choma worthy 96,000/=, 2 boxes of cups pen worthy 70,000/=, 2 boxes of correction pen worthy 378,000/=, 2 boxes of roller pen worthy 168,000/=, 2 gift paper cake worthy 600,000/=, 24 packets of big candle worthy 576,000/=, 24 brush day candle worthy 480,000/=, 100 packets of gift cake worthy 600,000/, 2000 pieces of birth day cap worth 1,600,000/=, 100 pieces of birth day cap worthy 100,000/=. All to total valued at Tanzania Shillings Forty Million Five hundred eighty-three thousand, five hundred only (40,583,500/=) from Borry Mbwana Ahmed. The appellant denied the charge. To establish its case, the prosecution presented five witnesses and tendered 21 receipts, which were admitted as Exhibits PE-1 collectively. In their defence, the accused persons had no witnesses, they defended themselves. The prosecution case was to the effect that: PW1, a businessman supplying various goods, was contacted by one Mariam Rajabu, who claimed to own a supermarket in Moshi and wanted to buy his goods. They agreed on a deal, and PW1 travelled to Moshi with his team to deliver the goods. Upon arrival, he was directed to offload the goods at a certain location near Mboya's stand, where Mariam and the 3rd accused (appellant herein) were involved with such process. The total value of the goods was 5 TZS 40,583,500/=. The appellant told victim and his team that Mariam will pay the money via PW1's NMB bank account. However, when PW1 checked, no payment had been made. Mariam blamed network issues. Later, the appellant gave PW1 TZS 50,000/= and promised that he would receive his full payment next day. However, next morning, Mariam was unreachable, and when PW1 went back to the location, he found the place empty. Realizing he had been scammed; he reported the matter to the police station. Investigations revealed that the frame shop belonged to the 7th accused, who had rented it to the 2nd accused through the 6th accused. Other prosecution witnesses supported PW1's version of the story. PW2 confirmed the

arrest of the 3rd accused. PW3 a guesthouse manager, testified that Mariam Rajabu stayed at their guesthouse for a month and was frequently visited by the appellant herein. That, the appellant used to pay for the room of the said Mariam. PW4 a sales officer working with PW1, confirmed the incidence and the loss of goods worth about TZS 40,000,000/=. PW5 the investigator, testified among other things that all accused persons acted together with a common intention. 6 In their defence, the accused persons denied involvement in the said incident. The 1st and 7th accused persons claimed that they only rented out the place. The 2nd accused said, he had leased the location for repairs but allowed his relatives (3rd and 5th accused) to use it temporarily. The 3rd accused admitted to had assisted the said Mariam to offload and count the goods but claimed that he only knew Mariam as a traditional healer. The 4th accused admitted being at the scene but said he was only greeting a friend. The 5th accused denied any involvement. After hearing the parties, the trial court observed that the prosecution case was proved beyond doubt against the 3rd accused only who is now the appellant herein. Ultimately, the trial court sentenced him to serve four years imprisonment. Aggrieved with the decision of the trial court, the appellant has now appealed to this Court on three grounds of appeal:

1. That, the trial Magistrate grossly erred in law and in fact by convicting the appellant by holding that the offence of obtaining money by false pretence was established. 7
2. That, the trial Magistrate erred in law and fact by admitting exhibit PE-1 collectively which was not readable and by defaulting procedures of admitting an electronic document.
3. That, the trial Magistrate erred in law and in fact by sentencing and convicting the appellant to serve four years in prison by not taking into account that, the offence against the appellant was not proved beyond reasonable doubts. When the appeal was called for hearing, the appellant enjoyed the services of Mr. Engelberth Boniphace learned counsel, whereas the 1st respondent was represented by Mr. Kambarage Samson, learned State Attorney and the 2nd to 7th respondents were unrepresented. On the first ground of appeal, the Mr. Engelberth submitted that the trial magistrate erred in finding that the offence of obtaining money by false pretences was established. In support of this ground, the learned counsel for the appellant commenced by quoting the particulars of the offence. He submitted that, for false pretence to be established, there must be a misrepresentation of an existing fact made by the accused, which was false to the accused's knowledge, and that such misrepresentation 8 influenced the mind of the person who parted with the money. Furthermore, the accused's conduct must have been fraudulent. To cement his argument, Mr. Engelberth made reference to the case of *Republic vs Sullivan* (1945) 30 Cr. App. 132, which was cited in *Nanteza Agati vs Uganda*, Criminal Appeal No. 33 of 2023, High Court of Uganda, Kampala (Criminal Division). He further argued that a representation is fraudulent only if made with a contemporaneous intent to defraud, as it was held in *Nakigude Madina v. Uganda*, Criminal Appeal No. 001 of 2007, which was also cited in *Nanteza Agati* (supra). Having cited the above authorities, Mr. Engelberth submitted further that, from the records of the trial court, the listed goods were ordered by one Mariam Rajabu from PW1, as seen at pages 10 and 11 of the proceedings of the trial court. He argued that according to the records

of the trial court, there was no single piece of evidence showing that the appellant at any time made false representation to obtain the said goods from PW1. The learned counsel referred to Section 302 of the Penal Code and insisted that PW1 received the order from Mariam Rajabu, who also directed where the goods were to be delivered. Finally, it was Mariam Rajabu who made payments into unknown bank account. Thus, the appellant was not involved in any of the processes and did not make any misrepresentation to PW1, as the transaction was exclusively between PW1 and Mariam Rajabu. The appellant participated only in counting goods with other people who were acting for both PW1 and Mariam Rajabu. Thus, the elements of the offence of obtaining goods by false pretence were not at all proved against the appellant. The learned counsel contended that the available evidence referred to Mariam Rajabu rather than the appellant and that Mariam Rajabu was not among the accused persons. He insisted that PW1's evidence negated the offence, as PW1 confirmed that Mariam Rajabu was the one who contacted him. The prosecution failed to ascertain whether Mariam Rajabu sent the alleged money to PW1 or not, thereby undermining the offence of obtaining goods by false pretences. Moreover, the learned counsel argued that the offence of obtaining goods by false pretence is inherently related to theft. He submitted that theft entails the unlawful taking of another person's property without consent, as defined under section 258(1) of the Penal Code. Given that theft is an integral component of obtaining goods by false pretence, the prosecution ought to have charged the appellant under section 258(1) 10 and (2) of the Penal Code. He buttressed his argument with the case of *Meck Malegesi & Another v. Republic*, Criminal Appeal No. 128 of 2011 (CAT), at page 8, and *Joseph Nyanchiwa @ Mangura v. Republic*, Criminal Appeal No. 81 of 2021, [2022] TZHC 13992 (7 October 2022). Mr. Engelberth insisted that the trial court erred in finding that the offence of obtaining money by false pretence was proved against the appellant. On the second ground of appeal, Mr. Engelberth submitted that the trial court erred by admitting Exhibit PE-1 collectively, despite its illegibility and non-compliance with the procedural requirements for admitting electronic documents. To substantiate the argument, he referred to page 11 of the proceedings, where PW1 admitted that the EFD receipts were faint and unreadable. On that basis, the learned counsel raised four key issues which were not proved beyond reasonable doubt: First, PW1 did not establish how many receipts were readable and how many were not. Second, no evidence was adduced to distinguish the goods collected in Dar es Salaam from those collected in Mwanza among the tendered receipts. Third, the prosecution tendered 21 receipts, whereas the charge sheet listed 222 11 items, with no explanation as to whether the 21 receipts accounted for all 222 items. Consequently, the charge remained unproven, as PW1 failed to specify each item listed in the charge sheet during the hearing. He was of the view that the discrepancy goes to the root of the case and cannot be cured by Sections 234(3) and 388 of the Criminal Procedure Act [Cap 20 R.E 2022]. He cemented his observation with the case of *Joseph Sypriano v. Republic*, Criminal Appeal No. 158 of 2011 [2012] TZCA 46 (11 May 2012). Fourth, PW1 testified that some receipts were readable while others were not; however, upon closer examination, none of the receipts were readable. That's why the receipts were not read over and explained to the appellant. Reference was made to page 11 of the proceedings and it was

asserted that the appellant was deprived of his right to be heard. In addition, the learned counsel cited Section 61 of the Evidence Act (supra) which is to the effect that the contents of a document or electronic records relied upon by either party cannot be proved orally. He submitted that what required proof was the truth of the facts stated in the document, which cannot be established through oral testimony alone. Furthermore, he argued that the production of the 21 receipts for the court's inspection was necessary, whether as primary or secondary evidence. He challenged 12 how this could be achieved when the tendered documents contained no content, as was well noted by the trial magistrate at page 11 of the proceedings. To support his argument, Mr. Engelberth relied on Robinson Mwanjisi & Three Others v. Republic [2003] T.L.R 218 at 226 where it was held that: "Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out...." Another reference was made to the case of Misango Shantiel v. Republic, Criminal Appeal No. 250 of 2007 [2012] TZCA 66 (30 May

2012) which alluded that the complaint by the appellant that the document was not read over to him was sufficient to cast doubt on the prosecution case. It was emphasized that, once a document is admitted into evidence, it must be read aloud in court. After clearing it for admission, the document is not merely tendered but must also be read out to form part of the evidence on record. 13 The learned counsel was of the view that the omission was fatal as it was held in Mbaga Julius vs Republic, Criminal Appeal No. 131 of 2015

[2016] TZCA 274 (25 October 2016). Mr. Engelberth concluded that, since the receipts were not read over to the appellant, they qualify to be expunged from the record. If expunged, the charge remains unproved, thereby contravening Section 110(1) of the Evidence Act (supra). Submitting on the third ground, Mr. Engelberth argued that the trial Magistrate made an error by convicting and sentencing the appellant to four years in prison while the offence was not proved beyond reasonable doubt. He pointed out that the prosecution failed to establish that the appellant was personally given the goods, as the business was mainly between PW1 and Mariam Rajabu. He said, without clear proof of the appellant receiving the goods, it is difficult to prove intent to commit fraud. The learned counsel raised another doubt to the effect that the appellant was charged with the offence of obtaining goods by false pretence, while PW1's testimony focused on obtaining money by false pretence. The learned counsel alluded that the inconsistency made it difficult for the 14 appellant to properly defend himself, thus violating the appellant's right to be heard. According to Mr. Engelberth, another area which raise doubt is the fact that the conviction was based on "common intention," which was not proven by any witness and was introduced by the trial Magistrate suo motto. Moreover, Mariam Rajabu, who was said to have shared this common intention, was never charged in the case. He argued that the fact that she was not arrested by the police did not preclude her from being joined in the charge. Furthermore, Mr. Engelberth stated that the doctrine of common intention applies to theft-related offences and is not relevant to the charge of obtaining goods by false pretence. He averred that convicting the appellant based on an element of a different offence, while disregarding the essential elements of the charged offence, demonstrated

that the prosecution failed to prove the case beyond reasonable doubt. In conclusion, Mr. Engelberth urged the court to acquit the appellant and order his immediate release from prison. 15 The learned State Attorney opposed the submissions made by Mr. Engelberth on behalf of the appellant. Responding to the first ground of appeal, Mr. Kambarage asserted that the appellant was charged with the offence of obtaining goods by false pretence contrary to section 302 of the Penal Code (supra), not obtaining money by false pretence. To support his assertion, he referred to pages 1 and 7 of the trial court judgment and contended that the first ground of appeal lacks merit. Arguing against the second ground of appeal that the exhibits which were admitted as exhibits PE-1 were not readable, the learned State Attorney argued that the admission of the said exhibit followed the procedures of admitting the exhibits as per section 64 of the Evidence Act (supra) which requires the admission of primary evidence. However, Mr. Kambarage conceded that the contents of the exhibits were unreadable. Consequently, he urged the court to expunge Exhibit PE-1 from the prosecution's evidence, citing *Erick Said @ Kinuma v. Republic*, Criminal Appeal No. 407 of 2021. He further explained that failure to read the exhibits rendered them inadmissible. Nonetheless, he was of the opinion that the expungement of the exhibits does not affect the 16 prosecution's case, as the adduced evidence proved the offence charged against the appellant beyond reasonable doubt. On the third ground of appeal on the outset, Mr. Kambarage cited the case of *James Duru @ Nade v. Republic*, Criminal Appeal No. 100 of 2020 (Court of Appeal at Moshi), arguing that under Section 302 of the Penal Code (supra), an essential element of the offence is obtaining from another person anything capable of being stolen by false pretence. He contended that the appellant committed the offence by fraudulently obtaining goods through false pretence, with the ultimate intention of defrauding the victim. To support his argument, he referred to PW1's testimony at pages 10 and 11 and PW4's testimony at pages 20 and 21 of the trial court proceedings. He further stated that it was undisputed that Mariam placed an order for supermarket goods, which were delivered at Moshi at Mboya Stand and handed over to both Mariam and the appellant. He stressed that the appellant personally counted and listed the goods, demonstrating knowledge of the consignment's value. It was submitted further that PW4's testimony established that it was the appellant who was given the account and made the purported payment 17 of TZS 50,000/ and later assured PW1 and PW4 that any delay in confirming the transaction was due to network issues. He averred that the appellant's conducts and representations were deliberately false, demonstrating his awareness and involvement in the fraudulent issue. The learned State Attorney asserted further that the appellant committed acts leading to the acquisition of something capable of being stolen by advancing a false pretence to the victim, with the ultimate intention of defrauding him, as it was stated in the case of *Hamisi Abdulrahman Mwessa vs. Republic*, Criminal Appeal No. 484 of 2022 (Court of Appeal at Shinyanga). It was explained that Section 301 of the Penal Code (supra), which defines false pretence, covered the appellant's actions. Hence, the prosecution proved the case beyond reasonable doubt as required by the law. In conclusion, Mr. Kambarage urged the court to find the appeal devoid of merit and the court be pleased to uphold the

appellant's conviction and sentence of the trial court. The 2nd to 7th respondents also filed their joint reply submission. Regarding the first ground of appeal, they jointly contended that together with the appellant, they were charged with the offence of obtaining goods 18 by false pretence contrary to section 302 of the Penal Code (supra) and not obtaining money by false pretence. They stated that while they were acquitted of the charge, the appellant was found guilty. On the 2nd and 3rd grounds of appeal, the respondents submitted that the burden of proving the case beyond reasonable doubt rests solely on the prosecution side. They cited the case of DPP vs. Shishir Shyamsingh, Criminal Appeal No. 141 of 2021 (Court of Appeal). They further submitted that the issue of tendering Exhibit PE-1 collectively and establishing proof beyond reasonable doubt was the prosecution's responsibility and not their concern. In conclusion, the respondent jointly prayed for the court to dismiss the appeal and uphold the appellant's conviction and sentence as determined by the trial court. In rejoinder, the learned counsel for the appellant reiterated his submission in chief. On the first ground of appeal, he stressed that it was not certain whether the appellant was charged and convicted for the offence of obtaining money by false pretence or obtaining goods by false pretence. Furthermore, that it remains uncertain whether the alleged 19 obtained items were money or goods, which, in turn, infringed the appellant's right to be heard. On the second and third grounds of appeal, Mr. Engelberth insisted his submissions in chief. I have carefully examined the grounds of appeal, the written submissions of both parties, and the record of the lower court. The appellant has raised three grounds of appeal, all of which fundamentally address the same issue: whether the prosecution proved its case beyond reasonable doubt. On the first and third grounds of appeal, the learned counsel for the appellant argued that the prosecution failed to establish its case, as the alleged goods were ordered by Mariam Rajabu, who managed the transaction, directed the delivery, and made the payments, while the appellant's role was limited to assisting in counting the goods. He contended that the prosecution did not demonstrate the appellant's intent to defraud or any false representation, given that the charge primarily implicated Mariam Rajabu, who was not among the accused persons. On the third ground of appeal, Mr. Engelberth asserted that the conviction was premised on the doctrine of "common intention," which was neither 20 supported by the testimony of any witness nor raised by the prosecution but was introduced by the trial magistrate *Suo motu*. Moreover, he stated that Mariam Rajabu, who was alleged to have shared this common intention was never charged in this case. In response, the learned State Attorney opposed the arguments raised by the learned counsel for the appellant. He was of the opinion that the prosecution had proved its case beyond reasonable doubt. He contended that the appellant had fraudulently obtained the goods through false pretence with intent to defraud the complainant. He further asserted that the testimonies of PW1 and PW4 proved the case beyond reasonable doubts. Other respondents, in short opposed the appeal and prayed that conviction and sentence meted against the appellant be upheld. According to the record, the appellant was charged with the offence of obtaining goods by false pretence, contrary to section 302 of the Penal Code (supra), which provides that: "Any person who by any false pretence and with intent to

defraud, obtains from any other person anything capable of being stolen or induces any other person to deliver to any person anything capable of being stolen, is guilty of an offence and is liable to imprisonment for seven years.” The term “False pretence” is defined under section 301 of the Penal Code to mean: “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.” Emphasis added From the foregoing provision, it is trite law that for the offence of obtaining goods by false pretence to be established, the prosecution must prove that the accused, with intent to defraud, obtained goods or induced another person to deliver goods capable of being stolen. In the instant case, the learned trial Magistrate implicated and convicted the appellant based on the doctrine of common intention. The same is among the grievances which were raised by the learned counsel for the appellant. Having considered the circumstances of this case, I am of 22 strong opinion that the trial Magistrate correctly applied the doctrine of common intention. At page 6 and 7 of the judgment of the trial court, reasons for relying on the doctrine of common intention were stated. First, according to the testimony of PW3 (lodge manager), the appellant used to visit the said Mariam Rajab and paid for her accommodation. Second, the appellant admitted in his defence that he knew Mariam Rajab as the traditional healer and that he assisted her to offload and count the consignment. Third, it was also testified that it was the appellant who requested a frame from the second accused in which the consignment was stored. Fourth, PW1 stated in his testimony that when he went to NMB Agent, he was followed by the appellant who gave him TZS 50,000/ and alleged that delay of payment might have been caused by network problems. Fifth, next day when the victim went at the frame, he found the offloaded goods missing and the frame was open. It was the conclusion of the trial court that the act of pretending that they would pay PW1 his money by depositing into his account while they knew that they had not intended to pay him, and the act of shifting the offloaded consignment from the frame, amounted to false pretence. This court is of the same opinion that since the delivered goods were mysteriously missing and payment was never fulfilled as promised, fraud as an evil 23 intention of the appellant and the said Mariam Rajab was proved beyond reasonable doubt. From the above noted reasons which were advanced by the trial court, this court agrees that the circumstances of commission of the offence in this case irresistibly points to the guilt of the appellant under circumstantial evidence and the doctrine of common intention as correctly found by the trial court. Section 23 of the Penal Code (supra) provides that: “23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.” Emphasis added In the case of Domisian Genand s/o Rwezaura vs Republic (DC Criminal Appeal No. 14327 of 2024) [2024] TZHC 8506 (24 September 2024) while determining a case similar to the present one, I said: 24 “In other words, false pretence is the act of deliberately misrepresenting a fact with intent to deceive someone for the sake of obtaining something

capable of being stolen. Due to such misrepresentation, the victim acts or makes a decision which he could have not otherwise made had he known the truth.” Concerning circumstantial evidence, I subscribe to the case of *Lucas Daudi Wage vs Republic* (Criminal Appeal No. 555 of 2021) [2024] TZCA 398 (5 June 2024) in which at page 21 and 22, the Court held that: “Therefore, in resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of circumstantial evidence as discussed in the case of *Jimmy Runangaza v. Republic*, Criminal Appeal No. 159B of 2017 [2018] TZCA 188: [27 August 2018: TanzLII], when this Court remarked that: "In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt (See *Simon Musoke v. Republic*, [1958] EA 715). Sarkar on Evidence, 15th Ed. 2003 Report Vol. 1 page 63 also emphasized that on cases which rely on circumstantial evidence, such evidence must satisfy the following three tests: 25

- 1) the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;
- 2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and
- 3) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else." In our case, the reasons of the decision of the trial court which I have noted above, speak loudly that the common intention and circumstantial evidence against the appellant meets the test expounded in the cited authority above. The learned counsel for the appellant also raised the issue of variance between the particulars of the offence in the charge sheet and evidence of PW1 and the judgment of the trial court. He said that in the charge sheet the appellant was charged with the offence of obtaining goods by false pretence while the testimony of PW1 and the facts in the judgment of the trial court showed that the appellant was arraigned before the court 26 for the offence of obtaining money by false pretence. With due respect to the learned counsel for the appellant, I have gone through the evidence of PW1, nowhere did his testimony establish “obtaining money by false pretence.” Moreover, I have examined the trial court judgment and found that the entire judgment is in respect of the offence of obtaining goods by false pretence except that fly notes were erroneously typed “obtaining money by false pretence.” Without employing more effort, it is obvious that fly notes are not part of the judgment. Concerning the second ground of appeal on the issue of exhibit PE1, both parties agreed that the receipts were not read over in court. They suggested that the exhibit should be expunged from the records. Mr. Engelberth was of the view that after expunging exhibit PE1, the charge will remain unproved. On the other hand, the learned State Attorney said that expungement of the said exhibit cannot affect the prosecution evidence as the adduced evidence proved the offence beyond reasonable doubts. Having examined evidence of both parties on record, first, I agree with both parties that the receipts deserve to be expunged from the record, which I do, for being admitted contrary to the law. Second, I concur with the learned State Attorney

that even in the absence of the receipts, the offence of obtaining goods by false pretence was proved 27 beyond reasonable doubt, against the appellant. The appellant did not dispute the fact that he assisted in offloading and counting the consignment. Impliedly, even the mysterious missing of the goods from the store was not disputed by the appellant. That said, I am of considered opinion that the defence of the appellant before the trial court, the grounds of appeal and submission in support of the grounds, do not raise any doubt against the prosecution case. At the same time, I am settled that evidence which was adduced by the prosecution before the trial court proved the charged offence beyond reasonable doubt. In that sense, this appeal lacks merit and I dismiss it forthwith in its entirety. Appeal dismissed. Dated and delivered at Moshi this 21st March 2025. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 21/03/2025 28 29

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