

TANZANIA / JUDGMENT

# richard loshiye abraham leskari nyango another vs republic 2015 tzca 48 15 october 2015

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TZCADECIDED  
15 October 2015

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA ( CORAM: KILEO, 3.A.. JUMA. J.A.. And  
MWARI3A. J.A.^ CRIMINAL APPEAL NO. 334 OF 2015 RICHARD LOSHIYE @ ABRAHAM LESKARI  
NYANGO..... 1st APPELLANT JOSHUA SADALA.....  
2NDAPPELLANT VERSUS THE REPUBLIC.....

RESPONDENT (Appeal from the decision of the High Court of Tanzania At Arusha) (Massenqi, 3.)  
Dated the 2nd day of February, 2015 In Criminal Appeal No. 79 of 2014 JUDGMENT OF THE  
COURT 7th & 15th October, 2015 MWARI3A, J.A.: In the District Court of Arusha, the appellants,  
Richard Loshiye @ Abraham Leskari Nyango (1st appellant), Joshua Sadala (2nd appellant) and  
another person, Saruni Saigayi Kikoisi were charged with the offence of obtaining money by false  
pretences contrary to section 302 of the Penal Code [Cap. 16 R.E. 2002]. The two appellants were  
convicted and sentenced each to three years imprisonment term. They were also ordered to  
compensate the victim of the crime, Asha Mohamed (PW6), shs. 14 million obtained by them  
falsely from her. The other person, Saruni Saigayi Kikoisi was acquitted. The appellants were  
aggrieved by conviction and sentence. They unsuccessfully appealed to the High Court hence this  
appeal. The background facts of the case can be briefly stated as follows: - Sometimes in 2012,  
Asha Mohamed (PW6) was looking for a plot of land to buy. It would appear that there were some  
people who knew that she was in need of a piece of land. On 29/7/2012 she received a telephone  
call from a person who introduced himself by the name of Nyagusi. He asked her whether she  
wanted to buy a plot of land. When asked as to who gave him her phone number, he replied that  
he was given the same by a broker whom he did not name. PW6 agreed to meet the person who  
called her so that they could talk on the matter. The evidence of PW6 which was not seriously  
controverted speaks of what followed. On 29/7/2012 she met the said person at Machinjioni, in  
Sakina area. Together with her, was her younger brother, Abraham Mohamed Hure (PW4) and  
another person. From Sakina, they went with the said person, 2 Nyagusi to the person who was  
selling a plot. The seller introduced himself by the name of Abraham Lesukari, the father of the  
said Nyangusi. PW6 was shown the plot and after bargaining, agreed to buy it at shs. 14 million.  
Apart from that purchase price, she was told that she had to part with shs. 700,000/= more being  
fees payable to village leaders who would witness the sale. On 30/7/2012 PW6 went to execute the

sale agreement. She was accompanied by her relatives, Halima Dahir (PW1), Abraham Mohamed Hure (PW4) (her younger brother) and another person, Swalehe Swedi (PW5) and Stanley Bupamba Mbogo (PW2). While at the seller's place, two persons arrived. They were introduced as village leaders holding the titles of a Ward Executive Officer and a Village Secretary respectively. They arrived there with a rubber stamp which was used to seal the Agreement between the seller and the purchaser of the plot of land. Before they witnessed the sale they demanded to be paid shs. 700,000/= which was paid by PW6 immediately. An agreement was signed by PW6 and the seller. It was witnessed by the witnesses for the purchaser (PW6), the seller and the persons who were introduced as village leaders. 3 Outside the house in which the Agreement was signed, there was a person who had slept on ground. It transpired later that he is the owner of the house identified as Saruni Saigayi Kikoisi, the person who was jointly charged with the appellants and who was later acquitted as stated above. After she had signed the Agreement, PW6 was taken to the plot where she was shown its demarcations. Although PW6 had the money for payment of the plot, the seller preferred to collect it from PW6's home on the ground that he did not have a bank account and that it was not safe for him to receive and keep that amount of money at his home. He went to collect the same at PW6's home in the company of a woman whom he introduced to PW6 to be his wife. On 31/7/2012, PW6 arranged for a person who could go to the plot and fix temporary beacons demarcating the plot. She asked Stanley Bupamba Mbogo (PW2) to find a person who could do that work. PW2 is the driver who took PW6 and the persons who accompanied her when she went to buy the plot. When PW2 and the person who was to fix temporary beacons arrived at the house, they found that the door was locked. When PW2 asked the neighbours the whereabouts of the seller of the plot who was believed to be the owner of the house, they replied that the said person is not known. The person who was introduced as Saruni Kikoisi told PW2 that he is actually the owner of the house. It was then that PW2 called PW6 and informed her about what had transpired. She informed the Police who arrived later and arrested the said Saruni Kikoisi. Save for the evidence of PW1 that the money paid to the persons who introduced themselves as village leaders was shs. 7 million and variance of her statement as regards the size of the plot, her evidence and that of PW2 to PW5 substantially supported the evidence of PW6's. After investigation had been carried out, the appellants were arrested. According to the prosecution, investigation revealed that the 1st and 2nd appellants were the persons who introduced themselves to PW6 as Abraham Lesikari Nyangusi and Nyangusi (father and son respectively). In their defence, the appellant denied the charge. The 1st appellant said that he was arrested on 29/8/2012 while on the way from Mererani to Sakina where he was shifting to. He said that he was in a car being followed by a Fuso motor vehicle transporting his households to his new residence. After his arrest, he said, he was taken to police where he was tortured and ordered to sign a document, the order which he obeyed. He was later charged in court on 12/9/2012. He complained in his defence that his properties which were in the Fuso motor vehicle were seized without justifiable reasons. On his part, the 2nd appellant said that he was arrested at Mbauda and taken to Central Police Station where he met the 1st appellant. He denied that he was involved in the commission of the offence. In this Court, the appellants have filed a joint memorandum of appeal raising four grounds of appeal as follows: "1. The first Appellate Judge erred in law and in fact by disregarding the fact that the prosecution failed to

prove their case against the appellants beyond reasonable doubt

2. That, the first appellate Judge erred in law and in fact in ignoring the contradictions in the prosecution evidence.
3. That, the first appellate Judge failed miserably to scrutinize the evidence of the complainant and exhibit P.1 as a result she arrived on an erroneous decision.
4. That, the first appellate Judge erred in law and in fact when she failed to consider the appellants' defence." At the hearing of the appeal, the appellants appeared in person without representation by a counsel. On its part, the respondent Republic was represented by Mr. Fortunatus Muhalila, learned State Attorney. When they were called upon to argue their appeal, the appellants opted to hear first the learned State Attorney's submission in reply to their grounds of appeal and thereafter make a response. Mr. Muhalila argued that the case against the appellants was proved beyond reasonable doubt because the act of the appellants of receiving the amount of shs. 14 million from PW6 on the pretext of selling a plot of land was witnessed by among other witnesses, PW1 - PW5. He went on to argue that on 29/7/2012, the 2nd appellant took PW6 together with PW4 to the plot where they argued with the seller on the purchase price. The learned State Attorney argued further that the 1st appellant identified himself as Abraham Lesikari while the 2nd appellant introduced himself as the son of the 1st appellant. On the Sale Agreement, Mr. Muhalila argued that the appellants did not object on its admissibility when the same was tendered in court showing that they had no objection on their names. That Agreement, Mr. Muhalila, argued, was made in the office which the parties believed that it was the village office. With regard to the contradictions in the prosecution evidence, the learned State Attorney submitted that although the evidence of PW1 was contradictory on the size of the plot, the same is not fatal because the evidence of other witnesses was consistent on the size of the plot as described in the Sale Agreement. On the amount of money paid to the persons who witnessed the sale as village leaders, Mr. Muhalila argued that the contradiction did not weaken the prosecution case because PW1 was not the person who paid the money. He said that the reliable evidence is that of PW6 who made the payment. 8 In response, the 1st appellant reiterated his argument about existence of contradictions in the prosecution evidence as regards the size of the plot and amount of money paid for witnessing the sale. He argued further that his properties which were seized are worth over shs. 100 million, an amount which is not commensurate with shs. 14 million which PW6 claims to have been defrauded. He wondered why didn't the village leaders testify if at all the property in question is in their village. The 2nd appellant did not have any useful argument to make in rejoinder. He supported what was said by the 1st appellant. Although as stated above, the appellants have raised four grounds of appeal, their grounds boil down to two; firstly, that the prosecution did not prove its case beyond reasonable doubt and secondly, that the appellants' defence was not considered. To begin with the second ground, in their arguments, the appellants did not say anything in support thereof. They raised that ground in the first appellate court and the learned appellate judge found that the learned trial Resident Magistrate considered their defence. She therefore

dismissed it for being devoid of merit. She did so in the following words:- "...this Court has gone through the judgment of the trial court together with its proceedings and finds that trial magistrate considered the defence of the Appellants as indicated under page 7 and 8 of the judgment of the trial court but the Appellant's defence was unsubstantiated." This ground is for this reason, lacking in merit. Coming to the first ground, the appellants are contending that the evidence of PW1 is contradictory as regards the size of the plot of land which is the subject of the charge as compared to the size shown in the Sale Agreement. They submitted further that her evidence is also contradictory on the fact concerning the amount of money which PW6 paid to the persons who witnessed the sale as village leaders. Having considered the nature of the contradictions relied upon by the appellants, we agree with the learned State Attorney that the same are minor. PW1 was not, according to the evidence, the person who paid the money. She was not also the person who went to negotiate for the plot on 29/7/2012. Failure by her to give accurate figures as regards the said 10 money and the size of the plot will not cause the evidence of other witnesses to be discredited. For this reason, we also find no merit on this point. The main issue in this ground however, is whether the offence was proved. This ground was also raised in the first appellate court. We think that the issue was not properly dealt with. Although this is a second appeal, we find it important to reconsider it because we are convinced that there was a non-direction on evidence to that effect. We are doing so understanding that this is a second appeal. The principle as observed by this Court in the case of Omari Said and Another v The republic, Criminal Appeal No.302 of 2014 (unreported) is that the Court can interfere with the finding of the two courts below if there is inter alia a misdirection or a non-direction on the evidence. The Court stated as follow:- "...very rarely does the higher appellate court interfere with concurrent findings of facts by the courts below unless there are mis-directions or non- directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice ." 11 Although he argued strenuously that the prosecution evidence proved the case against the appellants beyond reasonable doubt, Mr. Muhalila did not dispute the fact that there is a missing link in the prosecution evidence necessary to prove the offence against the appellants. The provisions of S. 302 of the Penal Code under which the appellants were convicted states as follows:- "302 - Any person who by 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 phrase "false pretence" is defined under S. 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. " In this case, it is the contention by the prosecution that the appellants sold a plot of land which was not their property. According to the evidence, the buyer was shown the plot before and after signing of the Agreement. The basis of the prosecution case is that the plot does not belong to the person who sold it. It tried to show that the persons who witnessed the sale were actually not village leaders. The pertinent question which arises is, was the allegation that the seller pretended to sell the

plot which was not his property proved by the prosecution? We hasten to say that this allegation remained un- established. Since the physical location of the plot was known, we see no reason why the prosecution failed to call any witnesses from that locality so that the allegation that the buyer sold the property which did not belong to him could be established. Furthermore, since according to the prosecution witnesses and the Sale Agreement, the persons who identified themselves as village leaders witnessed the sale, we see no reason why the prosecution failed to produce evidence from the village authority so as to IB establish whether or not those persons were actually the village leaders. In our considered view, absence of this crucial evidence weakened the prosecution case. We therefore agree with the appellants that the case against them was not proved beyond reasonable doubt. For these reasons, we allow the appeal, quash the appellants' conviction and set aside the sentence. The appellants shall be released from prison immediately unless they are otherwise lawfully held. DATED at ARUSHA this 15th day of October, 2015. E. A. KILEO JUSTICE OF APPEAL I. H. JUMA JUSTICE OF APPEAL A. G. MWARD A JUSTICE OF APPEAL I certify that this is a true copy of the original. 14

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