

TANZANIA / JUDGMENT

20181219 TZHC Dodoma1

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' IN THE HIGH CORUT OF TANZANIA (DODOMA DISTRICT REGISTRY) AT DODOMA APPELLATE JURISDICTION DC CRIMINAL APPEAL NO. 52 OF 2018 (Original Criminal Case 311 of 2017 from the District Court of Manyoni at Manyoni) 'v'OHAFA S/O LUBENI

•..... APPELLANT VERSUS THE

REPUBLIC.....I.....S.....II...II.....RESPONDEI11 2811112018 & 1911212018

JUDGMENT

MASAJU, 1 The Appellant, Yohana Lubeni, was charged with, and convicted of the offence of obtaining money by False Pretense contrary to section 302 of the Penal Code, [Cap, 16] and sentenced to four (4) years imprisonment by the District Court of Manyoni at Manyoni. The appellant, so aggrieved by the trial Court's Judgment has come to the Court by way of an appeal against the trial Court's Judgment. His Petition of Appeal is very brief, as it essentially challenges his conviction on the basis that non production of the motorcycle and the documentary evidence by the prosecution in the trial Court was manifestation of non proof of the case against him beyond reasonable doubt. 1 Briefly stated, the prosecution case in the trial Court was that on the 25th day of October, 2016 in the area chairman's office, Kapiti village, the Appellant did sale the Motorcycle, make King lion black in colour to Raphael Nchingo at TZS, 1,100,000/= in the presence of Masumbuko Alexander (PW3) Area Chairman, and Almasi Himid (PW2). That, the Appellant was paid TZS 700,000/- only, the balance of TZS 400,000/= thereof was to be paid in August, 2017. That, the sale was reduced into writing and signed. by the parties, the Appellant and Raphael Nchingo (PW1), and witnesses Almas Himid (PW2) and Masumbuko Alexander (PW3). Yet, the alleged Sale Agreement document was not tendered in the court as proof of the alleged sale transaction, hence the Appellant's taking issues with the prosecution's proof of the case against him in the trial Court. According to Raphael Nchingo (PW1) and Almas Himid (PW2) two days after the alleged sale, one Mbasha Lubeni told them that the Motorcycle sold to Raphael Nchingo (PW1) was a stolen property. That, the said Motorcycle by then belonged to his father Lubeni Lazaro who has bought it from the Appellant. That, the trio (namely PW1, PW2 & PW3) were arrested by the said Mbasha Lubeni, the Appellant's brother. The said Mbasha Lubeni did not testify in the trial Court. Reuben Lazaro (PW5) the Appellant's father testified in the trial Court that the Appellant did not own the Motorcycle but himself. That, the said Motorcycle black in colour whose registration number he had forgotten got lost but found at Kapiti Village. That, he was told by .Mbasha Reuben, that one Almas (PW2) sent the motorcycle there. That the same

was seized and brought to the Police Station. . 2 Since the prosecution witnesses Raphael 'Nchingo (PW1), Almas Himid (PW2) and Masumbuko Alexander (PW3) were suspects of the theft of the Motorcycle in issue and arrested as testified by Almas Himid (PW2), their evidence in the court, other things remaining equal, is suspect for being witnesses with interest to server bearing in mind also that the alleged Sale Agreement was not produced in the trial court as proof of the sale between Raphael Nchingo (PW1) and the Appellant as so alleged by the prosecution witnesses (PW1, PW2 and PW3). In Paul Mr/mi V Republic

[1973] LPT34, the Court held that "a witnesses who has his own interest to serve should not have his evidence taken as credible. "This Court find that the prosecution witnesses (PW1, PW2, & PW3) were not witnesses of truth for they had their own interests to serve having had been aid to ' have stolen the impugned Motorcycle. One wonders that the Appellant's father Reuben Lazaro (Pw5) was called to testify in the trial Court but the Appellant's brother, Mbasha Reuben who arrested the prosecution witnesses (PW1 PW2 & PW3) for being in possession of stolen property (The Motorcycle) was not called to testify in the trial Court. There was doubt if at all there was ever the alleged sale Agreement of the Motorcycle between the Appellant and Raphael Nchingo (PW1) in the absence of the sale Agreement that was signed by the parties and their witnesses as alleged by the prosecution in the trial Court. On the other hand, the Appellant defended himself in the trial court that the Motorcycle Make King lion Model KL150-1, Model No: 150, Chasis No. LTBPJ8BG4E2KO2868, Engine No. KL157FMI14J02287, Registration No. T238CZD belonged to him and produced the Original Registration 'Card of 3 II' the said motorcycle that was admitted in evidence as Defence Exhibit "DI" in the trial Court. The said card bears the name of KINLION INVESTMENT CO. LTD of Msimbazi/Sikuu Street, Dar es Salaam. The company that can be said to have sold it to the Appellant bearing in mind that so far there is nobody who has claimed the ownership of the said motorcycle except the Appellant and his father (PW5) who produced no any documentary evidence as to proof of the ownership of the Motorcycle. Since the Motorcycle Kinglion, black (T.238CZD) belonged to the Appellant, if at all he ever attempted to sell it to another person, other things remaining equal, he could not have been legally said to obtain money by false pretence. Going by the foregoing reasons, the prosecution was not able to prove the case against the Appellant beyond reasonable doubt in the trial Court. If there was ever any sale agreement of the motorcycle between the Appellant and Raphael Nchingo (PW1) its enforcement and consideration, if any, thereof can be recovered by way of Civil action in a Court of competent jurisdiction. That being the case, the appeal is hereby allowed accordingly. The Appellant's conviction, the sentence of four (4) years imprisonment and the order of compensation thereof are hereby quashed and set aside respectively. The Appellant shall be set at liberty the soonest unless otherwise there is a lawful cause for him to remain in prison. At the hearing of the appeal in the Court on the 28 day of November, 2018 the Appellant did appear in person and being layman he fully adopted 4 1' I, his grounds of appeal to form his submissions in the court in support of his appeal. The Respondent Republic, in the service of Ms. Neema Taji, the learned State Attorney contested the appeal

on the ground that the prosecution did prove its case beyond reasonable doubt against the Appellant in the trial Court. the Respondent Republic's reasoning was based upon the prosecution witnesses (PW1, PW2, PW3) who are witnesses with interest to serve hence not credible witnesses, as the Court has so reasoned herein above, hence the prosecutions failure to prove the case beyond reasonable doubt as against the Appellant. As it was so rightly held by the Court in Lawrence MaLiki V R f19731 LRT 12 the burden of proof beyond reasonable doubt never shifts from the prosecution. Since the prosecution was not enormously successful in discharging the burden of proof, the benefit of doubt thereof has to go to the Appellant. o

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