

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: RAMADHANI, J.A., MNZAVAS, J.A., And MFALILA, J.A.)  
CRIMINAL APPEAL NO 39 OF 1995

JOHN CHRISTIAN WAAGE ..... APPELLANT

AND

S.M.Z. .... RESPONDENT

(Appeal from the Judgement of the High  
Court of Tanzania at Zanzibar)

(Dahoma, J.)

dated the 7th day of February, 1995

in

Criminal Appeal No. 20 of 1994

SUMMARY REJECTION

MFALILA, J.A.:

In the Regional Court of Zanzibar at Vuga, the appellant  
Jen Christian Waage was charged with three counts involving  
stealing by agent contrary to Section 248 (7)(b) of the Zanzibar  
Penal Decree Cap. 13 of the Laws of Zanzibar. He denied the charge  
in all the three counts. Before the case was set down for hearing,  
one Mr. Awadh who was appearing for the accused, asked the court for  
permission to address it on a preliminary point of law that he was  
praying that the Court turn this case into a Civil Case. The  
reasons given by Mr. Awadh for this unusual prayer are not only  
so general in nature that it is impossible to give them any legal  
touch, but they cite no legal provision to back them. Mr. Awadh  
addressed the Regional Magistrate in support of his preliminary  
point of law as follows:

"In our affidavit, there is a prayer that this case against the accused is more of civil nature than criminal. The crux of the case is a civil debt, and nobody should be allowed to recover his civil debts through criminal procedure. There is a special procedure used in obtaining civil rights. This is a civil procedure. It is an abuse of court process to try to recover your civil rights through criminal procedures. It is only through civil procedure that the rights of parties can be determined. It is a law of the land that right of civil right cannot be obtained through criminal procedure. It is a wrong use of public time and tax payers' money to try to force civil case to criminal procedure. In civil cases there is a procedure of costs. Therefore to use the public and tax payers' money to enforce your right in criminal procedure is not a right. Once there is a civil reaction, then any dispute naturally gives right to civil case criminal case. It must be considered that all civil case entails civil characteristic. It is technically difficult to make a demarcation which is criminal and which is civil. Even if it is the intention of the complainant to punish the accused, then in civil matter he can do it. Indeed it is a practice of this court to prefer civil whenever it appears that the issues tackle by

the court is in doubt. The most recent case was R v Tric Toyer (?) ... .. It was decided that this case is a civil matter and the court decided to tackle the matter as civil" ... ..

These submissions speak for themselves and we fail to understand how Mr. Awadh could have quoted a decision of the Regional Court as authority for his propositions. Of course we do not know in what capacity Mr. Awadh appeared in the Regional Court.

Surprisingly, the Regional Magistrate agreed with these submissions general as they are and without any legal basis to support them. He rejected the submissions of the prosecutor that he be allowed to prove the case against the appellant. The Matistrate then proceeded to make an order which is nowhere to be found in the Zanzibar Criminal Procedure Decree Cap. 14. The learned Magistrate made the following order:

"The Court having heard both sides arguments, it is of the opinion that since the accused person was a representing agent in Zanzibar as Zanzibar Estate and Property of which he was the share holder and Managing Director, it is certain that their relation is more of a civil relation than a criminal. The main claim in this case is about the recovery of USD 15,000 which can be easily claimed in civil suit. This Court is therefore ordered that the

case should be opened in Civil Court  
as a civil case<sup>2</sup>,

The S.M.Z. appealed to the Zanzibar High Court against this decision where they argued correctly that the Regional Magistrate had no power to make the kind of order he did and asked the High Court to restore the case so that the S.M.Z. can proceed with the criminal case against the appellant. The High Court (Dahoma, J.) allowed the appeal and ordered that the criminal case against the appellant be restored. Aggrieved, the appellant lodged this appeal complaining that the learned judge erred in law in ordering the trial contrary to the decision of the learned Regional Magistrate which he had correctly delivered after the evaluation of the facts as disclosed in the various affidavits.

We are satisfied that this appeal has no merit at all. First of all in his ruling, the Regional Magistrate seemed to think that a director or shareholder cannot steal from the company of which he is a shareholder. A company has a separate existence from its shareholders, its owners, therefore such shareholders can commit torts as well as criminal acts against the company. Secondly, we are not surprised that Mr. Awadh was not able to give any legal support to his extraordinary submissions because there is none. The Regional Magistrate had power to dispose of the criminal case before him in only three situations. After hearing the evidence, or upon withdrawal of the complaint under Section 172 and upon a nolle prosequi being entered by the Attorney-General under Section 75 of the Criminal Procedure Decree.

In the instant case, none of these events occurred, the order which he made converting the criminal case before him into a civil case was without statutory power, it was null and void. The High Court therefore properly set it aside and ordered restoration of the criminal case against the appellant.

For these reasons and as we have already indicated this appeal has no merit and we summarily reject it.


DATED AT DAR ES SALAAM THIS 12TH DAY OF JUNE, 1996.

A.S.L. RAMADHANI  
JUSTICE OF APPEAL

N. S. MNZAVAS  
JUSTICE OF APPEAL

L. M. MFALILA  
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

  
( M.S. SHAUQALI )  
DEPUTY REGISTRAR