

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)**

**CRIMINAL APPEAL NO. 128 OF 2011**

**1. MECK MALEGESI }  
2. MAZURA NDARO }..... APELLANTS**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court  
of Tanzania at Mwanza)**

**(Rwakibarila, J.)**

**dated 13<sup>th</sup> day of October, 2010**

**in**

**Criminal Appeal No. 306 of 2006**

-----

**JUDGMENT OF THE COURT**

**30<sup>th</sup> & 31 July, 2013**

**JUMA, J.A.:**

The appellants, Meck Malegesi and Mazura Ndarowere in the District Court of Bunda charged with the offence of stealing by agent contrary to section 273(b) of the Penal Code, Cap. 16. This section states:

***273.*** *If the thing stolen is any of the following things, that is to say:-*

*(a)...*

*(b) property which has been entrusted to the offender either alone or jointly with any other person for him to*

*retain in safe custody or to apply, pay or deliver it or any part of it or any of its proceeds for any purpose or to any person;*

*the whole or part of the proceeds arising from any disposal of any property which has been received by the offender by virtue of a power of attorney for the disposal, such power of attorney having been received by the offender with a direction that the proceeds should be applied to any purpose or paid to any person specified in the direction,*

*the offender is liable to imprisonment for ten years.*

According to the particulars of the offence, the two appellants, on 14<sup>th</sup> day of January, 2006 at around 14.00 hrs at Manyamanyama village in Bunda District, they stole a water pump valued at Tshs. 250,000/= the property of Manyamanyama village thus converting the said water pump for their own use. Appellant and his co-accused were both found guilty and were sentenced to four (4) years imprisonment. In addition, after completing their prison terms, they were both ordered to pay for the restoration and installation of the water pump. The appellants appealed to the High Court in Criminal Appeal No. 61 of 2008 contending that at their trial, the prosecution had failed to prove its case against them beyond

reasonable doubt. Their first appeal to the High Court was dismissed. Rwakibarila, J. imposed an additional order for the appellants to restore the missing pump or pay Tshs. 250,000/- compensation. Appellants have preferred this second appeal to this Court.

The facts that led to the conviction briefly were that Manyamanyama village in Bunda District was a beneficiary of five water wells drilled by a Non-Governmental Organisation that's best known by its abbreviation, HESAWA. Apart from construction of water wells, HESAWA also distributed water pumps. It soon occurred to some villagers that one out of the six water pumps was missing. On 20<sup>th</sup> January, 2006 some villagers raised that issue with Mugendi s/o Makanganga (PW1) their village Chairman. The villagers expressed their suspicion that the missing pump was taken by Mazura Ndaro their Village Executive Officer-VEO and the second appellant herein. PW1 asked his VEO where the missing pump was. According to PW1, his VEO informed him that he had in fact borrowed it with the intention of using it for practical training purposes at a seminar. PW1 was not fully convinced by this explanation. He urged his VEO to return the missing pump. It appeared that the villagers were still keen to follow up on the whereabouts of the water pump.

The whereabouts of the pump was made part of the agenda during the village meeting on 27<sup>th</sup> February 2006. The villagers demanded to see the pump in order to believe that indeed their VEO had borrowed it for seminar purposes but had returned it. Meck Malegesi (the first appellant) was at the time a water technician working at the Water Department in Bunda. He testified that indeed he had asked the second appellant to be resource person in a training seminar on how to operate water pumps. He presented to the police documents evidencing the preparations for that seminar.

It turned out that the second appellant herein, returned a water pump silver in colour, which the villagers refused to accept. Their water pump was light blue in colour, they insisted. The pump painted in silver which their VEO presented was different from the light blue pump they knew, the villagers pointed out. A formal complaint was lodged at the Police Station Bunda and D. 4550 Detective Sergeant Mpangala was put in charge of the investigations.

In this appeal the appellants, unrepresented, preferred three grounds of appeal. These grounds of appeal in their essence contend that the Judge on first appeal failed to consider their grounds of appeal. They also fault

the learned Judge for failing to properly re-evaluate the evidence. Appellants finally complain that they were adversely affected by the failure of the first appellate court to evaluate exhibits appellants tendered and how this exhibits contradicted what the prosecution witnesses testified on.

At the hearing of the appeal the appellants preferred the learned State Attorney to address the Court first and allow them to submit after hearing what the respondent Republic had to say on the grounds of appeal.

Mr. Castus Ndamugoba, the learned State Attorney who appeared for the respondent Republic did not support the conviction of the appellants. He at the very outset made it clear that from evidence, the main thrust of the prosecution case was to the effect that the two appellants had changed a blue coloured pump belonging to the village and substituted it with another pump which was cheaper and of lower quality. Mr. Ndamugoba went on to highlight shortcomings which he regarded as apparent in the prosecution evidence which in his opinion, make the conviction of the appellants doubtful.

**First,** the learned State Attorney took issue with the identification of the light blue water pump which the witnesses claimed that it was

exchanged with a poor quality silver coloured water pump. **Second**, not a single witness who testified for the prosecution was able to definitely establish the silver coloured is not one of the six water pumps which HESAWA had fixed in the village. **Third**, even that silver water pump was neither tendered in court nor was it compared with any light blue water pumps left behind by HESAWA. **Fourth**, it was HESAWA who installed the pumps and presumably this NGO was in a better position to clarify by comparison of serial numbers, if any one of the water pumps it installed had been stolen or otherwise exchanged with a poor substitute. No officer from HESAWA testified, instead it was the villagers who testified. **Fifth**, matters were not made better when, even the Village Chairman who ostensibly was a custodian of village property and assets, did not testify.

Both the trial court and the first appellate court were unanimous that the appellants converted the light-blue water pump to their own use and with the aim of permanently depriving the village of that water pump. The trial magistrate (R.B. Maganga-SDM) on page 22 lines 1 and 2, posed the question:

*".....whether or not the accused persons did steal water pump as alleged..."*

In the following paragraphs offered the following answer:

*"...I have carefully considered the issue, and the prosecution witnesses impressed me to be truthful witnesses. And in my opinion it could be the water pump was borrowed the way the defence is trying to [tell] the court... court believes that it was first borrowed in good faith but exchanged and the appellants brought a different water pump..."*

On first appeal, the High Court agreed with the trial court:

*"...appellants returned a smaller silver colour water pump. It means the light blue colour water pump was not returned at that village.*

*Therefore both appellants converted the light-blue water pump which belonged to Manyamanyama village into their own use to wit, this appeal was lodged without sufficient grounds and is hereby dismissed..."*

Before determining whether there are reasons for this Court to interfere with the concurrent findings of the offence of theft by the two courts below, it is opportune here to ask whether the offence of stealing by agent was proper offence to charge the appellants who were at the time public servants. Meck Malegesi (the first appellant), a water technician working at the Water Department in Bunda, was a public servant. Similarly,

Mazura Ndaru the Village Executive Officer was also a public servant. Since the appellants came by the water pump by virtue of their employment as public servants, they should have been charged with offence of Stealing by servants contrary to section 271 of the Penal Code instead of stealing by agent contrary to section 273 (b). Section 271 provides:

**271.** *If the offender is a clerk or servant and the thing stolen is the property of his employer or came into the possession of the offender on the account of his employer, he is liable to imprisonment for ten years.*

The component of stealing or theft is an integral part of the offence of stealing by public servant. Component of stealing is also integral to the offence of stealing by agent for which the appellants were tried and convicted. In order to prove, as against the appellants, the offence of stealing by agent; the prosecution was required to bring its case within the ingredients of the offence of theft under section 258 (1) and (2) (a) of the Penal Code:

258. *-(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing.*

*(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say-*



*(a) an intent permanently to deprive the general or special owner of the thing of it;*

From the above-cited section 258 (1) and (2) (a), the first essential ingredient constituting the offence of theft is the proof beyond reasonable doubt that the taking of the pump was without any claim of right. That taking of the pump is the physical part or *actus reus* of the offence of theft. There is evidence of PW1, that the water engineer had borrowed that pump for the purposes of a training workshop. When the villagers demanded it back, it was returned and displayed in a village meeting on 27/1/2006. The water pump that was displayed was coloured in silver. The villagers insisted that the village water pump is light-blue in colour. We have no reason not to believe that the initial taking was lawful, for the purposes of a training workshop. This is confirmed by the documents which the second appellant tendered as his evidence and which were admitted as exhibit P1 and P2.

The next issue is whether after lawfully borrowing the water pump, the appellants decided to permanently deprive the village of the water pump. With due respect, we are inclined to agree with Mr. Ndamugoba that the shortcomings in the evidence of prosecution witnesses makes it hard for us not to interfere with the conclusion reached by the two courts

below that an intention to permanently deprive the village of its water pump had been proved beyond reasonable doubt. The HESAWA who installed the water pump were better placed than the witnesses who testified, to clarify whether the light-blue water pump was deliberately changed by the appellants for purposes of stealing.

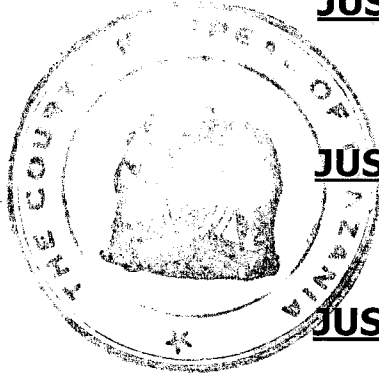
We cannot therefore remove the possibility that the silver coloured pump was amongst the six water pumps, which were installed in the village by HESAWA. In his cautioned statement that was admitted as exhibit P3, the first appellant explained that the pump was used for training at Serengeti. He had painted it with silver colour to improve its appearance. The two courts below should have evaluated this evidence to remove any lingering doubt. With this possibility that the silver coloured pump may after all be the one that HESAWA installed, we cannot confidently agree with the two courts below that the prosecution had proved beyond reasonable doubt the component of stealing in the offence stealing by agent.

Therefore, with the shortcomings in the prosecution evidence, the two courts below should have given the appellants the benefit of doubt. As a result, we allow their appeal, quash the conviction(s) and set aside the

sentence(s). The orders for compensation are also set aside. We order forthwith the release of the Appellants unless lawfully held.

DATED at MWANZA this 31<sup>st</sup> day of July, 2013.

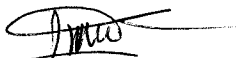
J.H. MSOFFE  
**JUSTICE OF APPEAL**



N.P. KIMARO  
**JUSTICE OF APPEAL**

I.H. JUMA  
**JUSTICE OF APPEAL**

I Certify that this is a true copy of the Original.

  
R.W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**